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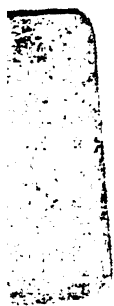
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REPORTS

OF

All the Cases decided by all the Superior Courts

RELATING TO

MAGISTRATES, MUNICIPAL,

AND

PAROCHIAL LAW.

(REPRINTED FROM THE "LAW TIMES" REPORTS.)

EDITED BY

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REPORTS OF ALL THE CASES

DECIDED BY THE

Superior Courts

RELATING TO THE

LAW ADMINISTERED BY MAGISTRATES

AND TO

PAROCHIAL AND MUNICIPAL LAW.

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COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Saturday, April 25, 1874.

PITTS v. MILLAR.

*Cruelty to animals—Baiting—12 & 13 Vict.
c. 92, s. 3.*

A match between two dogs as to which could take the greatest number of rabbits took place in a walled field, the rabbits being let loose at a certain distance in front of the dogs, and the appellant taking part in the match.

Held, upon a case stated, that the appellant was upon these facts improperly convicted of using a field for baiting a rabbit under 12 & 13 Vict. c. 92, s. 3.

THIS was a case stated by two of Her Majesty's Justices of the Peace for the borough of Dewsbury, in the West Riding of the county of York, under 20 & 21 Vict. c. 43, at the request of George Pitts, hereinafter called the appellant, who was dissatisfied with their determination in convicting the said appellant of the offence charged as hereinafter mentioned as being erroneous in point of law.

The information was laid under 12 & 13 Vict. c. 92 s. 3, which enacts "That any person who shall keep or use or act in the management of any place for the purpose of baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of a domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding 5*l.* for every day he shall so keep or use or act in the management of any place or permit or suffer any place to be used as aforesaid.

The information stated that on the 12th July 1873, at the borough of Dewsbury, George Pitts, of Dewsbury, aforesaid, labourer, did unlawfully use a certain place, to wit a field, for the purpose of baiting a certain animal, to wit a rabbit, and did then and there bait such rabbit contrary to the form of the statute in such case made and provided.

At the hearing, which took place on the 17th July 1873, at the Court House, Dewsbury, the

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following facts were proved by Alexander Millar and two police sergeants.

That, on Saturday afternoon, the 12th July, they went to a field at West Town in Dewsbury occupied by Solomon Eastwood, and known as the Boro' Park Grounds. That a person was at the entrance of the grounds receiving money for admission. The grounds consist of a field containing 3a. 3r. 15p., which is walled and paled round so that an animal such as a rabbit cannot escape therefrom. That 400 to 500 men were in the grounds, and a match took place for 25*l.* a side between two dogs as to which could take the greatest number of rabbits by running after them. That the witness saw the appellant and Sam Newton and Benjamin Booth and other persons taking part. That a person had two dogs in a slip, and Pitts and Booth had each hold of one of the dog's tails. That a man took a live rabbit and shook it in front of the two dogs, and then took a rabbit and let it loose about 60 yards in front of the dogs who were then slipped and ran and killed the rabbit. This was done to about 20 rabbits; the dog who killed the most rabbits was the winner of the 25*l.*

Mr. Ibberson, solicitor, appeared on behalf of the appellant, and contended that this was not such a baiting of an animal as came within the section of the Act of Parliament, and that a person who set a greyhound at a hare in a coursing match, or who put on the hounds in fox covert might just as well be charged with baiting the hare or fox, as the case might be. The justices, however, considered that the cases named were quite different, as the hare or fox might escape, but that in this case a rabbit could not possibly get away from the dogs, and that this was such a case of baiting an animal as the section was intended to meet. They convicted the appellant in the penalty of 3*l.* and costs, and the defendant being dissatisfied with their decision, as being erroneous in point of law, requested a case to be stated for the opinion of this court.

If the court should be of opinion that the case stated is such a baiting as the section of the Act

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of Parliament intended, then the conviction was to be confirmed, and if not to be quashed.

Sir J. Karslake, Q.C. (with him Shadwell), for the appellant.—There is no evidence that the appellant kept, used, or acted in the management of the field. If he was liable to a penalty it was under the second part of the section, which provides "that every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or any other animal as aforesaid, shall forfeit and pay a penalty not exceeding 5*l.* for every such offence." It has been decided, however, that this latter penalty is not incurred unless the penalty in the first part of the section is also involved by the habitual user of the field;

Clark v. Hayne, 2 E. & E. 281;

Morley v. Greenhaugh, 3 B. & S. 374;

Coyne v. Brady, Ir. C. L. R. 577.

There is no proof here that the field had before been used for the purpose. [COCKBURN, C. J.—Supposing the place was specially appropriated to the purpose on this occasion and the meeting arranged beforehand, would it not be a place under the first part of the section? There would be no user if two persons met by accident in a public-house and then and there agreed to fight a pair of cocks, and went to the yard to do so, but if a person gave notice that it would take place on a particular day and in a particular place, I think that there would be a user, and that the offence would be constituted. QUAIN, J.—The fact that money was received for admission, seems to show that the meeting was arranged beforehand.] Chasing an animal that cannot fight is not baiting. The object here was to kill as quickly as possible. If this conviction be confirmed, pigeon-shooting may be held to be baiting.

No counsel appeared for the respondent.

COCKBURN, C. J.—The pursuit of rabbits cannot be said to be baiting, which only applies if the animal be tied to a stake or otherwise fastened so that he cannot get away, and then be set at by dogs or other animals.

QUAIN, J.—Chasing is not baiting. Johnson's definition of baiting is: 1. To attack with violence. 2. To harass by the help of others, as we bait a bear by mastiffs, or a bull by bull-dogs.

Conviction quashed.

Attorneys for the appellant, *Blakeley and Beswick*, for *J. Ibberson*, *Dewsbury*.

Saturday, May 2, 1874.

REG. v. WORCESTER UNION.

Status of irremovability—Breach of residence—Animus revertendi—Employment out of parish.

A pauper, whose settlement was in the appellants' union, resided for forty-five years in the respondents' parish; at the end of that time he was admitted into the respondents' workhouse, where he worked at his trade of a tailor about six months. A tailor, residing just out of the parish, then arranged with the pauper to employ him; the master tailor of the workhouse gave the pauper leave to go, and said he might come back if he and his employer did not agree. The pauper worked for ten weeks in his employer's house for 3*s.* per week wages, with board and lodging. He then left, after a week's notice, because he and his employer could not agree, although the employer told him

he might stay as long as he thought proper. He returned to the respondents' parish, and after a week in lodgings became chargeable:

Held, that the absence from the respondents' parish was a sufficient break of residence to destroy the pauper's status of irremovability therein, and that an order of removal to his place of settlement in the appellants' union was right.

THE Guardians of the Worcester Union were appellants, and the overseers of the parish of Birmingham were respondents.

This was an appeal against an order of two justices for the removal of Henry Hardman from the parish of Birmingham, in the borough of Birmingham, in the county of Warwick, to the parish of All Saints, Worcester, in the Worcester Union, in the city of Worcester, and was heard at the Easter Quarter Sessions for the borough of Birmingham, holden on the 21st April 1873, when the recorder confirmed the order, subject to the following case:—

The pauper, Henry Hardman, went to live at Birmingham in the year 1827, and continued to reside there and support himself by working at his trade as a journeyman tailor for upwards of forty-five years from that period, down to the 30th May 1872. On that day he applied for relief, and was admitted into the Birmingham Workhouse under an order, on which was indorsed the word "irremovable;" and there he remained until the end of the following month of November, working at his trade under the direction and superintendence of the master tailor of the workhouse in the tailors' shop.

On one day, at the end of the month of November, a tailor named William Rose, living at West Smethwick, in the county of Stafford, about two miles distant, came to the Birmingham Workhouse and saw the master tailor and the pauper in the tailors' shop there, when a conversation took place between them. Mr. Rose said he wanted a man to assist him, as he was much pressed with business. He had on several previous similar occasions, through the said master tailor, obtained men from the Birmingham Workhouse, who had stayed with him till his trade became slack, and then left. He was in the habit of taking a man on at the times only when he was busy.

During the conversation at the interview mentioned, the master tailor told the pauper that he might go, and if Mr. Rose and he did not agree, he might come back.

The pauper then left the workhouse and went to West Smethwick with Mr. Rose, and worked for him, receiving the wages of 3*s.* a week and board and lodging in the house of his master. Mr. Rose stated in evidence that the pauper worked by the week, that no specific time was ever mentioned as to how long the pauper was to stay, that the pauper left his employment because they could not agree; but if they had agreed, the pauper might still have been working with him, and that he told the pauper he might stay as long as he thought proper.

The pauper stayed with Mr. Rose for ten weeks, and then having given him a week's notice, he left and came back to Birmingham, and took a lodging at No. 11½, Mill-lane, where he stayed for a week, and then went to the workhouse again.

It was contended, on behalf of the appellants, that the pauper was irremovable by reason of his forty-five years' residence in Birmingham, and that

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the ten weeks' absence at Smethwick did not operate as a break of residence.

It was contended on behalf of the respondents, that his absence constituted a break of residence, and that he was removable to his place of settlement at Worcester.

The recorder was of opinion that the pauper's absence, under the circumstances before mentioned, operated as a break of residence, and he confirmed the order of removal with costs.

The question for the court is, whether the absence of the pauper at West Smethwick constituted a break of his residence in Birmingham. If the court should be of opinion in the affirmative, judgment is to be for the respondents, and the order of sessions confirmed. If in the negative, judgment is to be for the appellants, and the order of sessions and the order of removal quashed.

Soden argued for the respondents in support of the orders of removal and of sessions.—The question is, whether this was such a break of residence as to destroy the pauper's status of irremovability; the test, according to this case of *Reg. v. Glossop* (L. Rep. 1 Q. B. 227), is, whether his intention on leaving his residence was that his absence should be temporary or permanent, and whether or not he had a right to return to his residence. The facts here show that the pauper left the Birmingham workhouse with the intention of remaining permanently in Mr. Rose's employment; and it is stated he might have been there still if they had not disagreed. Greater stress was laid upon the intention to return in *Reg. v. St. Leonard, Shoreditch* (L. Rep. 1 Q. B. 21); and in the more recent case of *Reg. v. St. Ives* (26 L. T. Rep. N. S. 393; L. Rep. 7 Q. B. 467), Blackburn, J. qualified the language used by him in *Reg. v. Glossop* and *Reg. v. Stourbridge* (34 L. J., 179, M. C.), with respect to a pauper's right to return to his residence. He said, at p. 470: "The real test is, does the person going out of the parish intend to stay away permanently, or is the absence from the parish merely a temporary absence?" He then refers in his judgment to *Reg. v. Glossop*, in terms exactly applicable to the present case. There is nothing in the facts here stated from which the court can infer an intention to return to Birmingham when he left the workhouse. [COCKBURN, C.J.—May it not be said that Rose borrowed the pauper from the workhouse?] No; the case is very similar to that of *Reg. v. Stapleton* (1 E. & B. 766).

Dugdale (with him *Russell Griffiths*), for the appellants.—The Irremovability Statutes were passed for the benefit of the pauper, and not for that of either of the contending parishes. It has been laid down in *Reg. v. Whitby* (L. Rep. 5 Q. B. 325), and also in the more recent case of *Reg. v. St. Ives* (*ubi sup.*), that the *onus probandi* rests upon the removing parish; and although the question, no doubt, is What was the pauper's intention when he left Birmingham? everything should be inferred in the appellants' favour. Considering all the facts of the case, I contend there is sufficient ground for holding that this temporary absence from Birmingham did not create a break of residence. In the case of *Reg. v. Llanelly* (20 L. J. 179, M. C.), the law on this point was thus stated by Patteson, J.: "A temporary absence with an *animus revertendi* indeed will not, as we have recently decided in *Reg. v. Tacolnestone* (12 Q. B. 157), suffice to effect a break in the residence so as to include the

operation of the statute; but there must be a complete disruption." This cannot be said to have been a complete disruption; and a similar state of facts was so held in *Reg. v. Brighton* (4 E. & B. 236). It was decided in *Guildford Union v. St. Olave's Union* (25 L. T. Rep. N. S. 803), that it was not necessary, in order to constitute a constructive residence, that the absent pauper should retain possession of a specific place of residence to which he may return.

COCKBURN, C.J.—I wish we could adopt the view of the appellants, for I am not sure that this order of removal was not an abuse of power on the part of the parochial officers. It was a very hard thing upon the pauper, and if I could see my way to set it aside, I would certainly do so. But according to the facts stated, the man left the Birmingham Workhouse at the invitation of Mr. Rose, with the intention on both sides that he should continue in Mr. Rose's employment as long as he thought proper, or as long as they could manage to agree. The case finds that the pauper left his employment because he and his master could not agree, and that if they had agreed he might still have been working with him. I am unable to see how this stay of ten weeks at West Smethwick could have been either an actual or constructive residence in the parish of Birmingham. I am sorry to come to this conclusion, but I must hold that this order of removal was right.

BLACKBURN, J.—I also am sorry to decide in this way, but there is no remedy for such a case as this except by the Legislature. This is an example, not only of the hardship, but also of the impolicy of the existing law. Because this man went out of the workhouse of the parish in which he had lived for forty-five years, in order to get work as an honest man, and be no further burden to the ratepayers, he is now punished for doing so by being sent away from the neighbourhood in which he had passed nearly all his life. The Legislature has done this; it has required a residence of one year immediately before the chargeability commences, to prevent the removal of a pauper to his place of settlement. It has been held that such a residence is not interrupted by a mere temporary absence, commenced with an intention to return; and the question in a case of this kind always is, whether the actual physical departure from the residence in one place was such as to be the commencement of a new residence in another. A person cannot have a residence in two places at once. If he leaves a place with the intention of soon coming back, his residence continues in that place; but if he has no intention to return, he changes his residence by moving away. I think, as was said in *Reg. v. St. Ives* (*ubi sup.*), every case must depend upon its particular circumstances. I cannot, however, from the statements in this case, conclude otherwise than that the pauper left the Birmingham Workhouse with the intention of staying away from it if possible; it was not the case of an inmate of a workhouse being hired out temporarily for work elsewhere; the man here might have remained with his employer as long as they could agree. Although he became removable to his place of settlement because he did his duty, it is not for us to alter the law.

LUSH, J.—I share the regret which has been expressed; but cases of hardship must arise under all enactments, and here our duty is clear. The statutes say that "no person shall be removed, nor

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shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for one year next before the application for the warrant." In this case the pauper was bodily absent for ten weeks during the year preceding his chargeability; can it be said that in any sense he resided in the parish of Birmingham during that period? I think, certainly not. There is no ground, therefore, for setting aside the order of removal.

Judgment for respondents.

Attorneys for appellants, *Prior, Bigg, Church, and Adams*, for *A. W. Knott*, Worcester.

Attorneys for respondents, *Torr and Co.*

Saturday, May 2, 1874.

KNIGHT v. HALLIWELL.

Vaccination—Notice—Period of limitation—Previous summary conviction—Point raised in case stated—30 & 31 Vict. c. 84; 34 & 35 Vict. c. 98; 20 & 21 Vict. c. 43.

Under the Vaccination Acts, 1867 and 1871, every child is subject to the legislation thereby provided, whether born within or without the district of the registrar who gives the information, or whether born before or after either Act was passed, until the age of fourteen years.

A resolution of guardians, appointing a vaccination officer, is sufficient authority for the officer so appointed to take proceedings under section 31 of the Act of 1867.

The grounds upon which Allen v. Worthy (L. Rep. 5 Q.B. 163; 21 L. T. Rep. N. S. 665), was decided are in no way effected by 34 & 35 Vict. c. 98.

The appellant, on the 10th May, 1872, received a notice under 30 & 31 Vict. c. 84 s. 31, from the respondent, the vaccination officer of his district, requiring him to have his child vaccinated within fourteen days. He was shortly afterwards summoned and fined for disregarding this notice. On the 24th June 1873, the respondent laid an information against the appellant for disregarding the same notice, and on the 3rd July appellant was again fined for the offence alleged against him.

Upon a case stated under 20 & 21 Vict. c. 43, in which certain questions of law were reserved for the consideration of the court, but in which no allusion was made to the period of limitation for proceedings provided by sect. 11 of the Vaccination Act 1871, it was held that the matter of complaint or information arose at the end of the time in which vaccination was required by the notice; and that no information could be laid after the lapse of twelve months from that time, without delivering a fresh notice:

Held, also, that the court was competent to determine any question of law arising on a case stated under this Act, notwithstanding that the question was not raised before nor reserved by the justices, provided that the question did not depend upon further evidence which might have been called before the justices.

This case was stated for the opinion of this court by one of Her Majesty's justices of the peace for the borough of Wigan, in the county of Lancaster, pursuant to the statute 20 & 21 Vict. c. 43.

On the 24th June 1873, the respondent Robt. Halliwell, being an officer appointed by the guardians of the Wigan Union to prosecute persons charged with offences against and other-

wise to enforce the provisions of the Vaccination Acts of 1867 and 1871, and being the registrar of births and deaths for the sub-district of Wigan in the said county, laid information in due form of law before the said justice against the above-named Wm. Henry Knight (hereinafter called the appellant), that he, the said Robert Halliwell, had reason to believe that Jane Knight, a child under the age of fourteen years, being within the said union, had not been successfully vaccinated, and that he had given notice to the said appellant, the father of such child, to procure its being vaccinated, and that this notice had been disregarded; and praying that the said appellant might be summoned to appear and answer to the said information, or to show cause why an order should not be made directing the said child to be vaccinated.

At a petty sessions holden at the borough court, in and for the said borough on the 3rd July 1873, the said information came on to be heard before the said justice of the peace as aforesaid, when both the said parties appeared before him by their attorneys.

The proceedings were taken under sect. 31 of 30 and 31 Vict. c. 84, which is as follows:

If any registrar, or any officer appointed by the guardians to enforce the provisions of this Act, shall give information in writing to a justice of the peace that he has reason to believe that any child under the age of 14 years, being within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded, the justice may summon such parent or person to appear with the child before him at a certain time and place, and upon the appearance, if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated, nor has already had the small-pox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time, and if at the expiration of such time the child shall not have been so vaccinated, or shall not be shown to be then unfit to be vaccinated, or to be insusceptible of vaccination, the person upon whom such order shall have been made shall be proceeded against summarily, and unless he can show some reasonable grounds for his omission to carry the order into effect, shall be liable to a penalty not exceeding 20s.

The following is a copy of the notice given to the appellant in pursuance of the above-recited section:

Vaccination Acts 1867 and 1871.

To Mr. Wm. Henry Knight:

Whereas you are in default under the above Acts respecting your child Jane Knight, I hereby require you to have the child vaccinated within fourteen days from the date hereof, and to do all other things the law requires touching the said vaccination; failing which it will be my duty to report your case, in order that proceedings may be taken as the law directs.

Dated 10th May 1872.

ROBT. HALLIWELL,

Vaccination Officer for Wigan.

Address of Vaccination Officer—22, Rodney-street.

Upon the hearing of the said information, the said appellant admitted the facts that he was the father of the child, that he had received a copy of the before recited notice, and that the child had not been vaccinated. It was also proved by the respondent by the production of the minute book of the board of guardians that he had been duly appointed vaccination officer for the Wigan district.

It was admitted by the respondent that the said notice was the only notice that had been given to the appellant, and that proceedings had been previously taken against the appellant, for disre-

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garding such notice, and that the appellant had been repeatedly convicted for failing to comply with the said notice.

It was contended on behalf of the appellant that in order to comply with the provisions of the said recited section, it was necessary that a fresh notice should be given before each occasion on which proceedings against the appellant were taken, and that the appellant could only be convicted once for non-compliance with such notice, as the notice became exhausted after the appellant had been once convicted for not complying therewith.

It was also contended on behalf of the appellant that in order to comply with the provisions of the recited section, it was not sufficient for the respondent to have been appointed vaccination officer of the district, but that it was necessary that a special resolution should be passed by the guardians authorising the respondent to take proceedings in each particular case.

It was contended on behalf of the respondent that the notice referred to was sufficient within the meaning of the recited section, and that there was nothing in that section to support the contention that a fresh notice ought to be given previous to the laying of each information, but that on the contrary a person might be summoned and convicted any number of times for disregarding one and the same notice.

It was also contended on behalf of the respondent that it was the duty of the respondent as a duly appointed vaccination officer to institute proceedings against all persons refusing to obey the statute, and that no special resolution was necessary to authorise the respondent to take proceedings in each particular case.

The said justice was of opinion that neither of the objections raised on behalf of the appellant was valid, and therefore made an order directing the child to be vaccinated and that the appellant should procure its being vaccinated within the space of fourteen days from the said 3rd July.

Whereupon the said William Henry Knight, the appellant, did, pursuant to the first-mentioned statute, within three days after the said determination, that is to say, on the 4th July last past, apply in writing to the said justices to state and sign a case setting forth the facts and grounds of his determination for the opinion thereon of this honourable court; and he having duly entered into a recognisance with one surety to prosecute without delay such appeal, and to submit to the judgment of this honourable court, and pay such costs as may be awarded by the same as required by the said statute in that behalf, the said justice in pursuance thereof stated and signed this case accordingly.

And it appeared to the said justice, and he submitted that the questions of law arising upon this case were: First, whether or not the recited notice of the 10th May 1872 is a sufficient notice within the meaning of the recited section, upon which to ground the proceedings, notwithstanding that the appellant had been previously convicted for disregard of such notice; secondly, whether or not the resolution appointing the respondent the vaccinating officer to enforce the provisions of the Vaccination Acts is sufficient to warrant him in taking these proceedings without a special authority from the guardians to take proceedings in each individual case.

The following were the minutes of the meeting of the board of guardians of the Wigan Union held 28th Feb. 1868.

The subject of appointing registrars of the various districts in the union to be vaccination officers under the new Act was then considered, and on the motion of Mr. Atkinson, seconded by Mr. Darlington, it was unanimously resolved to appoint them vaccination officers at the following salaries, viz., for the registrar of Wigan, £20 per annum.

T. Baker (with him McConnell) argued for the appellant.—Sect. 8 of the recent Act (34 & 35 Vict. c. 98) limits the duties of each vaccination officer to children born within his district, and it does not appear from this case where the child was born. Moreover, notwithstanding the case of *Allen v. Worthy* (L. Rep. 5 Q. B. 163; 21 L. T. Rep. N. S. 665), there is nothing in 30 & 31 Vict. c. 84, nor in 34 & 35 Vict. c. 98, to give justices power to convict again a person who has been already fined. Further, the Act of 1867, under which *Allen v. Worthy* was decided, relates only to children born when that Act was passed. Another objection to the proceedings in this case is that a mere general resolution appointing the registrar of a district is not sufficient authority to the person appointed to institute proceedings under sect. 31 of the Act of 1867; there should be a separate resolution of the guardians to enforce the provisions of the Act against the particular individual in each case. And the chief objection is the insufficiency of the notice; for even if the authority of *Allen v. Worthy* be supported, it does not follow that one notice can be the ground for any number of summary convictions. The cause of complaint is disobedience of the notice, and unless a fresh notice be given after a conviction there can be no fresh cause of complaint. Further, in this particular case the notice was given to the appellant and it was disobeyed more than twelve months before the complaint was made, in direct opposition to the third clause of sect. 11 of 34 & 35 Vict. c. 98.

[Stopped by the court on this last point.]

J. Edwards, for the respondent.—The effect of sect. 31 of the Act of 1867, and of the decision in *Allen v. Worthy*, is to make disobedience of the notice a continuing offence; and although the offence commenced on the 24th May 1872, it was and is now continually repeated every day so long as the child is not vaccinated. [COCKBURN, C.J.—Surely the offence was first completed upon the conclusion of the period allowed by the notice; from that time the limitation in sect. 11 ought to run.] But even if this be a good objection, it was not taken before the justices, and no question as to its effect is reserved by them for the opinion of this court. It cannot, therefore, be allowed, or even discussed now. It was held in *Purkis v. Huxtable* (28 L. J. 221, M. C.), that, upon the argument of a case stated under 20 & 21 Vict. c. 43 (the Act which applies to the present case), the appellant should not be allowed to take objections which were not raised before the justices. [BLACKBURN, J.—What was the nature of the objection there?] That there was no evidence of appellant's knowledge of the bad character of the persons he was convicted of harbouring. [BLACKBURN, J.—That was an objection which might have been cured by further evidence, if it had been raised before the justices.]

Baker was not heard in reply.

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COCKBURN, C.J.—I am very clearly of opinion that there is nothing in any of the first points taken by Mr. Baker. The case of *Allen v. Worthy* is immediately in point, and the grounds upon which it was decided are in no way affected or removed by the recent statute, 34 & 35 Vict. c. 98. Were it not for the limitation of time for proceedings in the 11th section of this Act, the appellant would be liable to conviction in the same way as the appellant in *Allen v. Worthy*. One of the clauses in that section is, "Any complaint may be made, and any information laid for an offence under the Vaccination Acts 1867 and 1871, at any time not exceeding twelve months from the time when the matter of such complaint or information arose, and not subsequently." That section having introduced this provision, although a notice once given still creates, as long as it is disregarded, a continuing cause of complaint, yet, inasmuch as the statute says no complaint can be made subsequently to twelve months from the time when the matter of complaint arose, it must be understood to limit proceedings upon this continuing cause to twelve months only from the first disobedience of the notice. The only difference which this clause will effect in the law is that instead of one notice being sufficient for complaints during any period of time, a fresh notice must be given every twelve months if the old one has been disregarded, and any number of complaints may be founded upon the fresh notice until twelve months have elapsed from the date upon which it required the vaccination to be completed. Whether this is a right provision or not it is not for us to say; we are at all events, bound to give it effect, and I do not think the point taken by Mr. Edwards is a sufficient answer to it. He says it is not competent to this court to consider upon a case stated by justices any point not raised before them and not reserved by them for our opinion. But looking at the words of the Act which provides for the statement of a case by justices (20 & 21 Vict. c. 43), I find by sect. 6, the court shall hear and determine the question or questions of law arising thereon; it seems, therefore, that any objection to the justices' decision which arises from the facts as the justices have stated them, may be considered by the court; and it is consequently open to us to say there ought in this case to have been a fresh notice before the present complaint was made.

BLACKBURN, J.—I am of the same opinion; and I wish to say that all the points raised are perfectly untenable except this one. Every child whether born within or without the district, or before or after either Act was passed, is subject to this legislation until the age of fourteen. I think the registrar was right to proceed in this case without further special instructions than those contained in the minutes. I also agree with the case of *Allen v. Worthy* that one fine is no reason for not proceeding again for a continued breach of the law, and that it is competent to justices to make an order *toties quoties*, as it shall be shown to their satisfaction that the notice has not been complied with, and that the child remains unvaccinated. To this there was, at the date of that case, no limit, but by section 11 of 34 & 35 Vict., c. 98, it was provided that a complaint must be made within twelve months from the time when the matter of complaint arose, and we must now consider whether or not this complaint was made within the

proper period. The matter of complaint in this case was the disobedience of the notice which was dated the 10th May 1872, and which required the child to be vaccinated by the 24th of that month. This notice continued to be disregarded until the 24th June 1873 when the information was laid upon which the justice made the order appealed against of the 3rd July. Thirteen months elapsed from the cause of complaint before the complaint was made. Mr. Edwards attempted to answer this objection by contending that although the notice was disobeyed on the 24th May, it was also disobeyed and the cause of complaint arose every day afterwards as long as the child continued unvaccinated, but I do not think we can put that construction upon this 11th section in opposition to the decisions upon statutes which create limitations in respect of proceedings for neglect of the provisions of an Act of Parliament. Now, in the present case there can be little doubt why the period of limitation imposed by this sect. 11 was created; it was put into the legislation upon the subject in consequence of the decision of *Allen v. Worthy*, and it must have been considered that the power to fine a man for ever upon a single notice was too hard upon him. The provision, however, does not affect the duty to vaccinate upon receipt of notice, and the only result will be that if one notice be disregarded for a year another fresh notice will have to be substituted for it. Mr. Edwards also says we ought only to answer the questions raised by the justices, and we cannot consider points not taken before them. But this is not like a point reserved for our consideration from quarter sessions, to which our decision must be limited, but we are directed to hear and determine questions of law which arise upon the facts stated. The answer to the argument derived from the cases cited is obvious. The objection raised there might, if taken before the justices, have been cured by further evidence. Where there is a point of law, the effect of which no evidence could alter, it is competent for this court to consider it under 20 & 21 Vict. c. 43, although the justices do not expressly reserve it. On this point, and on this only, the appellant is right.

LUSH, J.—On the questions asked in the case, I think the respondent is right. I entirely agree with the decision of *Allen v. Worthy*, and I should think the respondent was right altogether, if it were not for the Act subsequent to that case (34 & 35 Vict. c. 98). I can, however, put no other construction upon the limitation clause in the 11th section, than that the period of limitation is to run from the time when the cause of complaint first arose. Also as to the point raised in answer to this objection, I have only to say we are authorised to determine questions of law which arise upon a case stated, not merely questions asked by the justices.

Judgment for appellant.

Attorneys for appellant, Gregory, Rowcliffes, and Co., for Leigh and Ellis, Wigan.

Attorneys for respondent, Parkers, Pritchard, and Sharpe, for Ackerley and Son, Wigan.

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[C. P.]

COURT OF COMMON PLEAS.Reported by **ETHERINGTON SMITH** and **J. M. LELY, Esqrs.,**
Barristers-at-Law.

Jan. 22, 26, and 31.

(Before **KEATING, BRETT, DENMAN,** and
HONYMAN, JJ.)**BOON (app.) v. HOWARD (resp.).**

Parliament—Borough vote—Part of a house—Separate occupation—Separately rated—When can a rate be said to be made?—Representation of the People Act 1867—30 & 31 Vict. c. 102, ss. 3, 7, 61—Stamper v The Overseers of Sunderland considered.

A. claimed to be registered for a borough in respect of a dwelling-house. He occupied as tenant two rooms in a house and lived entirely in those two rooms. It was necessary for him to use a staircase and passages for the purpose of getting to and from his rooms, and a short piece of passage also for the purpose of getting from one room to the other. The staircase and passages were common to the other tenants of rooms in the same house, and the whole of the house was let to and occupied by tenants similarly situated as the claimant, and the landlord did not reside on the premises, or exercise any control over the rooms.

Held by Keating and Denman, JJ., that this constituted a separate occupation of a "dwelling-house" within ss. 3 and 61 of the Representation of the People Act 1867.

Held by Brett, J., that it did not.

Held by Honyman, J., that if the rooms had been separately rated within the meaning of sect. 61, during the necessary period, the occupation would have been sufficiently separate.

Two rates for the relief of the poor were made during the qualifying year, one in November, the second in May. To both these the claimant was separately rated. In a rate made in the May preceding the qualifying year the claimant was not separately rated but the tenants were rated jointly under the names of "A. and others."

Held by Keating and Denman, JJ., that the claimant was entitled under subsect. 3 of sect. 3, and sect. 61, to be registered as having been rated to all rates made during the qualifying year, and as the inhabitant occupier of a dwelling-house separately rated to the relief of the poor.

Held by Brett and Honyman, JJ., that sect. 61 is to be read into sub-sect. 2 of sect. 3, and that the claimant had not been during the whole of the qualifying year an inhabitant occupier of a dwelling-house separately rated to the relief of the poor.

At the time of the passing of the Representation of the People Act 1867, there was no Act in force in the borough authorising the rating of owners instead of occupiers.

Held by Keating and Denman, JJ., that as the claimant was in fact rated in respect of his rooms, and there had been no appeal against the rate, the revising barrister need not have considered the question whether he could legally be separately rated.

Held by Brett, J.—That the revising barrister ought to look behind the rate and determine whether the claimant could legally be separately rated.

Held also, by Keating, Brett, and Denman, JJ.,

that here the claimant could legally be separately rated.

Held by Brett, J., that the interpretation of sect. 7 in Stamper v. Overseers of Sunderland, took this case out of the operation of any part of the section, because no Act authorising the rating of owners instead of occupiers was in force in the borough in 1867.

Held, by Denman, J., that the fact that parts of the house had been separately rated precluded the application of the latter part of sect. 7.

Held by Brett and Denman, JJ., that Stamper v. The Overseers of Sunderland, did not apply to this case because it was not brought by the facts found within sect. 7, upon which the former case was decided.

Quære, per Keating, J.—Whether the interpretation of sect. 7 in Stamper v. The Overseers of Sunderland, can be maintained, and whether that case, inasmuch as it was not a registration appeal, is binding on the court sitting to decide questions affecting the franchise in the exercise of its special jurisdiction.

Held by Brett, J., that Stamper v. The Overseers of Sunderland was rightly decided, and that it was binding on the court.

This was an appeal from the decision of the Revising Barrister for the City of Exeter.

At a court held for the revision of the list of voters for the city of Exeter, the appellant objected to the name of the respondent being retained on the list of persons entitled to vote in the election of members for the city in respect of his occupation of a dwelling-house. The revising barrister held that he was entitled, and retained the respondent's name on the list, whereupon the present appeal was made.

The grounds on which the vote was objected to were these:

1. The rooms occupied by the claimant were not structurally separate.

2. The part of the house occupied by the claimant as a dwelling-house included a passage and staircase used by other tenants within the same building.

3. The first rate made to which the respondent was separately rated was after July 1872.

4. The rooms occupied were not separately rated within the meaning of the Act as interpreted in *Stamper v. The Overseers of Sunderland* (18 L. T. Rep. N.S. 682; L. Rep. 3 C. P. 388).

5. The decision in *Stamper v. The Overseers of Sunderland* (*ubi sup.*), and the judgments in *Thompson v. Ward* (24 L. T. Rep. N.S. 679; L. Rep. 6 C. P. 327), show that the rooms ought not to have been separately rated, and that the rating of them illegally did not constitute them a "dwelling-house" within the meaning of the Representation of the People Act 1867.

The facts were as follows: The respondent, on the 31st July 1873, occupied, and had for the whole of the preceding twelve months occupied, part of a house consisting of two rooms, which were not structurally separate from the rest of the house. The staircase and passages were used in common by the persons occupying other parts of the same house, and the rooms of the respondent communicated with each other by means of one of the passages on the staircase. The respondent lived entirely in the rooms, sleeping, cooking, and eating there. The landlord did not live in the house at all, nor had he any control over the

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premises, the whole house being let out to tenants who occupied their rooms similarly to the respondent. There was an outer door to the house over which each tenant exercised an independent control.

A rate was made in May 1872, in respect of which the respondent was not separately rated, but he and the other occupiers were rated under the title "Howard and others." This was the last rate made in the parish previous to the commencement of the qualifying year, on the 31st July 1872. In Nov. 1872, and in May 1873, rates were made, and no others, up to the 31st July 1873. To these two rates the rooms of the respondent were separately rated from the rest of the house, and the respondent was accordingly separately rated in respect of them. It was not definitely stated in the case whether the respondent had paid any share of the rate made in May 1872.

The revising barrister held that the two rooms were occupied as a separate dwelling, and were separately rated to the relief of the poor within ss. 3 and 61 of the Representation of the People Act 1867, and allowed the name of the respondent to be retained on the register. This decision was appealed against, and

Lopes, Q.C., now argued for the appellant.—The question is what is a dwelling house within the meaning of ss. 3 and 61 of the Act? How are the qualifications specified in those sections to be proved? But this has been already decided; this court in *Thompson v. Ward* (*ubi sup.*), has practically settled it; and on the authority of *Hadfield's case* (28 L. T. Rep. N. S. 901; L. Rep. 8 C. P. 306), the court will not rehear a question once decided. Brett, J., says there: "I think this court is bound to administer the law as it exists at the time of the particular judgment delivered. I abide by what I said in *Orme's case* (27 L. T. Rep. N. S. 652; L. Rep. 8 C. P. 281), that this court should loyally abide by its former decisions unless they are clearly shewn to be wrong." [KEATING, J.—Yes; but in the case followed there the court was not divided, and in *Thompson v. Ward*, *ubi sup.*) it was equally divided.] The words of sect. 3, sub-sect. 2 are "occupier of any dwelling-house," and the interpretation clause in sect. 61 says: "dwelling-house shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor," and as pointing to a difference of qualification, a lodger in sect. 4, is described as occupying separately and as sole tenant the same lodgings, such lodgings being part of one and the same dwelling-house. As to the meaning of dwelling-house so giving the right to be on the register, I cannot put the view I am desirous of urging before the court better than by reading the judgment of Brett, J., in *Thompson v. Ward* (*ubi sup.*) [He then read the judgment referred to.] I say also that the use of the passage here prevents this being a separate structure. In *Brewer v. McGowan* (21 L. T. Rep. N. S. 462; 1 Hopw. & Colt. 275) the words of Willes, J., are important; he says the definition of "dwelling-house" in the Act would be satisfied by part of a dwelling-house with all internal communication cut off, with access secured by a separate outer door and separately rated. Now if this definition be good, it is not satisfied here. So too in *Thompson v. Ward* (*ubi sup.*), the same learned judge says,

"Ordinarily at common law, according to the common understanding of mankind, rooms in a house, the occupier of which rooms has no control over a separate outer door, do not constitute a house;" and, again: "It is a mistake to suppose that the Representation of the People Act 1867, repeals, or was intended to be a substitution for the Reform Act, except in so far as it extends the franchise by enabling a person who in respect of the occupation of a dwelling house would be entitled to a vote under the Reform Act, provided the subject of occupation was of the annual value of 10*l.*, to acquire a vote, even though it be not of that value, subject to certain conditions." [BRETT, J.—The interpretation clause omits the word "house." It may enlarge or diminish or leave the original section just as it was; which does it do?] It leaves it in such a manner that the subject of occupation must still be a house, as before 1867. [KEATING, J.—Formerly there was great difficulty as to what was and what was not a dwelling-house, so the Legislature said, We will define any part of a house occupied in a particular way to be a dwelling-house; and if this be so, sect. 61 is an enlargement of the previously-existing qualification. HONYMAN, J.—But if it were structurally severed, it would be a dwelling-house under the old Act; and therefore the new Act would be unmeaning in this view. Why were the words "dwelling-house shall include part of a house" put in, if structural severance made it so before? BRETT, J.—Wilkes, J. would have said "we will follow *Cook v. Humber* (5 L. T. Rep. N. S. 838; 11 C. B., N. S., 33) in respect of structural severance." The same facts must now be found proved as under the old Act; the difference is in the abolition of the money qualification.] The second point is that the claimant must be separately rated during the whole of the twelve months preceding the claim. The facts found here are that the claimant was not separately rated till Nov. 1872, and the qualifying year began on the 31st July 1872. There was no new rate between May and November 1872, but to the rate of May the respondent was not separately rated, and therefore he was not separately rated for three months of the qualifying year. [DENMAN, J.—The words of the Act are in the 3rd sub-section of sect. 2: "Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises." Read that in sect. 61, and it will be "separately rated to all rates, if any." There is a case, *Cuthbertson v. Haines* (1 Hopw. & Colt. 184), which shows that, though a man's name may be inserted in the occupiers' column in the rate-book, where no separate rate had been carried out against his name, he cannot be deemed to be separately rated within sect. 61 of this Act, as the court will not infer payment of the rates by him. [KINGDOM, Q.C., referred to *Powell v. Jones* (11 L. T. Rep. N. S. 600; 18 C. B., N. S., 83) where the inference was rather in favour of the franchise.] I say that during the whole of the qualifying year the rate must have been carried out opposite to the name of the claimant. [BRETT, J.—Do you say then that if no rate was made during the year the man could not vote?] Yes, that must be so. [KEATING, J., referred to *Flatcher v. Boodle* (11 L. T. Rep. N. S. 630; 18 C. B., N. S., 152), in

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which (Williams, J., *dissentiente*) the claim was allowed, a rate having been made in April, which though liable to, the claimant had not, from want of being informed of it, paid; all subsequent rates he had however paid.] Thirdly, the claimant here was not rated so as to be qualified to be put on the register, for the reason that in 1867 he was not rated as an occupier, and his case falls within the authority of *Stamper v. The Overseers of Sunderland* (*ubi sup.*). This point turns on sect. 7 of the Act of which the words are "Where the owner is rated at the time of the passing of this Act to the poor-rate in respect of a dwelling house or other tenement situate in a parish, wholly or partly in a borough, instead of the occupier, his liability to be rated in any future poor rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs," the exception being: "Where the dwelling house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling house or tenement shall be rated in respect thereof to the poor rate." Now, *Stamper v. The Overseers of Sunderland* (*ubi sup.*), decides that such a house as the one in this case comes within the exception in sect. 7, that the owner and not the several occupiers is rateable. I say here, therefore, that the claimant not having been rated in 1867, at the time of the passing of the Act, cannot now be legally rated; but the owner must be. This is agreed to in principle in the judgment of Bovill, C.J., in *Thompson v. Ward* (*ubi sup.*), viz., that not having been rated then he cannot be rated now by sect. 7 of 30 & 31 Vict. c. 102. [KEATING, J.—The first part of the section is not fulfilled here, and so the exception cannot apply. BRETT, J.—The words are "with respect to rating in all boroughs," so it may apply. It seems that unless within the excepted case the occupier shall be rated, so that primarily the occupier is to be rated.] Yes, that view is held by Bovill, C.J., in *Cross v. Alsop* (23 L. T. Rep. N. S. 589; 1 Hopw. & Colt, 444), and in *Thompson v. Ward* (*ubi sup.*).

Kingdon, Q.C., *contra*.—The first question, that of the claimant not being rated in 1867, and so being incapable of being rated now, is answered in the mode suggested by Keating, J. The section only applies where the owner was rated at the passing of the Act, and that fact is negatived here. He could not be rated except by force of the Small Tenements Acts, but here there is no local Act, and so he could not have been rated in 1867 instead of the occupier. This reading of the section exempts boroughs where the owner was not rated at the passing of the Act from its operation, for otherwise it would practically disfranchise occupiers. But is the exception independent of the first part of the section? If it is, yet the exception says that the owner shall only be rated where the occupier is not separately rated. If the owner, by the exception is to be rated, yet he is not to be rated where the occupier is separately rated. If the rating is wrong the parties may appeal. That was the way in *Stamper v. The Overseers of Sunderland* (*ubi sup.*), and the revising barrister had no power to try a rating appeal. [BRETT, J.—If it is proved to him that a whole class without being entitled had been rated, could he not strike them off?] No, he cannot look beyond the rate book, and I contend that the 7th section has no applicability in boroughs where the

owner could not be rated in 1867. Secondly, it is said that the name was not on the rate book during the whole of the electoral year. But if sub-sect. 3 of sect. 2, and sect. 61 be read together, the meaning must be that he is to be rated to and pay those rates assessed during the year, and this is supported by the 4th sub-section, saying: "And shall pay all rates made upon him." [KEATING, J.—Must he pay a rate made before, if liable to it on coming in?] Yes, he is bound by the Act to do so. This Act is to be construed with the Reform Act of 1832, the 27th section of which has fuller words abridged in the later Act into the expression "if any;" there it is "rates made during the time of his occupancy." The section in the later Act is in effect an incorporation of the old Act, and I ask you now to read the statute so as to incorporate the 27th section of the 1832 Act. As to the question whether he has paid his share of the May rate, there being no finding one way or the other, the court must not assume that he has not paid it against the claimant, and it is proved that he has paid the rates made during the year, viz., in Nov. 1872, and May 1873. [HONYMAN, J.—How is he to know what part to pay of a rate made generally for the house in May if the real first separate assessment of his rooms is made in November?] That is merely a practical matter of detail and arrangement, and does not affect the principle of the qualification. On the structural question, I would refer the court to the judgments of Bovill, C. J., and Keating, J., in *Thompson v. Ward*, (*ubi sup.*) Consider what was the state of the law at the time of the passing of the Act. At that time *Cook v. Humber* (*ubi sup.*), had decided that where there was no structural severance, there was no house within the meaning of the Act. In *Henrette v. Booth* (9 L. T. Rep. N. S. 392; 15 C. B., N. S., 500), the principle was discussed, but a very subtle distinction was drawn depending on the fact that the outer door was dilapidated. To get rid, as I contend, of this unsatisfactory state of things, the Legislature said that any part of a house separately occupied, and separately rated, should be a house for the purpose of the franchise. This is doubtless an exceptional piece of legislation, because under the old Act parts of houses used for commerce, such as shops, warehouses, &c., were recognised as separate tenements, and gave votes. But it is further argued that the common use of passages comes within the term "joint occupier" in sect. 3. But see the judgment of Brett, J., in *Thompson v. Ward* (*ubi sup.*) The Act says, "any part of a house occupied as a dwelling," and the conditions are fulfilled here, for there are the two rooms so occupied, and the passage and staircase are only appurtenances, and are not occupied as a dwelling. Then the next objection is that there is an outer door. Now to these two objections I say, first, that the joint occupation of the passage and staircase does not affect the right of the claimant to vote because, apart from these, there was a separate occupation of a dwelling; and, secondly, that it has been held in reference to chambers and flats that an outer door constituted a qualification under the old Act. Here the claimant has an outer door to each of his rooms, and how can the fact of there being two doors instead of one make any difference? The points then are these. First, the appellant says that the respondent could not be legally rated for these

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rooms. The answers are (1.), this is a matter not for the revising barrister, but for an appeal. (2.) The 7th section does not apply; because, on the one hand the owner was not rated and could not be in 1867, there being no Small Tenements Act in force in the borough, and on the other the sub-section is inoperative, because if the owner can be rated it is only if the whole house is let out in separate tenements and the separate occupiers are not rated. Secondly, then the appellant says again that the respondent was not rated for the whole twelve months during which he occupied in the qualifying year, and that his name was not on the rate book till November. To this I answer that the rate made in May was prospective, and lasted till a new rate was made, and that the words of the section are quite consistent with this view, for they are to all rates, if any made, in respect of the premises. The effect of holding otherwise would be to disfranchise a man for the first year of his tenancy. [BRETT, J. called attention to *Townsend v. The Overseers of St. Marylebone* (25 L. T. Rep. N. S. 749; L. Rep. 7 C. P. 143).]

Lopes, Q.C. in reply.—The case here does come within the 7th section of the Representation of the People Act 1867, for this is an independent provision, and does not depend on the introductory words in the first part of the section. That this is the correct view will appear from the judgment of Montague Smith, J., in *Stamper v. The Overseers of Sunderland* (*ubi sup.*), and of Bovill, C.J., in *Thompson v. Ward* (*ubi sup.*). The effect of the provision is that persons not separately rated at the passing of the Act cannot be rated afterwards, but that the landlord must be rated. Sect. 7 applies to cases where the Small Tenements Acts was in operation down to the proviso, which is independent. For it is clear that the intention of the Legislature was that the general enactment in furtherance of the franchise should not apply to certain cases. Then as to the next point—the payment of the rate during the qualifying year; it is admitted that he must pay his quota of the previous rate, but how is it to be ascertained? [BRETT, J.—Look at sect. 30, as to claiming to be put upon the rate book.] The case of *Bushell v. Luckett* (2 C. B. 111) is in point as to the meaning of rate made. But the third point is the question of the signification to be attached to the words, “separately rated.” I say they must mean separately rated during the whole of the qualifying year. Now, assuming that the claimant has occupied a separate dwelling-house, has that house been separately rated within the meaning of sect. 3? During part of the year, as I contend, the house was not such a house as is defined in the interpretation clause. You cannot take one part of a definition and reject the other. How long is the part of the house to be separately rated? Surely it must be during the qualifying year; any other view would be wholly arbitrary and uncertain, and if this be so, the claimant here has not been an occupier of a dwelling-house separately occupied and separately rated during the preceding twelve months. [DENMAN, J.—Do not the words mean separately rated only to such rates as may be made in accordance with sub-sect. 3 of sect. 2 in the year? KEATINGE, J.—The house is not and cannot, strictly speaking, be rated; it is the occupier in respect of the house. BRETT, J.—If the definition be read into the sub-section, that

does not get rid of the necessity of the qualification extending over the preceding twelve months.] Then, lastly, can it possibly be a separate dwelling when you cannot get from one part to another without using a common passage and staircase.

Cyr. adv. vult.

On Jan. 31 the following judgments were delivered:

HONYMAN, J.—In this case, which was an appeal against the decision of the Revising Barrister for the City of Exeter, I am of opinion that the decision is erroneous, and ought to be reversed. The question turns on the proper construction of sects. 3 and 61 of 30 & 31 Vict. c. 102. It appears that the voter had been from the 31st July 1872, the occupier of two rooms in a house, which it was found by the barrister were not structurally severed from the rest of the house, such two rooms being connected by a staircase and passage, used by the voter in common with the persons occupying the rest of the house. The last rate made for the parish before the commencement of the electoral year, beginning on the 31st July 1872, was made in the month of May 1872, and in this rate the two rooms were not rated separately from the rest of the house. During the electoral year, beginning 31st July 1872, two rates only were made, viz., one in November 1872, and the other in May 1873, and in those the two rooms were rated separately from the rest of the house, the voter being rated for them; so that in fact there was no separate rating of the premises from the 31st July 1872, to the month of November 1872. It was objected to the vote, among other things, that the qualification was insufficient, because, assuming that the two rooms constituted a dwelling house within sect. 61 of the Act of 1867, they had not been separately rated during the whole of the electoral year. The revising barrister was of opinion that the voter was duly qualified, and retained the name on list. Before the Act of 1867 it had been settled by the decisions that the occupier of part of a house used not as a counting house but as a dwelling house, was not entitled to vote, unless the part of the house was so actually severed from the rest of the house as to be a house of itself: (see *Cook v. Humber* and *Henrette v. Booth*) (*ubi sup.*). What then is the effect of the new Act? To ascertain this we must look at sect. 3. This section contains four sub-sections, differently worded (see *Cull v. Austin*, 26 L. T. Rep. N. S. 767; L. Rep. 7 C. P. 227), and directed to different subjects. The first relates to the personal capacity of the voter; the second to the subject matter of the occupation and the length of it; the third to the rating of the voter; and the fourth to the payment of rates. The second sub-section requires that the voter should, during the whole of the twelve months preceding the 31st July in any year, have been an inhabitant occupier of “a dwelling house” within the borough. Now the 61st section of the Act says that unless there be something in the context repugnant thereto, the word “dwelling house” shall include “any part of a house occupied as a separate dwelling and separately rated to the relief of the poor.” Now let us read the 2nd sub-section of the 3rd section as if these words were incorporated in it, so as to see what the Legislature intended to say should be a sufficient occupation, and it will read, “has been during the whole of the twelve months preceding the 31st July an in-

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habitant occupier of any dwelling house or any part of a house occupied as a separate dwelling and separately rated to the relief of the poor." It has been argued that the object of the Legislature in the 61st section was to do away with the distinction between a part of a house structurally severed from the rest and one not so severed, provided it be occupied as a separate dwelling, and probably this was the intention; but it must be borne in mind that the Legislature has further required that it should be separately rated, and it seems to me that where the part occupied by the voter has not been separately rated during the whole of the electoral year, the voter has not for the whole twelve months occupied the thing described by the Legislature. It is clear that before the Act of 1867 the voter had no sufficient qualification unless the rooms occupied by him had been structurally severed during the whole year, and it seems to me that if the Legislature intended to do away with the doctrine as to structural severance, the intention was to substitute for structural severance a separate rating for the same period. It was contended on behalf of the respondent that it was impossible that part of a house used as a separate dwelling should be separately rated, as a house cannot be rated, the rate being imposed on the occupier, not on the house; but we must, if possible, read the 61st section so as to give some meaning to it, and this I think can only be done by reading the words as if they were, "and the occupiers of which are separately rated." If, however, it be true that the part of the house cannot be separately rated, the result would, I think, follow that the voter is not in the occupation of any such thing as that specified by the 61st section, and therefore is not the occupier of a dwelling house within sect. 3, sub-sect. 2. It was further contended for the respondent that by sect. 3, sub-sect. 3, it was only necessary that a voter should be separately rated to all rates made during the electoral year, and that the 61st section only required the separate rating of the rooms to the rates to which it was necessary that the voter should be rated; but I think that so to hold would be to confound the definition of the thing occupied with the provision defining the rating of the voter, and that though it may be enough within sub-sect. 3 that the voter should have been rated to all rates made during the electoral year, it does not affect the provisions of the second sub-section, as explained by sect. 61, that the premises should have been the subject of a separate rating during the whole electoral year. Unless I am right in this view, the consequence would follow that if no rate be made in the borough within the electoral year, so that the voter himself need not be rated, the franchise would be acquired by the occupier of part of a house occupied as a separate dwelling, although it had not been separately rated at any time during the year. Nay more, supposing that the house had, before the electoral year, been jointly rated in the name of the owner, and that there has been no rate made during the electoral year, so that the rooms have never been separately rated at all, the franchise would be acquired without any separate rating, contrary to the language of sect. 61. As I think that on this ground the decision of the revising barrister is wrong, it becomes unnecessary for me to pronounce any opinion as to whether the rooms in question did constitute part of a house occupied as a separate

dwelling within sect. 61, or whether in consequence of the whole house being let out as mentioned in the case, we should be compelled by the construction put upon sect. 7 by this court in the case of *Stamper v. The Mayor of Sunderland (ubi sup.)*, to hold that the owner alone could be properly rated for the house, and consequently that the voter was disqualified as not being properly rated.

DENMAN, J.—The appellant in this case had duly objected to the name of the respondent being retained on the list of voters for the city of Exeter. The case stated by the revising barrister found the following facts. [The learned judge then read the facts as found in the case.] Upon this state of facts it was contended on the part of the objector that the respondent was not entitled to have his name retained on the list of voters; first, because the rooms occupied by him were not structurally separate from the rest of the house; secondly, because the portion of the house occupied by the respondent included the staircase and passages, and the staircase and passages were occupied by him jointly with the other tenants of the house; thirdly, because, until the first rate made after the 31st July 1872, the said rooms were not separately rated, and therefore they did not constitute a "dwelling house," the occupation of which would qualify the voter during the part of the electoral year preceding the making of the said rate; fourthly, because, according to the decision of *Stamper v. The Overseers of Sunderland (ubi sup.)*, and the judgment of Bovill, C.J., in *Thompson v. Ward (ubi sup.)*, the said rooms ought not to have been severally rated, and the rating of them illegally by the overseers did not constitute them a "dwelling house" within the meaning of the Representation of the People Act 1867. The revising barrister held, as far as it was a question of fact for his decision, that the said two rooms were occupied by the respondent as a separate dwelling, and were separately rated to the relief of the poor, and retained the name of the respondent on the list, and the question for the court is whether his name and that of nineteen other persons similarly circumstanced, ought to be retained on the list. Though the argument upon the case involved the consideration of more than one statute, and of several cases decided before the passing of the 30 & 31 Vict. c. 102, I am of opinion that the decision of the questions raised upon this appeal depends entirely upon the construction to be placed upon three sections of that statute, and that previous statutes and cases are only important so far as they throw light upon the probable intention of the Legislature in passing the enactments upon which the present case turns. The first section to which our attention was called is sect. 3 of the Act which enacts as follows: "Every man shall in and after the year 1868 be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a borough, who is qualified as follows; that is to say—first, is of full age, and not subject to any legal incapacity; and, secondly, is, on the last day of July in any year, and has during the whole of the preceding twelve calendar months, been an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough; and has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough, to all rates (if any) made for the

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relief of the poor in respect of such premises; and, fourthly, has, on or before the 20th day of July in the same year, *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the said premises up to the preceding 5th day of Jan.: Provided that no man shall, under this section, be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house." The first part of this section which it is necessary to discuss critically is sub-sect. 2. This sub-section is intended to secure, first, that the voter shall be the inhabitant occupier as owner or tenant of a dwelling house within the borough; and secondly, that his occupation should not be one of a few weeks' or months' duration, but that it should have extended over the whole of twelve months, ending on the 31st July in the year of registration. Taking the case of an ordinary dwelling house wholly and exclusively occupied by one person, this is a clause easily understood and applied, and it is only when the word dwelling house is contemplated under different circumstances from those, that any real difficulty arises. It must, however, be here observed that this sub-section relates wholly to the subject of occupation, first, as to the thing occupied (the dwelling house); secondly, as to the kind of occupation (as inhabitant, owner, or tenant); and thirdly, as to the kind of occupation (one whole year, &c.), requisite for the attainment of the franchise. It is a sub-section wholly confined to the topic of occupation. Then follows sub-section 3, which is wholly confined to a second subject matter, or requisite of the franchise in question, viz., the rating of the occupier who has been already defined by sub-sect. 2. This sub-section requires that the above-mentioned occupier shall, during the time of such occupation, have been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises. A question has been raised in this case as to the extent and meaning of this requirement. In my opinion it merely requires the occupier in question to have been rated in respect of the premises occupied by him within sub-sect. 2, to all rates made after the 31st July in the year preceding the year of registration, according to the requirements of sub-sect. 3. It was contended by Mr. Lopes, on the part of the appellant, that this sub-section required the rating of the respondent to the last rate made before the commencement of the qualifying year, but I can find nothing in this sub-section to warrant me in so holding, and so to hold would, in my opinion, be inconsistent with several cases decided upon this sub-section, in all of which the question has been whether the voter was rated to all rates made during the year, and not extended to an inquiry as to rates made even in part, before the commencement of the year: (See *Jones v. Bubb* (19 L. T. Rep. N. S. 483; L. Rep. 4 C. P. 468); *Ainsworth v. Creeke* (19 L. T. Rep. N. S. 824), and *Cull v. Austin* (*ubi sup.*), see also *Clark v. Brown* (L. Rep. 4 C. P. 500), which decided under a different enactment, but in almost identical words, that where no poor rate was made within the time mentioned in the Act, the franchise was acquired by the voter. The third head of qualification beyond occupation for twelve months of the

qualifying tenement and being rated to rates made during those twelve months, is that contained in sub-sect. 4, viz., "Has on or before the 20th July in the same year *bonâ fide* paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the premises up to the preceding 5th Jan." The words of this sub-section have received judicial construction. In the case of *Abel v. Lee* (23 L. T. Rep. N. S. 844; L. Rep. 6 C. P. 365) it was held that the words "all poor rates payable by him" were not restricted to all poor rates made during the qualifying period, but included a rate made in June previous to the commencement of the qualifying year in which the voter was rated; and the excusal of such rate was not equivalent to payment, and I think it must be inferred that even if he had not been separately rated to that rate, but by virtue of some statute had been liable to pay it, though originally made upon others, the same result would have followed. The sub-section was again under consideration in the case of *Cull v. Austin* (*ubi sup.*) There a rate in which the voter was rated was made on the 2nd Feb. and was then payable by him. He had afterwards, without any application of his own, been excused by order of justices from the payment of this rate. It was again held that this excusal was not equivalent to payment, and that the rate in question being one made between the 5th Jan. of the year preceding the qualifying year, and the 5th Jan. of the qualifying year, and up to that time payable by the claimant, no vote was gained. These decisions seem to me to apply only to the case of a person who has either been himself rated to some rate payable by him during the prescribed period, or to the case of a person from whom a rate has become payable by virtue of some statutory or other obligation by reason of his occupation of the premises (though he may not be named in the rate) upon the neglect or default of some one else to pay; and not to include the case of a rate made upon others and already paid. I can find nothing in the statutes requiring the voter to get his name placed upon the rate book in respect of rates made upon other persons before the commencement of the qualifying year, and paid by them. Before stating my opinion upon the more important and difficult question in this case, it will be well to dispose of the objections raised to the vote in respect of non-compliance with sub-sects. 3 and 4 of sect. 3. The facts have been already stated, and first, as to sub-sect. 3, It was contended that the voter had not been rated to all rates made for the relief of the poor during the qualifying period, because, in a rate which had been made in the month of May 1872, which was the last rate made before the commencement of the qualifying year, the rooms were not rated separately from the rest of the house, and that a rate so made remained a rate made in respect of the premises during part of the qualifying year, and being made in respect of the qualifying premises was a rate to which the respondent ought to have been rated. I can find no authority for holding that upon the true construction of this section there is any necessity for the rating of the voter to any rates except those made during the year. The cases cited above seem to me to dispose of this objection so far as sub-sect. 3 is concerned. I will, therefore, pass on to the objection

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raised upon sub-sect. 4. It was argued for the appellant that assuming the rate of May 1872 was not made during the qualifying year, still it was payable by the respondent and not paid by him to the extent and in the manner provided for by sub-sect. 4. But it does not appear from the case that this objection was raised in this shape before the revising barrister, and no facts are stated from which it can be inferred that if this rate was in any sense a rate payable by the respondent in respect of the premises, it remained unpaid during any part of the qualifying year either by him or any body. It may, consistently with the facts of the case, have been fully paid by him or the owner, or anyone, before the 20th July 1872. I think, therefore, that assuming the respondent to have occupied a "dwelling house" within the meaning of sub-sect. 2 of clause 3, there is no ground for saying that he does not bring himself within both of the sub-sects. 3 and 4. I come now to the main question discussed in the case. It was contended for the appellant that the respondent was not entitled to the vote, because he did not fall within the description of sub-sect. 2, as a person who "was on the last day of July 1873, and had during the whole of the preceding twelve calendar months, been an inhabitant occupier as owner or tenant of a "dwelling house" within the borough. This objection was, in fact, a series of objections, some of them raising very difficult and important questions. In order to state these properly it is necessary to refer to sect. 61 of the Act upon which the respondent and the appellant both relied, and which enacts that the word "dwelling house shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." It is also necessary to bear in mind the proviso at the end of sect. 3, which provides "that no man shall under this section be entitled to be registered or to vote by reason of his being a joint occupier of any dwelling house." The appellant contended that the respondent did not, under the circumstances of the case, occupy a dwelling house, that the premises occupied by him not being structurally severed from the house of which they formed part, *Cook v. Humber* (*ubi sup.*) applied. That if resort was had to sect. 61, still the words of that section "as a separate dwelling" were not complied with. That even if the rooms occupied by the respondent could be considered a separate dwelling within sect. 61, they were not a separate dwelling which had been separately rated to the relief of the poor during the whole qualifying year, and therefore sub-sect. 2 had not been complied with. That the occupation of the respondent was a joint occupation of a dwelling house, and therefore within the proviso of sect. 3. That the respondent occupied as a lodger, and not as owner or tenant; and that the premises in question were part of a house wholly let out in lodgings, and therefore not properly the subject of a separate rateability of the occupiers of such lodgings or apartments, but such as the owner ought to be rated for within the decision of *Stamper v. The Overseers of Sunderland* (*ubi sup.*). Mr. Lopes, in his argument for the appellant, relied mainly upon the decision of Willes and Brett, J.J. in the case of *Thompson v. Ward* (*ubi sup.*), but inasmuch as the court was there equally divided upon the question raised, it becomes necessary to consider the case as one of the first impression, and to look to the reasons given on both sides in

the different judgments in that case rather than to the result of it, which was merely an affirmation of the rejection of the vote by the revising barrister. In the present case the revising barrister has allowed the vote, and I do not think that it would be reasonable to complain of that course having been taken under the circumstances. The facts in *Thompson v. Ward* (*ubi sup.*) were extremely similar to those in the present case, but not identical. The existence of an ashpit and a privy, and other conveniences used in common by the occupiers of the rooms inhabited, appears to have been a material consideration in inducing one member of the court to hold that the room occupied by the claimant was not the whole subject matter of occupation, and that therefore there was a joint and not a separate occupation in that case. In the present case, however, it appears clear that only part of the house in respect of which the respondent was rated as for a "dwelling-house" was the two rooms in which he dwelt, and the question is therefore much more distinctly raised whether those two rooms could or could not constitute a "dwelling-house" for which a vote could be acquired. I am of opinion that they could, and that, it having been found by the revising barrister, so far as it was a question of fact for him, that they did, there is no ground for holding the contrary. For the purpose of the present case, I think it may be conceded that the occupation of the rooms in question would not have conferred a vote, though all other requisites existed, as being the occupation of a "house" within the meaning of sect. 27 of 2 Will. 4, but in considering the meaning of sects. 3 and 61 of the 30 & 31 Vict. c. 102, I think it must be borne in mind that extremely difficult questions had arisen as to what does constitute a house, which would make it peculiarly desirable for the Legislature to adopt some definition which would prevent the recurrence of similar difficulty, when the franchise was to be conferred for the first time in respect of the occupation of a "dwelling-house," independently of its value. It was, as it seems to me, entirely with the view of preventing similar questions to those which have arisen in *Cook v. Humber* (*ubi sup.*), and other cases, that the Legislature introduced into the Act of 1867, the 61st clause, so far as it relates to the word "dwelling-house." The effect of *Cook v. Humber* cannot be better stated than in the words of Brett, J., in *Piercy v. McLean* (22 L. T. Rep. N.S. 213; L. Rep. 5 C. P. 269), "All that *Cook v. Humber* decides is that the occupation of part of a house not structurally severed from the rest confers no vote, because house, in sect. 37 of 2 Will. 4, c. 45, means a whole house." But in deciding what was a whole house, questions of great doubt and difficulty arose: (see *Henrette v. Booth*, *ubi sup.*) After the most careful study of all the arguments used in that case and in the present, and of the very elaborate judgments in that case, I have come to the conclusion that the law and its application to that case as well as to this (and even *à fortiori* to this) cannot be more correctly stated than in the following passage from the judgment of Bovill, C. J., in *Thompson v. Ward* (*ubi sup.*): "Upon that question it seems to me that the Legislature intended to make 'any part of a house' as distinguished from a whole house (in the sense in which the term 'house' had been previously interpreted by the courts) a sufficient subject of occupation, provided it was occupied for the pur-

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pose of a dwelling, and as a separate dwelling in the sense of the occupation not being a joint occupation with others of that particular part of the house, and provided there was a wholly independent occupation as distinguished from that of a mere lodger, and the part of the house was separately rated. The room of the present claimant was part of a house, and the nature of his occupation in this case seems to me to fulfil the other conditions; and, it being found that he was separately rated, I am of opinion that he must, for the purposes of this appeal, be considered the occupier of a dwelling house, and that his premises must be considered a dwelling house within the meaning of the Act of Parliament." This view of the matter disposes of several of the specific objections raised upon the construction of sects. 3 and 61. The objection founded upon the proviso at the end of sect. 3 fails because the dwelling house here being the two rooms which the respondent solely occupies as a separate dwelling, there is no joint occupation in respect to this dwelling-house, by reason of his joint occupation of something else, namely, the staircase and passages. The objection founded upon the want of structural severance also fails, because, according to the view of Bovill, C. J., which I adopt, it is not essential, provided there be a separate dwelling, separately, and not jointly, occupied. The objections founded upon the argument that the occupation was that of a lodger and not of a tenant, also fail if the words of the sects. 3 and 61 are large enough, as I think they are, to include the case and to confer the franchise upon the respondent. A more formidable argument remains. It was contended by the respondent that sect. 61 itself, in defining the cases in which a part of a house shall be included in the word "dwelling-house," adds a limitation which is fatal to the respondent's case; for, that it must be "a part of a house separately rated to the relief of the poor," and that "if this limitation be read in as it was contended it ought to be when applying sect. 3, sub-sect. 2, to the case of part of a house, it becomes clear that the "part of a house" which is to qualify as a dwelling house, must not only have been occupied separately as a separate dwelling for the whole qualifying year, but must during that time have been separately rated, and that inasmuch as the premises in question in this case have been separately rated for the first time in Nov. 1872, they did not come within the word "dwelling house" by virtue of sect. 61, but, on the contrary, were excluded by that very section. I must own that I was at first much struck by this argument, but on full consideration I think it is unsound. The words relied upon in sect. 61, it must be observed, are not strictly in an interpretation clause, but in a clause intended to include a particular subject-matter of occupation (a part of a house) under a word which might not otherwise, and often would not have been thought to include it. The clause does not say that "dwelling house" shall mean "part of a house" wherever it is used in the Act, but that it shall include it if occupied as a separate dwelling, and if separately rated. Under these circumstances, I do not think that the mode suggested of reading the two clauses, sect. 3 sub-sect. 2 and sect. 61 together, would have the effect of putting the two enactments together so as to do what the Legislature intended. Sub-sect. 2 contemplates an occupation of the qualifying tenement for

twelve months as a *sine qua non* of the franchise for a dwelling house; but sub-sect. 3, as has been already explained, does not absolutely require a separate rating during the whole twelve months, but only a rating to all rates made within the twelve months; and I think that the words of sect. 61 are amply satisfied where the "part of a house" in respect of which the franchise is claimed has during the whole twelve months been occupied as a separate dwelling, and is during that period separately rated—or, more properly speaking, separately named in the rate as the subject-matter in respect of which its occupier is separately rated—to all rates made during the qualifying year as is required in the case of "dwelling houses" of any other kind. I think that the intention of the Legislature was in the language used in sect. 61 merely to apply the word "dwelling house" in sect. 3 to the case of a "part of a house" where occupied as a separate dwelling, and where separately rated as other dwelling houses are required to be rated for the purposes of the franchise, i.e., to all rates made during the qualifying year. One further point was made by the appellant. It was said that the rooms occupied by the respondent were such that, according to the authority of *Stamper v. The Overseers of Sunderland* (*ubi sup.*), the owner ought to have been rated instead of the occupier. I greatly doubt whether this point was really open to the appellant. The respondent was, in fact, rated in respect of the rooms in question; and I think very great inconvenience would result if the revising barrister were to take upon himself in such cases—there being no appeal against the rate—to decide whether the claimant was properly rated or not; but I do not think that the case of *Stamper v. The Overseers of Sunderland* applies. In that case each occupier occupied one room only. The case found that a water-closet and other conveniences were used in common by the occupiers of the house, and the court drew the conclusion that the exception in sect. 7 of the Act applied, for that the house was wholly let out as apartments or lodgings, not separately rated, and therefore that the owner and not the occupier ought to be rated. In the present case the revising barrister has found, and that upon facts upon which I think he might reasonably find, that the rooms occupied were occupied as a separate dwelling, and he states that the overseers have separately rated the occupiers of parts of houses in respect of the parts occupied by them, except when such persons occupied only as lodgers, from which I think it must clearly be inferred that the revising barrister, so far as it was a question of fact for him, was of opinion that the present respondent was not occupying as a lodger. I think, therefore, that the objection taken under sect. 7 of the Act fails, and that sub-sect. 3 of that section applies, and the occupier was there properly rated. For these reasons I am of opinion that the revising barrister was right in retaining the votes objected to, and that our judgment ought to be for the respondent.

BRETT, J.—I am sorry that I have not been able to prepare a written judgment in this case. The first material fact is that at the time of the passing of the Representation of the People Act 1867, there was no Act in force in the city of Exeter, authorising the rating of owners instead of occupiers. The claimant in this case is stated

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to have occupied part of a house, and there is, therefore, a conclusive finding that the whole building was what is called a house, and the claimant therefore occupied part of a house in the manner described, which was this: He and his family occupied two rooms, eating, sleeping, and cooking in them, which is no doubt what the revising barrister means by "living entirely in the rooms." This cannot mean that they used no other part of the house, because they must have used the passages and staircase which were outside the rooms and between them and the street; these they in reality did use in common with the other tenants. It is found that the landlord did not live there, or have control of the house, or of the rooms or any of them, for the rest of the house was let similarly in separate sets of apartments and to various tenants. Two rates for the relief of the poor were made in the city of Exeter in the twelve months preceding the month of July 1873, one in Nov. 1872, and the other in May 1873. In both these rates the rooms of the claimant were rated separately, and the claimant was rated in respect of them. There was a preceding rate made in May 1872, in which the claimant was not nor were his rooms separately rated. So far as we can gather, then, at that time the whole house was rated, one name only being used, the rest of the tenants being designated as "and others." Notwithstanding the case of *Thompson v. Ward* (*ubi sup.*), which, on similar facts was decided against the franchise, the revising barrister held here in favour of it, and allowed the vote. The first point is whether the occupiers could legally have been separately rated. In point of fact they were so rated in the last two rates, and so it is argued that the revising barrister cannot look beyond the rate, and that if the overseers do rate the occupiers separately the persons so rated acquire a qualification, if the rate be not appealed against, whether they could legally be rated or not. This is the first time I have heard of such a proposition being maintained. If it were admitted, it would put into the hands of overseers a great power, and make them the judges of a man's status and his legal qualification, and practically put the register at their mercy. But this cannot be so, and we must look behind the rate, and the revising barrister must look behind the rate, and determine whether the occupiers here could be legally separately rated or not. The answer to this question depends on the Representation of the People Act 1867. The canon of construction, in my opinion, is that laid down in the judgment in *Cull v. Austin* (*ubi sup.*), and is as follows: "The governing rule with regard to the construction of all statutes by a court of law administering the law, is that the court is bound to construe them as nearly as possible according to the ordinary received meaning of the words, and ordinary grammatical construction of the phrases and sentences used in them. The court ought not in any case to depart from such ordinary sense and ordinary grammatical construction, unless an interpretation according to both or either appears by the context to be contrary to the manifest intention of the Legislature. It would seem that this rule should, if possible, be more strictly adhered to with regard to the various clauses of the statutes under discussion than with regard to any other, because it must be manifest to any court in this country that a statute,

dealing with the matter with which this statute deals, must have been discussed and settled in almost every clause by persons having different views of the most earnest kind, and that the best way for the court to hold a strictly even balance is to follow, as nearly as possible, the words used in each clause of every section of the Act." This was concurred in by two eminent judges, Willes and Keating, JJ. But then, it is said, that by construing the section in this case, according to the ordinary received meaning of the words, and ordinary grammatical construction of the phrases and sentences, an absurdity will arise. But Willes, J., dealt with this matter in his judgment in *Abel v. Lee* (*ubi sup.*), and again I adopt his view. He said: "No doubt the general rule is that the language of an Act of Parliament is to be read according to its ordinary grammatical construction, unless so reading it would entail some absurdity, repugnancy, or injustice. One recognises that rule where the repugnancy arises between the words of the section to be construed and those of some other section in the same Act, or in some other Act which is *in pari materia* with it. But I utterly repudiate the notion that it is competent to a judge to modify the language of an Act of Parliament in order to bring it into accordance with the views of what is right or reasonable." I also venture again to state what I think to be one of the greatest duties of this court in sitting to interpret these statutes. The personality of the court must vary, but the action of the court will be much injured unless the judges determine to follow loyally the previous decisions of the court. Before 1867 there were two distinct sets of circumstances in Parliamentary boroughs; there were boroughs in which there were statutes in force whereby owners could be rated instead of occupiers, and there were other boroughs where no such statutes existed. In the first the owners might be rated if they occupied, though the others occupied also, or if the house was let out in separate dwellings, then, according to the authority of *Stamper v. The Overseers of Sunderland* (*ubi sup.*), the separate occupiers might be separately rated under the statute of Elizabeth. In the boroughs where no Small Tenements Acts were in force, the owners, if they occupied, might be rated to the full rate paid by others, and so also might the occupiers, and they might be rated jointly or separately; but again, if the Small Tenements or any local Act applied, the owner might be rated instead of the occupier, in which case he paid a composition rate, which was less than the full rate. This being the state of things up to 1867, sect. 7 of 30 & 31 Vict. c. 102, the Representation of the People Act, was passed. In *Stamper v. The Overseers of Sunderland* (*ubi sup.*) a particular interpretation was put on that section. It is true that the appeal there was from a rate, but the question was in reality raised as a question of the Parliamentary franchise, and so we must loyally follow that decision, and we cannot disregard it because it is not in form a case decided upon an appeal from the court of a revising barrister. The real decision was that the latter part of sect 7 was to be taken as an exception, withdrawing from the section that which would otherwise be in it. The 7th section contains both a positive and a negative enactment, first the negative, "where the owner is rated at the time of the passing of this Act to the poor-rate in respect of a dwelling-house or other tenement situate in a

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parish wholly or partly in a borough instead of the occupier, his liability to be rated in any future rate shall cease;" and then the affirmative, "and the following enactment shall take effect with respect to rating in all boroughs," that is in Parliamentary boroughs. Now unless the enactment would apply, the exception would not apply. Hence the 7th section will not apply to any borough in which no Small Tenement Act was subsisting at the time of the passing of the Representation of the People Act 1867, by which the owner could be rated instead of the occupier, and consequently the exception in the latter part of the section does not affect the case. I think that the decision in *Stamper v. The Overseers of Sunderland* (*ubi sup.*) is right, but I should, under any circumstances, have held on this point in obedience to it. Hence it follows as a necessary result from this view that sect. 7 does not apply to this case nor does *Stamper v. The Overseers of Sunderland* (*ubi sup.*). decide that the occupiers of these rooms could legally be separately rated. The second point is, assuming the occupation to be sufficiently separate to entitle the occupiers to be separately rated, has the occupation in respect of rating sufficiently fulfilled the requirements of sect. 61? We must look at sect. 3, and the sub-sections, and in sub-section 2 the words are, "Is on the last day of July in any year, and has during the whole of the preceding twelve calendar months, been an inhabitant occupier as owner or tenant of any dwelling house within the borough." The occupation therefore of the dwelling house must have existed through the whole year. Now sub-section 3 is "Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough, to all rates (if any) made for the relief of the poor in respect of such premises," and an interpretation has been put on this sub-section from the cases of *Cull v. Austin*, *Abel v. Lee*, and *Jones v. Bubb* (*ubi sup.*) It is evident that the court held there that the claimant need not be rated to rates made within the qualifying year. Then arises the question, When can a rate be said to be made? Let us see what the cases say which bear upon the point. A rate made before the year but allowed by the magistrates during the year, was held not to have been made in the year. So in *Abel v. Lee* (*ubi sup.*) the court held the 4th sub-section to be different from the 3rd sub-section, and that the claimant was bound to pay all rates payable by him. In *Cull v. Austin*, (*ubi sup.*) the claimant had been rated to rates made before and during the qualifying year, and he had paid all made during the year. Four or five years previously, however, he had not paid one rate which was payable by him, and had been duly demanded, but the reason was that he had been excused the payment of it by the magistrates. The court then held that it was only a certain number of rates made before the qualifying year that the claimant was bound to pay, viz.: all rates made and allowed after the 5th Jan. of the year preceding the qualifying year, and payable up to the 5th Jan. of the qualifying year. These cases decide distinctly that there is a difference between sub-sections 3 and 4; sub-section 3 relates only to the question of the claimant being rated; sub-section 4 applies to rates which must be paid by him. If this matter had turned on sub-sect. 3, there is nothing to show that the apartments might not have been separately

rated, and the claimant entitled to vote. There is, however, no finding as to whether he had paid the May rate or not, though it is found that he was rated to it jointly with others. As to the rating question, therefore, it falls on the 61st section, "Dwelling house shall include any part of a house occupied as a separate dwelling and separately rated to the relief of the poor," and there is nothing in this case to show that the occupiers of these rooms may not satisfy every requirement of the Act as regards rates. I come now in the third place to the construction of the 61st section. What is the meaning of the latter part of the definition "separately rated to the relief of the poor," assuming the first part, "occupied as a separate dwelling" to be satisfied, for the purposes of the argument, on this point? It was said, and said rightly, that strictly speaking part of the house cannot be rated at all, for it is the person, not the house, that is rated. Though strictly true, this is hypercritical, because the expression is a common one, and the meaning of it is obvious, and further, it is used in this very statute. If we read the definition in sect. 61 into sub-sect. 2 of sect. 3, which is the interpretation under certain circumstances of the word "dwelling house," then it would stand thus: "Is on the last day of July in any year and has during the whole of the preceding twelve calendar months, been an inhabitant occupier as owner or tenant of any house or part of a house occupied as a separate dwelling and separately rated to the relief of the poor." And the ordinary construction of the words is that all which is necessary as qualification must have existed during the whole of the year. If you ask me to read "rated" as equivalent in meaning to "liable to be rated," you do what Sir Montague Smith said in *Stamper v. The Overseers of Sunderland* (*ubi sup.*) you ought not to do; you ask, I say, the court to say something else than the statute says. What the statute does say is this: that the person occupying the rooms, be he who he may, must have been separately rated during the whole year. I decline with Willes, J., in *Abel v. Lee* (*ubi sup.*) to discuss the point, whether it leads to what some people would say is an unreasonable or absurd conclusion. As I read it, therefore, the rating must have existed for the whole year, and I agree with my brother Honyman that the claimant here was not entitled for this year. On the last point I am still of opinion that the view I took in *Thompson v. Ward* (*ubi sup.*) was not wrong, and I cannot alter what I said there. On reading again the judgments in *Stamper v. The Overseers of Sunderland*, and assenting to everything there said by the judges who decided it, and especially by Sir Montague Smith, I think it is clear that every one was of opinion that sect. 61 did not alter the decision in *Cook v. Humber* (*ubi sup.*), except that where the interpretation is not necessary, that decision holds good; and where it is necessary, it is meant to and would apply to cases like chambers in the Inns of Court rather than in cases like these. Even if there had been a sufficient rating for a sufficient period, I am of opinion that the claimant could not be registered because the part of the house he used was not wholly occupied as a separate dwelling-house, as required by what I hold to be the existing law as appearing in the Acts of Parliament and interpreted by the cases which have been decided under them. I think, therefore, that the decision of the revising barrister was wrong on both points.

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KEATING, J.—I also am sorry that I am not able to deliver a written judgment. I need not pronounce a detailed opinion on all the points in this case, because I agree substantially with what has been said by my brother Denman, but there are one or two points to which I will especially refer. I regret the present state of affairs because the court will, though differently constituted, be equally divided, as it was in *Thomson v. Ward* (*ubi sup.*), and no satisfactory decision is therefore given to bind all similar future cases. I will look at the question of the franchise historically, and I find that before 1867 the franchise could not be obtained except by the occupation of a whole house. What constituted a whole house was frequently disputed, and the difficulty which arose with reference to this gave rise to the doctrine of structural severance, one of the most unsatisfactory doctrines, in my opinion, ever laid down in a court of law. Anyone who doubts this should see the judgment of Erle, C.J. in *Cook v. Humber* (*ubi sup.*). He thought he had dealt with everything, and delivered a most careful and exhaustive judgment, and anyone might then think the question settled. Yet let him look at *Henrette v. Booth* (*ubi sup.*), and if he can reconcile the two decisions he is more acute than I am. Then came the 1867 Act. It intended to give the franchise to persons who occupied something different from a whole house, and thus was wider and more in favour of the franchise than the old Act. Now I agree that words are to be taken in their natural sense, and so if the Legislature say that the franchise may be acquired by the occupation of part of a house, they meant something different from the whole house. This seems to me to be so; but I say it with diffidence, because Willes, J. in *Thompson v. Ward* (*ubi sup.*) said differently. How, then, is a man to acquire the franchise in respect of a house or part of a house? What are the conditions precedent? It is to be separately occupied and separately rated for a certain time. It was contended that a man cannot separately occupy a part of a house if there is a common staircase and passage, but it must have been known to the Legislature that there were such things; houses so arranged are common, and I see no difficulty in saying that a man occupies separately, because he walks up and down the same staircase as other inhabitants of parts of the house. Does the use of the staircase interfere with the separate occupation of his part of the house, occupied as the separate dwelling? I think not; but if it be necessary that there should not be this common use of a staircase, what becomes of the franchise? In the existing state of things all houses let out in parts have a common staircase, and the Legislature, with a full knowledge of this fact, cannot have intended to make that a disqualification. But the next requirement is that he must be separately rated. This parish was not under the Small Tenements Act, yet most of England at that time was; and as I read *Stamper v. The Overseers of Sunderland* (*ubi sup.*), it comes to this, that no man can be separately rated in respect of part of a house wherever at the passing of the Act of 1867 the Small Tenements Act prevailed; if so, what becomes of the franchise? It would in effect be the result that very few could avail themselves of the franchise. I agree with my brother Denman as to dwelling-houses in his judgment on this point,

and I do not think that sect. 61 is to be read into the sub-sect. 2 of sect. 3. The Legislature intended to invest the house with a particular quality, and the object sought was this, viz., that a house which had the occupier separately rated could confer the franchise, and one in which the occupier was not separately rated could not. I must say that it is part of my canon of construction that if words are susceptible of a reasonable and also of an unreasonable construction, the reasonable prevails. I see no objection in holding that the Legislature intended that he is to be rated in respect of that separate occupation, only as the construction would involve a new kind of rating, viz., that of a house. I agree with my brother Denman again in his view of this question. As to *Stamper v. The Overseers of Sunderland* (*ubi sup.*), I agree generally with the observations made by my brother Brett, that the court should respect decisions of itself and of other courts; but I do not know of any such positive rule which prevents the court from examining a previous decision, so that the examination be done carefully and the decision not departed from except on the strongest grounds. We need not here pronounce an opinion on that case, but I may say, as it is the fact, that *Stamper v. The Overseers of Sunderland* (*ubi sup.*) has excited considerable observation, and it will be found discussed fully in Mr. Davis's book. If *Stamper v. The Overseers of Sunderland* be examined it may be a question whether this court having exclusive jurisdiction in registration cases is bound in the same way as in other matters by a judgment not arising strictly under the Registration Acts. I understand that no question was made before the revising barrister about the non-payment of rates, and so it was, I think, unnecessary for him to have stated anything more in the case than he has done. In my opinion it is properly stated, for he might with perfect reason take into consideration the fact of the division of this court in the previous case. I adhere then to the opinion I expressed in my judgment in *Thompson v. Ward* (*ubi sup.*) so far as it is applicable to this case, and in the other points I agree with the judgment of my brother Denman.

DENMAN, J.—With reference to *Stamper v. The Overseers of Sunderland* (*ubi sup.*) I put my judgment on other grounds, but still I wish to add that I think it does not apply here.

HONYMAN, J.—I wish to say also that on the points which my brother Brett has touched on, and I have not mentioned, it must not be inferred from my silence that I differ from his view of them.

The Court being equally divided the decision of the revising barrister stood.

Attorney for the appellant, *Philbrick*.

Attorneys for the respondent, *Coodo, Kingdon, and Cotton*, for *Floud*, Exeter.

April 2 and 5, 1874.

BENJAMIN v. STORR AND ANOTHER.

Action for nuisance—What plaintiff must prove—Excessive user of highway by neighbouring auctioneer with vans and horses—Obstruction of light and air by vans—Offensive smell from horses—Admissibility of evidence of smell, where not laid eo nomine.

In all actions for damage arising from a public

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nuisance the plaintiff must prove a damage at once particular, direct, and substantial.

The plaintiff kept a coffee-house, and the defendants carried on the business of auctioneers in a narrow street near Covent-garden Market. One of two entrances to the defendants' premises was situate in such street, and was distant six feet from the plaintiff's coffee-house. The defendants, in the exercise of their business, daily brought to and for some time kept standing in the street, horses and vans close to the doors of the plaintiff. The vans obstructed the light and air of the plaintiff's coffee-house, causing him to burn gas daily, and the horses caused offensive smells, by reason of which the plaintiff lost some of his customers.

Held, evidence to go the jury of particular, direct, and substantial damage to the plaintiff from excessive user of the highway, and a rule to set aside a verdict for the plaintiff discharged.

The declaration stated that the coffee-house was rendered "unhealthy and inconvenient, as well as a house of business as a dwelling-house."

Held, that evidence of the smell from the horses was admissible under such declaration, although the letter of complaint from the plaintiff's attorney five days before writ contained no mention of it.

THE declaration stated "That before and at the time of the happening of the grievances herein-after mentioned there was, and still of right ought to be, a certain public highway, known and called Rose-street, and that the plaintiff, before and at the time of the happening of the grievances herein-after mentioned, was possessed of a certain coffee-house and premises abutting and opening into the said highway, and carried on in the said coffee-house the business and trade of a coffee-house keeper; yet the defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff in his said trade as a coffee-house keeper, from time to time kept and continued to keep divers and an unnecessary number of carts, vans, waggons, and horses standing in the said highway for an unreasonable and unnecessary length of time, and in such a position as unreasonably and unnecessarily to obstruct the said highway and the light and air entering through the windows and doors of the said coffee-house of the plaintiff and the access to the said coffee-house, whereby the plaintiff was and is prevented from carrying on his said trade in so large and beneficial a manner as he otherwise might and would have done, and lost and has been deprived of divers great gains and profits which might and otherwise would have accrued to him from carrying on his said business, whereby also the said coffee-house and premises have been rendered unhealthy and inconvenient, as well as a house of business as a dwelling-house." The plaintiff also claimed a writ of injunction to restrain the defendants from a continuance and repetition of the injuries above complained of, and the committal of other injuries of a like kind. The only plea was—Not Guilty. Issue thereon.

The cause was tried before Honyman, J. and a common jury, at the Middlesex sittings in Trinity Term, 1873, and the following appeared to be the facts:—

The plaintiff's coffee-house was in Rose-street, Covent-garden, a narrow street which connects Hart-street with Garrick-street, and the defendants were auctioneers, carrying on a large business in King and Hart streets, Covent-garden, under the

firm of "Debenham, Storr, and Sons." The plaintiff's premises adjoin those of the defendant, one of the two entrances to the defendants' auction rooms being situate in Rose-street, at a distance of about six feet from the plaintiff's coffee-house, and the other in Hart-street, which is a broader street than Rose-street. The defendants had occupied their premises for more than thirty years.

The plaintiff had occupied the premises in Rose-street, for which he paid a rent of 35*l.* a year, since 1870, when he bought an unexpired term of twelve years for 150*l.* When he first came there the defendants did not use the street so much as they afterwards did. The roadway of Rose-street is about 8*ft.* wide, and allows room for only one cart at a time. Vans of the defendants, about ten feet high, in the course of loading, unloading, and reloading, stopped many times a day close to the doors, and darkened the windows of the plaintiff's coffee-house, compelling him to burn gas nearly all day. The smell from the horses was very disagreeable, and one of the witnesses said "that he could stand it no longer." The receipts of the plaintiff had fallen off since he first came to the premises, but he admitted that he kept no books. The watering-cart had been delayed for as much as half an hour at a time by the vans, and scavengers had been prevented from sweeping the street. Customers of the plaintiff deposed to the offensiveness of the smell, and one or two of them had left off frequenting the coffee-house from that reason. A police constable had seen the vans standing in front of the plaintiff's shop all day, but the men in charge had never refused to move when required. It was undisputed that the business of the defendants had recently much increased, and that Rose-street was ordinarily dark. The writ was issued on the 24th April, but a letter, written five days before by the plaintiff's attorney to the defendant, referred only to the obstruction, and made no complaint of the smell. It was contended for the defendants (amongst other things) that their user of Rose-street had been no more than a reasonable user of a highway for the purposes of their business, and that, even if it had been unreasonable, the plaintiff had a remedy before a magistrate.

In summing up the learned judge told the jury (to whom he read the declaration at length) that in his opinion evidence as to the smell was inadmissible, but that he had received it because he thought it safer, where evidence was tendered and objected to, that the evidence should be received than rejected. He also remarked that everything depended on the extent, the locality, and the duration of the nuisance; that in his opinion the plaintiff had no remedy before a magistrate; and, telling the jury that no length of time would legalise a nuisance, directed them to find for the plaintiff if they thought there "had been an excessive user and obstruction of the highway, and that loss had accrued to the plaintiff in consequence of that obstruction and inconvenience. The jury found for the plaintiff, damages 75*l.*, whereupon the learned judge reserved leave to the defendants to move on the question of the damage being sufficient to support the action, but refused leave on the ground of mis-reception of evidence as to the smell, and granted stay of execution. A rule was afterwards obtained to set aside this verdict and enter a nonsuit instead thereof, pursuant to leave reserved, on the ground that the plaintiff did

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not give sufficient evidence of damage to himself to maintain the action; or for a new trial, on the grounds (1) that improper evidence was admitted against the defendants at the trial, and (2) that the verdict was against the weight of evidence.

Roland Williams, for the plaintiff, now showed cause.—An action lies where one person damages another by an unnecessary and unreasonable use of a public highway; and if an obstruction of the highway prevents access to a person's shop, he may maintain an action for the damage thereby done to his trade. So it is laid down in *Bullen and Leake's Precedents of Pleading*, p. 324, citing *Wilkes v. Hungerford Market Company* (2 Bing. N. C. 281; 2 Scott, 446). It is true that *Wilkes's* case was overruled by *Ricket v. Metropolitan Railway Company* (Law Rep. 2 H. L. 175; 16 L. T. Rep. N. S. 542), but it was overruled on one point only, on the damage to goodwill, and its general effect remains the same. The effect of *Ricket's* case on *Wilkes's* case may be gathered from the judgment of Willes, J., in *Becket v. Midland Railway Company* (37 L. J. 11, C. P.; 17 L. T. Rep. N. S. 499), in which case he said "There are two uncontested requisites to entitle a claimant to compensation; one is, that he must have sustained damage; the next is, that that damage should be such that he could have recovered in respect of it in an action for damage caused by an actionable wrong, but for the statute which has authorised the company to take the course which brought about that damage." And he lays these propositions down as now undisputed, "notwithstanding some observations of the very able and learned lords in the *Pickled Egg* case" (*Ricket's* case, *ubi sup.*) "seeming to throw doubt upon the latter of them." And he proceeds to cite from Com. Dig., "Action upon the case," the rule that in all cases where a man has a temporal loss by the wrong of another, he may have an action upon the case to be repaired in damages; with this illustration: "If A. has a colliery, and B. stops up the highway near it, whereby nothing can pass to his colliery, an action upon the case lies, for he ought to be remedied in particular, though it was a highway for all," adding that, no doubt Comyn, C. B., was thinking of *Iveson v. Moore* (2 Ld. Raym. 486; 1 Salk. 15). [BRETT, J.—There is nothing in its nature permanent in this obstruction. In the illustration cited B. may have put a gate across the road. DENMAN, J.—What were the facts in *Iveson v. Moore* (*ubi sup.*)?] They are best stated in 1 Lord Raymond at p. 488, from which report Willes, J., appears to have taken his judgment in *Ricket's* case. [BRETT, J.—That judgment reads like a careful and elaborate argument to save *Iveson v. Moore* (*ubi sup.*) from being overruled by the House of Lords.] *Ricket's* case has not been much acted on, and it is submitted that *M'Carthy v. Metropolitan Board of Works* (L. Rep. 7 C. P. 508; 26 L. T. Rep. N. S. 772) is better law. [BRETT, J.—Is not the question here whether this case is to be governed by *Becket v. Midland Railway Company* (*ubi sup.*) or *Oaledonian Railway Company v. Ogilvie* (2 Mac. 229)?] The questions will be, first, was the cause a sort of cause, and, secondly, was the result a sort of result, as to cause actionable damage to the plaintiff; and the constant standing of the vans and horses before the plaintiff's very doors, coupled with the obstruction to light and air and the offensive smell,

is a state of things which satisfies both those conditions. The obstruction to light and air was a substantial one, and caused the plaintiff to consume more gas than he otherwise would. If the defendant does unreasonably that which causes damage, a cause of action arises *ipso facto*: (*Tipping v. St. Helen's Smelting Company*, 11 H. of L. Cas. 642.) The smell is included by the terms of this declaration; it comes in under the word "unhealthy." [DENMAN, J.—A smell is not necessarily unhealthy.] It also comes in under the word "incommodious."

J. B. Torr, Q.C. (*J. F. Torr* with him), for the defendants, supported the rule.—It has been said more than once that the cases cited on the other side have already gone too far. The careful résumé of the cases by Erle, C.J., in *Ricket's* case comes to this. In *Iveson v. Moore* (*ubi sup.*), a private way was stopped up. In *Hart v. Basset* (T. Jones, 156) the plaintiff, a farmer of tithes, was prevented by the defendant's obstruction from taking them home. There must be actual palpable pecuniary damage done to a man. A mere loss of trade, or a mere discomfort, is not enough. [BRETT, J.—Is not the loss of trade the greatest a man can suffer?] If there be a special loss, such as the diminution of 100 particular tons of coal to 50 particular tons, that might be actionable; otherwise the damage would be too remote. [DENMAN, J.—Except the compensation cases under the Lands Clauses Act, what authority is there for that?] In *Hubert v. Groves* (1 Esp. 148), the head note is "for an obstruction to a public highway, which is a public nuisance, though such should obstruct the party's business, an action on the case cannot be maintained; the only remedy is by indictment." And to the same effect is *Winterbottom v. Lord Derby* (L. Rep. 2 Ex. 316; 36 L. J. 194, Ex; 16 L. T. Rep. N. S. 771), where the plaintiff had to take a less direct road in consequence of the obstruction. [DENMAN, J.—I remember citing *Winterbotham's* case before Willes, J., on one occasion, and I think he expressed disapproval of it. I had cited it as a strong case for the defendants, and he did not express unqualified approval of it as reported.] The plaintiff must suffer more than the rest of the public. [BRETT, J.—He has so suffered in having to burn gas.] The proper test is that applied in the recent case of *The City of London Brewery v. Tenant* (L. Rep. 9 Ch. App. 212; 29 L. T. Rep. N. S. 755); has there been a substantial diminution of the enjoyment of the plaintiff's house? [DENMAN, J.—If the court had begun with the finding of a jury in that case, the decision might have been different.] *Wilkes's* case (*ubi sup.*) is overruled by *Ricket's* case (*ubi sup.*). See the judgment of Willes, J., in *Becket's* case (*ubi sup.*). [DENMAN, J.—The substance of the plaintiff's case is that the defendant used this highway as a stable at the point opposite to the plaintiff's house.] In no previous case has a small trader complained of a large trader in the same street. The business of the defendant could not go on without his doing as he does. It is for the benefit of the public that this business should be carried on as it is. The defendant is charged with the care of many valuable goods, which it requires time to unload. Secondly, the smell was not sufficiently laid in this declaration; "incommodious" does not mean uncomfortable. There was no notice that the smell was complained of, and the lawyer's letter, five days before the writ,

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contained no mention of it, so that the defendants came to trial quite unprepared to rebut the evidence which was given on that head. They also cited

Glover v. North Staffordshire Railway Company, 16 Q. B. 912; 20 L. J. 376 Q. B.;
R. v. Bristol Dock Company, 12 East, 428;
Senior v. Metropolitan Railway Company, 2 H. & C. 258; 32 L. J. 225 Ex.;
Cameron v. Charing Cross Railway Company, 16 C. B., N. S. 447; 32 L. J. 313, C. P.

BRETT, J.—In this case the plaintiff has sued the defendant for injury arising from alleged wrongful acts of the defendant, which acts consist in the defendant making an unreasonable use to an unreasonable extent of a public highway, so as to create a nuisance to that highway. That alone would not be enough to support the plaintiff's action. But the plaintiff goes on to say that these wrongful acts caused a damage personal to him, the plaintiff. We have first to consider the question whether it is necessary for the plaintiff to show more than personal injury—whether it is necessary for him to show an injury to his property. Upon this point various cases decided under the Lands Clauses Consolidation Act 1845, 8 & 9 Vict. c. 18, s. 68, are cited. It is not, I understand, seriously contended that it is necessary for the plaintiff to show damage to his house. The decisions under the Lands Clauses Act go to that extent because of the words used in that Act, and these decide, no doubt, that injury to trade merely is not sufficient. But I think that these cases do not affect the question. By the common law of England, and quite apart from the Lands Clauses Act, if a person create a nuisance he becomes liable to indictment; and if in creating that nuisance he injures a particular individual more than he injures the public in general, he is further liable to an action at the suit of that particular individual. But the cases cited show, that in order to maintain such an action that individual must show three things. First, the injury must be a particular injury, that is, an injury to the plaintiff himself. It is not enough to show that he suffers by the alleged nuisance as much as anyone else. *Hubert v. Groves (ubi sup.)* shows that. The plaintiff was a coal and timber merchant, and the defendant had obstructed a public highway by laying on it several cartloads of soil and rubbish, whereby the plaintiff was forced to carry his timber by a more circuitous route; but the court held that the action did not lie because he could not show that he had sustained a special injury. *Winterbotham v. Lord Derby (ubi sup.)* is to the same effect, and was decided on the same ground. The injury must be different from that which is the natural result of the nuisance to the public. Secondly, the injury must be direct, and not merely consequential. Where one of many ways is obstructed, and the others are unobstructed, the having to go round by the unobstructed ways is a consequential, not a direct injury, and such an injury would not give a right of action. Thirdly, the injury must be substantial, not merely momentary or evanescent. The three rules then are, that the injury must be particular, direct, and substantial. Does the plaintiff bring himself within these three rules? I am of opinion that he does. If the verdict be correct, the plaintiff has given evidence that, by too long user of the highway by the defendant, the light and air have been excluded from the plaintiff's particular shop

for an unreasonable time, with the result of compelling the plaintiff to go to a considerable expense in burning gas at a time when he would not otherwise have burnt it. That is a particular, direct, and substantial injury to the plaintiff. I think, therefore, that as to the nonsuit, assuming the evidence to have been properly admitted, this rule ought to be discharged. On the other point as to misreception of evidence, I entertain greater doubt. But it seems to me that Honyman, J., must have thought that there had been a substantial unfairness on the part of the plaintiff in not complaining of the smells in the first instance, otherwise he would have amended the declaration. If, therefore, the declaration be informal, we ought to construe it strictly against the plaintiff, after such an intimation of opinion from the learned judge who presided at the trial. Now is the declaration formal? The declaration says that the defendant obstructed the highway by keeping his horses and vans there an unreasonable time. If it had stopped there, it would have alleged no cause of action, but only an indictable offence. Then it goes on to say that the plaintiff has suffered in his trade, and has lost divers gains and profits, &c., which latter words, together with those which had previously stated the indictable offence, state a cause of action. We have then the words "unhealthy" and "incommodious." The word "unhealthy" would not cover a smell; but I think that the word "incommodious" would. We are not to construe declarations according to the strict grammatical rules of construction. It is sufficient that the phraseology, although it should not strictly mean, should let in, the injury arising from smells. The evidence, therefore, as to the smell was properly admitted, and the rule must be discharged on that ground also. As to the point that the verdict was against the weight of evidence, the evidence may be suspicious, but we must act on the invariable rule that the verdict of the jury ought not to be overruled unless it be so unreasonable that it cannot be supported.

DENMAN, J.—I am of the same opinion. I agree that in order to maintain his action the plaintiff must give evidence of an injury particular, direct, and substantial, and I think that he has given evidence of such injury. In order to be direct, the injuries need not flow through only two or three stages. If it had the ultimate effect of causing a daily consumption of gas, that is enough. The daily consumption of gas was also enough to separate the injury to the plaintiff from the injury to the rest of the public, and it was also a substantial, appreciable injury, and such as could be put in money. On the point of misreception of evidence, I also doubt whether the evidence was legally admitted, but on the whole I think that that part of the declaration which says that the dwelling-house was rendered incommodious, when taken together with the circumstances previously set forth, states an inconvenience arising from smell in sufficient terms to enable a jury to say, exercising their judgment on what was likely to happen under the circumstances so stated, whether the offensive smell was a substantial interference with the commodiousness of the plaintiff's premises or not. As to the verdict being against evidence, I cannot say affirmatively that the verdict was wrong, so that I think we ought to support it; and a jury of London trades-

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men are much more competent to judge of such a matter as this than we are.

Rule discharged.

Attorney for the plaintiff, *C. H. Lind.*

Attorneys for the defendants, *Stileman and Neate.*

EXCHEQUER CHAMBER.

Reported by JOHN SHORTT, Esq., Barrister-at-Law.

Saturday, Feb. 7, 1874.

(Before KEATING, GROVE, QUAIN, ARCHIBALD, and HONYMAN, JJ.)

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ERROR FROM THE EXCHEQUER.

Corporation—Trustees of a public navigation—Grant of pension, by resolution not under seal, to retiring clerk—Power to vary or reduce pension—Lee River Navigation Improvement Act 1850 (13 & 14 Vict. c. cix.), s. 76—Lee Conservancy Act 1868 (31 & 32 Vict. c. cliv.).

The Lee River Navigation Improvement Act 1850 (13 & 14 Vict. c. cix.) s. 76, enacts that "it shall be lawful for the trustees of the navigation" (constituted a corporate body by Act of Parliament), "from time to time to pay and allow to any officer or servant of the trustees, whose services might, from any other cause than misconduct, be no longer required by the trustees, such annuity or other allowance as, having regard to length of service and all the other circumstances of the case, might, in the judgment of the trustees, be reasonable and proper," and authorises them to pay the same from time to time out of moneys coming to their hands by virtue of their several special Acts of Parliament.

Upon the plaintiff's resignation of his office of their clerk, in March 1865, after a service of forty years, the trustees, by a resolution duly passed, but not under seal, granted to him, under the above-mentioned section, "a retiring pension of 300l. per annum, free of income tax," during the remainder of his life.

By the Lee Conservancy Act 1868 (31 & 32 Vict. c. cliv.), the Lee Conservancy Board (the defendants) was established and incorporated in the place of the trustees, and all the rights, property, privileges, interests, and obligations of the trustees were thereby transferred to and vested in the defendants. The plaintiff's pension was duly paid to him by the trustees and by the defendants successively, down to the end of 1871, when, in consequence of the funds of the trust falling off, the defendants, by resolution duly passed, but not under seal, reduced the amount of such pension thenceforth to 150l. per annum.

In an action by the plaintiff to recover the amount of the difference between 300l. and 150l., it was

Held, by the Court of Exchequer Chamber (Keating, Grove, Quain, Archibald, and Honyman, JJ.), reversing the decision of the court below (Kelly, C.B. and Martin, B.), that the action was not maintainable, on the ground that the original gift of the pension was a voluntary bounty on the part of the trustees, and there was nothing in the nature of a grant or contract binding upon them, or which prevented the defendants from afterwards reducing the amount of such pension.

This was an action to recover 37l. 10s. claimed by the plaintiff as due on account of a retiring pen-

sion granted to him by the Trustees of the Navigation of the River Lee.

The cause came on to be tried before Martin, B., at the Middlesex Sittings after Michaelmas Term 1872, when a verdict was found for the plaintiff for 37l. 10s. damages and 40s. costs, subject to the opinion of the Court of Exchequer upon the following special case, of which the parts material to this report may be shortly stated as follows:

Par. 2. The declaration stated that, by an Act of 13 & 14 Vict. c. cix., to alter and amend the Acts relating to the navigation of the river Lee, and to enable the trustees further to improve the navigation and to dispose of the surplus water and for other purposes, it was enacted that "it should be lawful for the trustees, acting under the provisions of certain Acts therein recited and of that Act, from time to time to pay and allow to any officer or servant of the said trustees, whose services might, from any other cause than that of misconduct, be no longer required by the said trustees, such annuity or other allowance as, having regard to length of service and all other the circumstances of the case, might in the judgment of the said trustees be reasonable and proper; and the said trustees might from time to time pay and allow such annuity or allowance out of the moneys which might come to their hands by virtue of the powers and provisions of the said recited Acts and of that Act. And the said trustees, at a meeting held on the 16th March 1865, and by virtue and in exercise of the powers given to them by the said Act, and of all other powers, &c., and having regard to the facts that the plaintiff had held for forty years the office of clerk to the said trustees, and had always conducted himself well in the said office; and, being incapacitated by illness from further discharging the duties of the office, had resigned the same; and, having regard to all the other circumstances of the plaintiff's case, by a resolution duly passed, accepted the plaintiff's resignation of his said office, and granted to him a retiring pension of 300l. per annum, free of income tax, during the remainder of his life; and at a subsequent meeting in April 1865, the said resolution was confirmed. That, therefore, the said pension became and was payable from time to time out of the moneys coming to the hands of the trustees by virtue of the powers and provisions of the said Act and the other Acts herein recited, and the same from time to time, as it became due, was paid by the said trustees out of such moneys accordingly, and the amounts so paid by the said trustees were charged in their annual accounts as moneys expended by virtue of the said Act and other Acts, and the said accounts were duly received, settled, and audited, according to the provisions of the Commissioners' Clauses Act 1847, incorporated in the said Act, and the payment of the said pension became and was, and thenceforth, until the passing of the Lee Conservancy Act 1868 (31 & 32 Vict. c. cliv.), continued to be one of the purposes for which income, received by the said trustees under the said Acts, was by law made applicable. That by the said Lee Conservancy Act 1868, a body of conservators was established and incorporated by the name of "The Lee Conservancy Board," which board were the defendants; and it was thereby enacted that the navigation, works, real and personal property, powers, authorities, privileges, exemptions, rights of action and all other rights and interests of the said trustees should be transferred to and vested in the

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said conservancy board, in the same manner and to the same extent, and for the same purposes and subject to the same obligations as the same respectively theretofore were held, used, occupied, and enjoyed by the said trustees; and that the tolls levied and income received by the said conservancy board should be applied to the purposes of the said Act of 14 & 15 Vict. and the other Acts therein recited, which said Acts are in the said Lee Conservancy Act 1868, referred to collectively as "The Lee Navigation Improvement Acts." And by the said Act of 1868, it was further enacted, that subject to the provisions of the said Act, all deeds, conveyances, grants, leases, sales, mortgages, agreements, contracts, and securities theretofore executed, made, or entered into by with or in relation to the said trustees, and all obligations and liabilities which, but for the said Act might or would have arisen in relation to the said trustees, should be as valid as if the same had been executed, &c., by, with, or in relation to the said board. And that on the 25th March then last, and thenceforth until the commencement of this suit, there was due to the plaintiff on account of the said pension 37l. 10s.; and after the passing of the said Lee Conservancy Act 1868, and on the said 25th March, and thenceforth until, &c., moneys, tolls, and income to an amount exceeding 37l. 10s., and applicable to the payment, had been raised and received by and were in the hands of the said board. And all conditions, &c., had elapsed necessary to entitle the plaintiff to be paid by the said board the said 37l. 10s. on account of the said pension, yet the defendants, the said board, had not paid the same.

3. The defendants pleaded, first, never indebted; secondly, payment before action.

4. The defendants demurred also to the declaration, on the ground that it disclosed no binding contract on their part to pay the plaintiff the said pension; and issue was joined on the plea and there was also joinder in demurrer.

6 and 7. By the before mentioned Lee Navigation Improvement Act 1850 (13 & 14 Vict. c. cix.), after reciting five several Acts, namely, the 13 Eliz. c. 18; the 12 Geo. 2, c. 32; the 7 Geo. 3, c. 51; the 19 Geo. 3, c. 58; and the 45 Geo. 3, c. 69, for ascertaining, preserving, and improving the navigation of the river Lee, &c., it was enacted by sect. 3, "that the trustees, acting under the provisions of the recited Act, and that Act and their successors, should, for the purposes of the recited Acts and that Act, be incorporated by the name of 'The Trustees of the River Lee and by that name be a body corporate, and have a common seal, with perpetual succession, and have power to purchase and hold, sell, demise, and dispose of lands for the purposes of this and the recited Acts.'"

8 and 9. By sect. 7 (The Commissioners Clauses Act 1847, 10 Vict. c. 16), except sect. 54 and the clauses with respect to the qualifications of commissioners and the appropriation and investment of a sinking fund, is incorporated in this Act; and by sect. 71, the trustees were empowered to levy the toll therein mentioned.

10 and 11. By sect. 76 it is enacted that it should be lawful for the trustees, "from time to time, to pay and allow to any officer or servant of the trustees whose services might, from any other cause than that of misconduct, be no longer required by the trustees, such annuity or other allowance as, having regard to length of service

and all the other circumstances of the case, might, in the judgment of the trustees, be reasonable and proper;" and the trustees might, from time to time, pay and allow such annuity or allowance out of the moneys which might come to their hands by virtue of the powers and provisions of the recited Acts and that Act. And by sect. 93 the Act was made a Public Act.

12. On the 1st Feb. 1865, the plaintiff, who had held the office of clerk to the trustees, finding himself incapacitated, by reason of failing health, from continuing his business duties, addressed a letter to the Chairman of the River Lee Trust (the Marquis of Salisbury), resigning his office, and asking, "in consideration of his lengthened services, the favourable consideration of his Lordship and the trustees, whether, under the circumstances, a retiring pension should not be allowed him;" and, observing, that "the River Lee Act 1850, contemplated such an arrangement as the resignation or otherwise of the officers of the trust."

13. The following are extracts from the Book of Proceedings of the Trustees of the River Lee, which book was kept by the clerk under the superintendence of the trustees:—"6th Feb. 1865. At the general meeting of the Trustees of the River Lee, holden on Monday, the 6th Feb. 1865: present, the Marquis of Salisbury, K. G., in the chair, &c. . . . a letter from the clerk, dated the 1st Feb. 1865, addressed to the chairman and trustees, resigning his office in consequence of ill-health, was read, and the acceptance of the resignation deferred until the next meeting of the trust. . . . The deputy-chairman gave notice that at the next meeting he should propose that the clerk's resignation be accepted, and that he be allowed an annuity, as a retiring pension, of 300l." The above entry was signed by the Marquis of Salisbury, chairman of the meeting.

14. "16th March 1865. At a meeting of the trustees, &c., held, &c., the 16th March 1865: present the Marquis of Salisbury, K. G., in the chair, &c. . . . Special notice having been given to every existing trustee, in conformity with the statute, that at their meeting it would be proposed that the resignation of Mr. Marchant be accepted, and a retiring pension of 300l. per annum be granted to him. On the proposition of Jas. Bently, Esq., seconded by H. G. Edwards Surtees, Esq., M. P., it was unanimously resolved, that the resignation of Mr. Marchant be accepted, and that a retiring pension of 300l. per annum, free of income tax, be granted to him during the remainder of his life." The above entry was signed by the Marquis of Salisbury, chairman of the meeting.

15 and 16. From the 16th March 1865, the date of the foregoing resolution, the plaintiff retired from the office of the Clerk to the Trustees of the River Lee, and the retiring pension of 300l. per annum, free from income tax, granted to the plaintiff by the said resolution, was duly paid to him thereunder quarterly by the said trustees, until their dissolution hereinafter mentioned.

17—20. The trustees, in compliance with the Commissioners Clauses Act 1847, kept books, in which true and regular accounts were entered of all moneys received and paid for and on account of the said Lee Navigation Acts and the Commissioners Clauses Act 1847, and of the several purposes for which such moneys were received and paid; which accounts were every year examined, settled, and allowed by the trustees, and certified

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by the chairman at their annual general meeting, and were duly audited, in compliance with the Commissioners Clauses Act 1847. In each year the trustees caused an annual account or abstract to be prepared, showing the total receipt and expenditure of all funds levied by virtue of the before-mentioned Acts for the year, with a statement of the balance, duly audited and certified, in all which accounts the quarterly payments of the said annuity to the plaintiff were included from its commencement to the dissolution of the trustees.

21—32. By the Lee Conservancy Act 1868 (13 & 14 Vict. c. cliv.) the Trustees of the River Lee were on and from the first Friday in April 1869, dissolved, and their duties and powers transferred to the defendants, who were substituted for them, and were thereby made a body corporate, by the name of The Lee Conservancy Board, with a perpetual succession and a common seal, with power to take, hold, and dispose of, by grant, demise, or otherwise, land and other property, and with all the property, powers, rights, and interests, and subject to all the obligations and liabilities of the trustees.

33 and 34. By sect. 129 of the said Act of 1868, in addition to the tolls authorised by the Lee Navigation Improvement Acts, and subject to the provisions of these Acts, the Conservancy Board might levy the tolls specified in the second schedule to the Act. And by sect. 130, power was given to the board, in case the reduction of the tolls in any year should diminish the income of the board so that it should be insufficient to keep down the interest and annual income charged thereon, and to meet the expenditure of the year, thereupon to raise the tolls to such an extent, not exceeding the maximum authorised by the Lee Navigation Improvement Acts and that Act, as would meet the insufficiency and prevent its recurrence.

35 and 36. From the 2nd April 1869, to the 25th Dec. 1871, the said retiring pension of 300*l.* per annum was paid quarterly by the said conservancy board to the plaintiff, such payments being duly entered in the accounts of the board, and such accounts being duly balanced, examined, settled, allowed, certified, and audited in manner required by the Commissioners Clauses Act 1847.

37—45. In consequence of the income and funds of the board falling off, as shown by the accounts, copies of which accompany and form part of the special case, notice was given by one of the members of the board, at a meeting held on the 2nd Feb. 1872, that at a meeting to be held on the 16th inst. he should move "that the resolution of the 16th March 1865, granting a pension of 300*l.* per annum to Mr. John Marchant, late Clerk to the Trustees of the River Lee, be altered by the reduction of the amount to 100*l.*, or to such other sum as, having regard to the state of the funds, the board may then determine; the same to be paid during the pleasure of the board." Notice in writing of the intended reduction "of his pension to such an amount as the present circumstances of the conservancy can allow," was given by the clerk of the board to the plaintiff on the 5th Feb. 1872, and on the 16th Feb. 1872, at a meeting of the board, a letter from the plaintiff, dated 5th Feb., repudiating their powers to reduce his pension, and that he was taking steps to enforce his rights, was read. At the same meeting the motion to reduce the pension having been

brought forward, due notice thereof having been given to every member of the board, in compliance with sect. 44 of the Commissioners Clauses Act 1847, and permission having been given to amend the same by inserting the words "150*l.* per annum, as from Christmas last," in the place of the words "100*l.* per annum," it was resolved, by six to three, "that the resolution of the 16th March 1865, granting a pension of 300*l.* per annum to Mr. John Marchant, late clerk, &c., be altered by the reduction of the amount to 150*l.* per annum, as from Christmas last, the same to be paid during the pleasure of the board."

46. Since that meeting the board declined to pay the retiring pension of 300*l.* a year in full, and reduced the same pension to 150*l.* per annum. They paid 37*l.* 10*s.*, being one quarter's pension to the 25th March 1872, at the reduced rate, but declined to pay the balance of 37*l.* 10*s.* required to make up the full amount to that day at the rate of 300*l.* per annum.

47. This action is brought to recover the said unpaid balance of 37*l.* 10*s.*, it being agreed that the pleadings and the statutes relating to the River Lee shall form part of this case, and also that the court shall be at liberty to draw any inferences or find any facts which in the opinion of the court or jury ought to have drawn or found. The question for their opinion being whether the plaintiff is entitled to recover the said sum of 37*l.* 10*s.*

The Court of Exchequer (Kelly, C.B., and Martin, B.) after argument had, gave judgment in Trinity Term 1873, in favour of the plaintiff (see report of the case below, L. Rep. 8 Eq. 290; 42 L. J. 141, Ex.), whereupon error was brought to this court by the defendant, the grounds of error being, first, that it does not appear in the special case that the Trustees of the Lee in the declaration mentioned, had power to make the alleged grant of a pension to the plaintiff for life; secondly, that it appears in the case that the alleged pension was unreasonably excessive in amount, and therefore the defendants had the power to, and did reduce it; thirdly, that the alleged pension does not appear to have been granted by deed; and also that it was a mere gratuity without consideration and revocable by the defendants; fourthly, that the defendants had power to revoke or reduce such pension, and did, before action, in the exercise of such power, revoke and reduce the amount thereof; fifthly, that before action the defendants, as such Lee Conservancy Board, never had money or funds come to their hands applicable to the payment of the plaintiff's claim; sixthly, that the matters stated in the special case, and pleadings forming part thereof, are not sufficient in law to entitle the plaintiff to recover the judgment herein against the defendants, but the said judgment ought to be given for the defendants against the plaintiff.

The following are the points for argument on the part of the plaintiff (respondent). First, that the Trustees of the River Lee were a public body, intrusted by the Lee Navigation Improvement Acts with powers and duties for a public purpose, and, in exercise and performance of those powers and duties, they, by resolution of a meeting duly held according to law, granted and allowed to the plaintiff an annuity or retiring pension of 300*l.* per annum during the remainder of his life, and they thereby incurred an obligation or liability

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to pay the said money during the plaintiff's life, which obligation or liability was by the Lee Conservancy Act 1868, transferred to the defendants; secondly, that it was the duty of the said trustees to fix the amount of the said annuity, having regard to the length of the plaintiff's services, and to all the other circumstances of the case, and to pay the amount so fixed out of the moneys which might come to their hands by virtue of the powers and provisions of the Lee Navigation Improvement Acts, and that the resolution fixing the amount of such annuity was either irrevocable or could only be revoked or altered, having regard to the same circumstances; thirdly, that it was the duty of the said trustees to fix the tolls to be levied by them under the before-mentioned Acts (not exceeding the maximum tolls authorised by the said Acts) upon due consideration of the expenses attending the execution of the said Acts, including the payment of the said annuity to the plaintiff, and that by the Lee Conservancy Act 1868 this duty was imposed on the defendants; fourthly, that by the said resolution and the payment of the said annuity thereunder by the said trustees down to the time of their dissolution, such annuity became an expense incident to the powers and duties of the trustees under the Lee Navigation Improvement Acts, and was one of the purposes for which income received by the trustees under the said Acts, was at the passing of the Lee Conservancy Act 1868, by law applicable, and that tolls levied and moneys received by the defendants are applicable solely to those purposes.

J. Brown, Q.C. (with him was *W. Barnard*), for the defendants (appellants).—The case cited and relied on by the plaintiff below (*Clarke v. The Imperial Gas Light and Coke Company*, 4 B. & Ad. 315; 2 L. J., N. S., 30, K. B.) is, when carefully looked at, as different as possible from the present case. There was nothing whatever to prevent a reconsideration of the resolution of 1865. By sect. 76 of the 7 Geo. 3, c. 51, under which the plaintiff was appointed, the trustees had power to remove all their officers and servants from time to time at their will and pleasure; and no retiring pension or allowance could then be granted because by sect. 84 of that Act, the trust funds were expressly appropriated to certain specified purposes, not including such a grant. It was not until the passing of the 13 & 14 Vict. c. cix, s. 76, that any power existed for giving compensation to retiring servants. But this section conferred a power only and imposed no obligation on the trustees to give a pension to the plaintiff. The language of the section is altogether the language of bounty and not of contract, and enabled the trustees, and, consequently, their successors (the defendants), at their discretion, to vary the amount, or even to discontinue it altogether. There was clearly no "grant," nor was there any "contract," nor any consideration to support one. The plaintiff being removeable at the will and pleasure of the trustees, the annuity could not have been given in consideration of his resignation. [*QUAIN, J.*—The words of the section are, "Whose services are no longer required by the trustees." Does the plaintiff's case come within these words? Neither the word "grant," or "contract," are used in the matter; the words are "pay and allow." It resembles the allowance of pocket money to a child. The trustees may,

"having regard to the circumstances," judge "from time to time," not only how much they will "pay and allow," but also whether they will pay and allow anything at all. No power is given by the Act to bind their successors, even if it had been granted under seal. [He was here stopped by the court, who called upon]

Benjamin, Q.O. (with whom was *Hayman*), for the plaintiff (respondent), *contra*.—The judgment of the court below was right. The resolution of 1865 was a good legal execution of a contract entered into between the plaintiff and the trustees, and was, it is submitted, binding on the trustees, and on their successors, the defendants, either as a Parliamentary grant or as a contract, and the plaintiff's claim is one of right, and not an eleemosynary application to the defendants' bounty. To take it first, as a grant. By sect. 76 of the 7 Geo. 3, c. 51, under which the plaintiff was duly appointed, the trustees might appoint a clerk, and might allow him "such salary or recompense as they might think reasonable," so that even under that Act, while he was liable to dismissal at their pleasure at any moment, yet he had the hope held out to him of a "recompense" at the end of a faithful service. But by sect. 76 of the subsequent Act (13 & 14 Vict. c. cix.) express power is given to the trustees "from time to time to pay and allow" to a retiring officer (in any other case than that of misconduct) such annuity or other allowance as they in their judgment should consider reasonable and proper. The object was to stimulate and encourage faithful and diligent service. No sum was fixed, but it was left to the judgment of the trustees. In fact, it was Parliament saying to the plaintiff, "Be you diligent and faithful, and the trustees for the time being shall allow you such a retiring pension as they shall judge to be proper." The plaintiff had thus a parliamentary right to a pension, and all that was left for consideration by the trustees was the value of the plaintiff's services and the amount of the pension. The trustees had exercised their "judgment" upon these matters by their resolution of 1865, and that resolution would not have been revocable, even by themselves; and, *a fortiori*, it was not by the defendants, who could not exercise the "judgment" intended by the Act of Parliament upon services and merits of which they could know nothing. Had the trustees, as they might have done, given the plaintiff a lump sum down to enable him to buy an annuity of 300*l.* a year for his own life, it could not have been recalled. What difference in principle can it make that (probably thinking it to be a better bargain for the trust) they prefer to pay him the annuity itself out of the funds? Either mode was an equally legal and valid execution of their power, and each, it is contended, equally irreversible. The words "from time to time" are applicable to the case of successive trustees and successive clerks, and not to the case of one clerk only. [*ARCHIBALD, J.*—Do you say that this is a parliamentary power delegated to the trustees and binding them for ever? I do; that is precisely the way in which I put it. Once done, it is done and done for ever. It becomes a vested right, and another party, having no knowledge of the circumstances, cannot, after it has been done, alter or reverse it. To take it now on the second ground, that of contract. In *Clarke v. The Imperial Gaslight and Coke Company* (*ubi sup.*), Lord Denman, C.J. (at p. 325 of 4

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B. & Ad.) says: "We are of opinion that the general authority confided to the directors to manage the concerns of the company may well authorise a grant like this, particularly to an officer entitled to a salary wishing to retire on account of ill-health, and agreeing to abstain from transferring his services to any other company." No doubt the annuity there was granted under seal. Does its not being so in the present case make any difference? By the very words of the decision in *Gibson v. The East India Company* (5 Bing. N.C. 262; 8 L. J., N. S., 193, C. P.), the grant in this case would have been valid if under seal. In *Gibson's* case a deed and seal were necessary to bind a large body of shareholders, and the doctrine of the common law is intelligible in the case of a corporation with a large body of shareholders. But here every individual trustee had formal notice of the proposed resolution, which was afterwards unanimously passed by all the trustees present, and there was nobody else to be bound. The same technical necessity for a seal also existed in *Innes v. The East India Company* (17 C. B. 351; 25 L. J. 154, C. P.) The Companies Clauses Act of 1847 (10 & 11 Vict. c. 16, and which is incorporated in 13 & 14 Vict. c. cix.) by sect. 56 gives power to enter into a contract such as that in the present case. After the passing of 13 & 14 Vict. the plaintiff must be assumed to have remained in the trustees' service on the terms that, barring misconduct, he should receive such a retiring pension as they in their judgment should allow, and the subsequent resolution created a binding contract on their part to pay him such pension in consideration of his past services: (*Eastwood v. Kenyon*, 11 A. & E. 438; 9 L. J., N. S., 406, Q. B.; *Bryant v. Flight*, 5 M. & W. 114; 8 L. J., N. S., 189, Ex.) The power "from time to time to pay and allow," &c., may be a power to grant other or increased annuities, but is not a power to recall a contract once made, or to reduce the amount of the pension once granted.

J. Brown, Q.C., replied, and cited a passage from Chitty on Contracts, p. 50, when he was stopped.

KEATING, J.—I am of opinion that the judgment of the court below (which, it must be observed, was that of two learned judges only, and in which judgment one learned Lord Chief Baron appears to have concurred with considerable hesitation) must be reversed. The facts of the case are very short, and it may be as well that I should here recapitulate them. The plaintiff in this action was appointed by certain persons, who were by Act of Parliament constituted a corporation under the name and style of "the Trustees of the River Lee," to be their clerk, and in pursuance of the provisions of the Act of Parliament (7 Geo. 3, c. 51, s. 76), under which he was appointed, he became their servant, removable at their will and pleasure. Under the terms of that Act it was not competent to the trustees to give or make any remuneration by way of a retiring allowance, or a payment of any kind whatever, to any servant or officer of theirs, upon his leaving their service, or resigning his office, under any circumstances; because by sect. 84 of the Act it was expressly enacted and provided that all sums of money raised by the trustees should be appropriated and applied by them to certain specified purposes, of which such an allowance or payment was not one. Any such allowance, or payment

being thus clearly excluded by the provisions of the Act of Geo. 3, it became necessary, in order to enable the trustees, if they should feel so disposed, to confer any remuneration in the shape of an annuity, or a retiring allowance, upon an old servant, to give them that power by a special enactment, and accordingly, by the 13 & 14 Vict. c. cix., which was an Act for altering and amending the Acts relating to the navigation of the river Lee, and to enable the trustees further to improve the navigation, and to dispose of the surplus water, and for other purposes, that power was given them by sect. 76, which enacts that "it shall be lawful for the trustees acting under the provisions of certain Acts herein recited, and of this Act, from time to time to pay and allow to any officer or servant of the said trustees, whose services might, from any other cause than that of misconduct, be no longer required by the said trustees, such annuity or other allowance as, having regard to length of service, and all the other circumstances of the case, might, in the judgment of the said trustees be reasonable and proper;" and the section then goes on to enable the trustees, from time to time, to pay and allow such annuity or allowance out of the moneys which might come to their hands by virtue of the powers and provisions of the several Acts of Parliament relating to their trust. In the year 1865 the plaintiff, who had been for a period of forty years in the service of the trustees as their clerk, finding himself, from increasing years and ill-health combined, unable any longer to perform satisfactorily the duties of his office of clerk, applied to the trustees to appoint his son to be their clerk in his stead, and further solicited their favourable consideration of his past services. Thereupon the trustees complied with both these requests, and they unanimously, on the 16th March 1865, passed a resolution that the plaintiff's "resignation be accepted, and that a retiring pension of 300*l.* per annum, free of income tax, be granted to him during the remainder of his life," and there is little doubt, probably, that it was their full intention that the annuity should be for his life. For many years, down to the end of the year 1871, the plaintiff received his full retiring pension of 300*l.* a year. Subsequently thereto, in consequence of the funds of the trust falling away, it became necessary, in the judgment of the defendants (who had in the meanwhile succeeded to the office, powers, and obligations of the old trustees) to reconsider the amount of the plaintiff's pension, which they accordingly did, and the result of such reconsideration was that the former resolution of 1865 was varied by a resolution of the 16th Feb. 1872, which reduced the amount of the plaintiff's annuity thenceforth from 300*l.* to 150*l.* per annum, and which stated that it was to be paid "during the pleasure of the board." The question, then, for our decision is whether or not the defendants had power to vary the previous resolution of 1865. In the interval between the date of that resolution and the later one of 1872, there had, no doubt, occurred a change in the constitution of the trustees, and a transfer under the Act of 1868 to The Lee Conservancy Board (the defendants) of the navigation, works, property, and all other rights and interests of the old trustees had taken place; but I do not think that that makes the slightest difference. The new board (the defendants) stand in the place and, if I

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may say so, in the shoes of the old one (the trustees), with all the latter's rights, powers, privileges, liabilities, and obligations. I am clearly of opinion, therefore, that the defendants had power to vary the resolution of 1865 in the way they have done. The power was to pay the annuity "from time to time," but there was no grant under seal or any valid contract by which the trustees had bound themselves to pay it. It is unnecessary to consider what the case would have been if the trustees had made a grant of this annuity under seal, or by a valid contract founded on a good consideration, for the simple reason that there was here neither the one nor the other. Mr. Benjamin, indeed, has argued with much ability that the original resolution was binding as a grant, because under sect. 76 of the 13 & 14 Vict. c. cix. a duty or obligation was imposed upon the trustees to exercise their judgment in the matter, and that, having once exercised that judgment by passing the resolution of 1865, they could not afterwards retract it, nor could such resolution be subsequently varied. I must say that that is a construction of the section to which I cannot agree, and for which I can see no ground at all; and from which, therefore, I entirely dissent. A power was given by the section in question to the trustees, but no obligation was thereby imposed upon them. But then Mr. Benjamin says, if the court should hold that there was no grant, yet still the resolution showed a valid contract founded on good consideration between the plaintiff and the trustees. I can see no trace of any such contract, or of anything like a contract. The case is one simply of good service, and a voluntary reward; the resolution conferred a bounty merely on the plaintiff. No doubt the trustees desired and intended, at the time, to provide for him during the remainder of his life; and had the funds continued to admit of it, the full original amount of the annuity would probably have continued to be paid to him; but a deficiency which was not anticipated having arisen in the funds, there is nothing to prevent the defendants from reconsidering the matter, and reducing the amount as they have done, and which I think they were fully authorised to do.

GROVE, J.—I am entirely of the same opinion, and upon the same grounds; though I should have been far better pleased if I could have come to an opposite conclusion.

QUAIN, ARCHIBALD, and HONYMAN, JJ. concurred, the last-named learned judge observing that, if necessary, he would have been disposed to rely upon the construction of the words "whose services are no longer required," in sect. 76, suggested by Quain, J. during the argument.

Judgment reversed.

Attorneys for the plaintiff (respondent), *Monckton, Long, and Co.*, 17, Lincoln's-inn-fields, W.C., and Maidstone.

Attorney for the defendants (appellants), *R. J. Pead*, 4, Storey's-gate, Great George-street, Westminster, S.W.

BAIL COURT.

Reported by R. A. KINGLAKE, Esq., Barrister-at-Law.

Friday, May 8, 1874.

THE OVERSEERS OF SALFORD UNION v. THE JUSTICES OF THE HUNDRED OF SALFORD.

Union Assessment Act 1864—Appeal to assessment committee—Condition precedent to appeal to quarter sessions.

Under the Union Assessment Act 1864 (25 & 26 Vict. c. 103, ss. 18, 20), and the Union Assessment Committee Act 1864 (27 & 28 Vict. c. 39, s. 1), notice of objection to the valuation list and notice of appeal must be given to the assessment committee before an appeal can be made to quarter sessions, and such notices are a condition precedent to the hearing of such appeal. In the event of omitting to give such notices the court will quash the order of quarter sessions, even in cases where the assessment committee has no power to grant relief.

THIS was an application for a rule for a *certiorari* to bring up an order made by the respondents, sitting in quarter sessions, to be quashed.

The facts of the case were as follows: Messrs. Shaw, Ashton and Sharp, were bill-posters, carrying on business at Manchester, and they were assessed to the relief of the poor in respect of certain advertising stations used by them in the ordinary way of their trade.

These stations consist of walls and hoarding, which are the property of a railway company, and for the licence to use which as advertising stations Messrs. Shaw and Co. pay a yearly rent. The licence is revocable at any time on behalf of the railway company, and it does not confer any exclusive right to the possession or sole use of the walls and hoardings.

The overseers having made out a supplemental valuation list the assessment note was served upon Messrs. Shaw and Co., and as they disputed their liability to be rated at all to the relief of the poor of the Salford township, they caused notice of appeal to be served both on the overseers and also on the assessment committee, but no objection was ever taken on behalf of Messrs. Shaw and Co. to the valuation list. The appeal against the rate was entered for trial at the ensuing general quarter sessions of the peace, and upon the hearing of the appeal, no counsel having appeared for the overseers, the court, upon proof being given of the service of the notice of appeal pronounced judgment, quashing the rate.

Herschell, Q.C. (with him *J. E. Gorst*), showed cause against the rule.—The real question is whether Shaw and Co. are rateable at all. The case depends on the construction of two Acts of Parliament, the Unions Assessment Committee Act 1862 (25 & 26 Vict. c. 103), sect. 20, and the Union Assessment Act 1864 (27 & 28 Vict. c. 39), sect. 1. I contend that the assessment committee are not authorised to entertain the question of rateability. By the 20th section of the first Act the committee may, whether any objection be or be not made to any such valuation list, and either before or after any meeting for hearing objections, make such alteration in the valuation of any hereditaments included in any valuation list, and insert therein any rateable hereditaments omitted therefrom, and make such corrections in names, descriptions, and particulars in any valuation list, and upon such information as to them may seem sufficient, and

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may, with the consent of the guardians as aforesaid appoint or employ a person to survey and value the rateable hereditaments comprised in any such valuation list, or any of them, or omitted therefrom, or may take such other means as they may think necessary for ascertaining the correctness thereof, and when the committee have heard and determined all such objections as aforesaid, and have made such alterations, insertions, and corrections in any valuation list as to them may seem proper, they shall approve the same under the hands of three members of the committee present at the meeting, at which the same is approved, with the date of such approval; but if Shaw and Co. had objected under that section, and said We are not liable at all, it would not be an objection which the committee could inquire into. Nor are the committee empowered to entertain the objection under the 18th section, for the persons to give notice of objection are persons who may feel themselves aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation. Nor is the authority of the assessment committee enlarged by the 27 & 28 Vict. c. 39, s. 1, which enacts that before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made, of the intention to appeal, and the grounds thereof, to the assessment committee of such union, provided that after the first day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee unless he shall have given to such committee notice of objection against the said list, and shall have failed to have obtained such relief in the matter as deemed just. [BLACKBURN, J.—Is it not a substantial enactment that after 1st Aug. no person shall be empowered to appeal unless he shall have given the committee notice of objection?] I submit not, where the contention is whether a party is rateable at all, not whether he is unfairly or incorrectly rated. Prior to 1864, you could go to sessions direct on appeal, and therefore it is easy to understand why the committee could determine the amount of the valuation. The words in sect. 20 are unmeaning unless my contention is right. [BLACKBURN, J.—It is quite clear that if Shaw and Co. had been left out of the valuation list altogether, the railway company might have appealed to have them inserted; the Legislature has enacted that the parties shall go to the committee, and fail to obtain relief before they can appeal to the quarter sessions.]

The *Solicitor-General* (Mr. Holker, Q.C.) and *Edwards* were not called upon.

BLACKBURN, J.—The 27 & 28 Vict. c. 39, sect. 1, is curiously worded, but absolute and positive. It enacts that before any appeal shall be heard at quarter sessions, the appellant shall give notice of his intention to appeal and the grounds thereof to the assessment committee; and then the statute goes on to provide that after the 1st Aug. next no person shall be empowered to appeal to any sessions against a poor-rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such com-

mittee notice of objection against the said list, and shall have failed to obtain such relief in the matter as deemed just. This is a separate enactment. Here there is a rate made out in conformity with the valuation lists, only assessing property which it is contended ought not to be assessed. If Mr. Herschell's contention is right, the parties would fail to obtain relief from their notice of objection to the assessment committee, but yet the applicant ought to have given notice, although the assessment committee could give no relief as that is a condition precedent to an appeal to quarter sessions. The rule must therefore be made absolute.

MELLOR, J.—I am of same opinion.

Rule absolute.

Solicitors for appellants, *Chester, Urquhart, and Co. for Butt, Manchester.*

Solicitors for respondents, *Venn and Son for Ritson, Manchester.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 25, 1874.

(Before Lord COLERIDGE, C.J., BLACKBURN and LUSH, JJ., and PIGOTT and CLEASBY, BB.)

REG. v. GEORGE KENDALL.

Larceny.

W. let a horse on hire for a week to C., who fetched the horse every morning from W.'s stable, and returned it after the day's work was done. The prisoner went to C. one day, just as the day's work was done, and fraudulently obtained it from him by saying falsely, "I have come for W.'s horse; he has got a job on, and wants it as quickly as possible." The same evening the prisoner was found three miles off with the horse by a constable, to whom he stated that it was his father's horse, and that he was sent to sell it:

Held, that the prisoner was rightly convicted of larceny on an indictment alleging the property of the horse to be in W.

CASE stated for the opinion of this Court by the Deputy Assistant Judge at the Middlesex Sessions.

George Kendall was tried before me at the Middlesex Sessions, on the 11th Feb. 1874, on an indictment which charged him with having stolen, on the 28th Jan. 1874, a horse, the property of James Watson.

The facts proved were these:

James Watson, the owner of the horse, had let it on hire for a week to John Coote, a master carman employed in the West India Docks. Coote fetched the horse every morning from Warren's stable, and returned it every afternoon after the day's work was done.

On the 28th Jan., just as the horse's work was done, the prisoner, George Kendall, came to Coote and said, "I have come for Mr. Watson's horse; he has got a job on, and wants it back as quickly as possible." Believing that statement, Coote took the harness off, assisted the prisoner to mount, and desired him to take the horse back to Watson's as soon as he could. The prisoner rode off with the horse, did not take it to Watson's, but was found with it the same evening three miles off by a police constable, to whom he stated that it

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was his father's horse, and that he was sent to sell it.

Upon proof of these facts, I doubted if the offence amounted to larceny, inasmuch as the horse was not taken out of the possession of Watson, in whom the ownership was laid.

The counsel for the prosecution then applied to amend the indictment, by alleging the property to be in Coote.

I was of opinion, that if this amendment were made, the offence was still not that of larceny, but that of obtaining the horse by false pretences.

There being no question as to the fraudulent intention of the prisoner, I left the case to the jury on the indictment unamended, and they found prisoner guilty.

I desire the opinion of the Court for the Consideration of Crown Cases Reserved, whether the prisoner on these facts could be properly convicted of larceny on the indictment, either as it originally stood, or as amended by alleging the ownership in Coote. If the latter, the amendment is to be considered as made.

I postponed judgment, and the prisoner remains in the House of Correction until the opinion of the court is pronounced.

(Signed) FRANCIS BARROW,
Chairman of the Second Court
Middlesex Sessions.

No counsel appeared for the prisoner.

Abram, for the prosecution.—There is no doubt if the case is one of larceny, the indictment is good, as Watson was the owner of the horse, but the learned judge doubted whether it was not more properly a case of obtaining the horse by false pretences.

BLACKBURN, J.—No doubt it would have been so if the prisoner had been charged with stealing the horse from Coote, the bailee, but as against the owner, Watson, it was larceny.

By the COURT. *Conviction affirmed.*

Saturday, May 2, 1874.

(Before Lord COLERIDGE, C. J., BLACKBURN, J.,
LUSH, J., PIGOTT, B., and CLEASBY, B.)

REG. v. FARRELL.

Evidence—Inability of witness to travel—Reception of deposition—11 & 12 Vict. c. 42, s. 17.

The deposition of a witness properly taken before the committing magistrate, with full opportunity of cross-examination by the accused, was allowed to be read at the trial under the following circumstances, in the absence of the witness who was alive. It was proved by a medical man that the witness was seventy-four years old, and that he thought that she would faint at the idea of coming into court, and that seeing so many faces would be dangerous to her, and that she was so nervous that it might be dangerous to her to be examined at all, but that he thought she could go to London to see a doctor without difficulty or danger.

Held that her deposition ought not to have been received under the 11 & 12 Vict. c. 42, s. 17.

CASE reserved for the opinion of this court by Lord Coleridge, C. J.

The prisoner was indicted for embezzlement, and was tried before me at Stafford, on Saturday, 14th March 1874.

In the course of the case for the prosecution it

was proposed to put in evidence the deposition of Mary Lee, the aunt of the prosecutor, who sold milk, and whose milk accounts were entirely kept and his milk business managed by Mary Lee, his aunt.

To Mary Lee the prisoner had been in the habit of accounting. Mary Lee was alive and was living in Stafford, not far from the court where the prisoner was being tried.

Due proof having been given that her deposition was properly taken in the presence of the prisoner, and with full opportunity of cross-examination, it was proposed to read it under 11 & 12 Vict. c. 42, s. 17, on the ground that she was so ill as to be unable to travel.

On this point Samuel Cookson, a doctor of medicine living in Stafford, and the regular medical attendant of Mary Lee, gave the following evidence:

Dr. Cookson: I am a doctor of medicine living and practising in Stafford. I know Mary Lee. She is very nervous and seventy-four years of age. I think she would faint at the idea of coming into court, but I think that she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous for her to be examined at all. I think she could distinguish between the court going to her house and she herself coming to the court.

I received the deposition and evidence, and the jury convicted the prisoner. But I respited the sentence, and now request the opinion of the Court of Criminal Appeal whether the deposition ought to have been received. If it ought not, the conviction must be quashed.

April 25.—This case was called on for argument, but no counsel appeared on either side.

May 2.—Lord COLERIDGE, C.J., now delivered the judgment of the court.—We are of opinion that upon the facts in this case the deposition of Mary Lee was improperly received in evidence under the 11 & 12 Vict. c. 42, s. 17, which (after directing justices to take in manner therein mentioned the statement on oath or affirmation of the witnesses appearing against any person charged before them with an indictable offence) enacts that if afterwards "upon the trial of the person so accused it shall be proved that any person whose deposition shall have been taken as aforesaid, is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." We think that old age, and nervousness, and inability to stand a cross-examination is not a sufficient foundation for the reading of the deposition, and that it would raise a dangerous latitude in practice if we were to admit it upon such grounds.

Conviction quashed.

C. CAS. R.]

REG. v. PEMBLETON.

[C. CAS. R.]

Saturday, April 25, 1874.

(Before Lord COLERIDGE, C.J. and BLACKBURN and LUSH, JJ., PIGOTT and CLEASBY, BB.)

Reg v. PEMBLETON.

Malicious injury to property—Throwing a stone at a person but missing and breaking a window—24 & 25 Vict. c. 97 s. 51.

Defendant was indicted for unlawfully and maliciously committing damage upon a window in the house of the prosecutor contrary to the 24 & 25 Vict. c. 97, s. 51. Defendant who had been fighting with other persons in the street after being turned out of a public house, went across the street, and picked up a stone, and threw at them. The stone missed them, passed over their heads, and broke a window in the public-house. The jury found that he intended to hit one or more of the persons he had been fighting with and did not intend to break the window:

Held that upon this finding the prisoner was not guilty of the charge within the above statute.

To support a conviction under sect. 51 there must be a wilful and intentional doing of an unlawful act in relation to the property damaged.

CASE stated for the opinion of this Court by the Recorder of Wolverhampton.

At the Quarter Sessions of the Peace held at Wolverhampton on the 8th Jan. instant Henry Pembleton was indicted for that he "unlawfully and maliciously did commit damage injury, and spoil upon a window in the house of Henry Kirkham" contrary to the provision of the Stat. 24 and 25 Vict. c. 97 s. 51. This section of the statute enacts:

Whosoever shall unlawfully and maliciously commit any damage injury or spoil to or upon any real or personal property whatsoever either of a public or a private nature for which no punishment is hereinbefore provided, the damage injury or spoil being to an amount exceeding 5s. shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years with or without hard labour; and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, shall be liable at the discretion of the court to be kept in penal servitude for any term not exceeding five years and not less than three, or to be imprisoned for any term not exceeding two years, with or without hard labour.

On the night of the 6th Dec. 1873 the prisoner was drinking with others at a public-house called "The Grank Turk" kept by the prosecutor. About eleven o'clock p.m. the whole party were turned out of the house for being disorderly, and they then began to fight in the street and near the prosecutor's window, where a crowd of from 40 to 50 persons collected. The prisoner, after fighting some time with persons in the crowd, separated himself from them, and removed to the other side of the street, where he picked up a large stone, and threw it at the persons he had been fighting with. The stone passed over the heads of those persons, and struck a large plate glass window in the prosecutor's house, and broke it, thereby doing damage to the extent of 7l. 12s. 9d.

The jury, after hearing evidence on both sides, found that the prisoner threw the stone which broke the window, but that he threw it at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window; and they returned a verdict of "guilty" whereupon

I respited the sentence, and admitted the prisoner to bail, and pray the judgment of the Court for Crown Cases Reserved, whether upon the facts stated and the finding of the jury the prisoner was rightly convicted or not.

(Signed) JOHN J. POWELL.

Recorder of Wolverhampton.

No counsel appeared to argue for the prisoner.

J. Underhill for the prosecution.—The conviction was right under the statute, for it is found that the prisoner threw the stone at the people, intending to hit some or one of them; that is, that he was guilty of a malicious act; and the other part of the finding that he did not intend to break the window, may be rejected as surplusage. An unlawful act done without just cause implies malice. In the Act there are some sections under which it is necessary that there should be the intention, in order to prove the offence, but there are others under which it is not necessary that there should be the intention; for instance sect. 58 enacts that every punishment and forfeiture imposed by the Act on any person maliciously committing any offence whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise. There was malice against the persons at whom the stone was thrown and the consequence of throwing the stone was the damage to the window. The above section seems to dispense with malice against the owner of the property injured, and the rule of law that a man must be taken to intend the consequence of an unlawful act also applies. In 1 Russell on Crimes 667 (3rd edit.) it is said "It should however be observed that when the law makes use of the term 'malice aforethought' as descriptive of the crime of murder it is not to be understood merely in the sense of a principle of malevolence to particulars, but meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked depraved and malignant spirit—a heart regardless of social duty and deliberately bent on mischief. And in general any formed design of doing mischief may be called malice. *Fost.* 256 262." [BLACKBURN, J.—Foster is speaking of murder in that passage. Lord Coke, 3 Inst 56 also speaking of murder says "If the Act which causes death is unlawful it is murder." He puts the case of a man who intending to steal a deer in a park, shoots at it, and by the glance of the arrow kills a boy that is hidden in a bush. "This, he says, is murder, for the act was unlawful although A. had no intent to hurt the boy nor knew not of him." Is there any authority except those *dicta* and *Plummer's case* (Kely, 109) which go that length? The same rule is laid down in East's P. C. 231 and Lord Hale, P. C. 451. [LUSH, J.—Lord Coke seems to put it on the unlawfulness of the act, and he goes so far as to say "If a man, knowing that many people come in the street from a sermon, throw a stone over the wall, intending only to frase them or to give them a light hurt and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death and though he knew not the party slain." Surely that would be only manslaughter unless he knew what his act would probably do, or unless he intended to do grievous bodily harm. You have to make out not only that the act was unlawful but that it was mali-

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cious. Does not that mean intentionally malicious? Must you not show that he did maliciously break the window? Suppose a man throws at one window, and misses it but breaks another. Would not that case be within the Act, although there was no intention to break the particular window? In *Rus. 739* it is said "There are many acts so heedless and incautions as necessarily to be deemed unlawful and wanton though there may not be any express intent to do mischief; and the party committing them, and causing death by such conduct will be guilty of manslaughter." In *Reg v. Ward*, (12 Cox C. C. 123; 41 L. J. 69, M. C.) where the prisoner who was jealous of other persons going in pursuit of wild fowl in a creek of a river, fired from his boat while the prosecutor was in pursuit of wild fowl in a way so as to frighten and deter him from going there again; but as the prosecutor's punt slewed round, he was struck by the shots from the prisoner's gun, but if the boat had not slewed round, the shot would not have struck him; and it was held by a majority of twelve judges to three that there was evidence of a malicious wounding by the prisoner. [LUSH, J.—In that case *Kelly*, C.B. asked "Does maliciously necessarily mean intentionally?" The cases of *Ree v. Haughton*, (5 C. & P. 555) and *Reg v. Monaghan* (23 L.T. Rep. N. S. 168) were then cited. If a person throws a stone in a neighbourhood where there are windows intending seriously to hurt some person, can he excuse himself because the result is only that a window is broken instead of a man's head? Sect. 39 relates to unlawful and malicious injuries to works of art. Now if two persons happen to quarrel in a museum and one throws a missile at the other, and misses him but destroys a valuable art specimen, is he to be held not guilty of an offence because his malicious intention was towards the man and not the property or its owner? Yet that must follow, if the conviction is not upheld in this case.

LORD COLERIDGE, C.J.—I am of opinion that this conviction must be quashed. The facts of the case are these. The prisoner and some other persons who had been drinking in a public house were turned out of it about 11 p.m. for being disorderly, and they then began to fight in the street near the prosecutor's window. The prisoner separated himself from the others, and went to the other side of the street, and picked up a stone, and threw it at the persons he had been fighting with. The stone passed over their heads, and broke a large plate glass window in the prosecutor's house, doing damage to an amount exceeding 5*l*. The jury found that the prisoner threw the stone at the people he had been fighting with intending to strike one or more of them with it, but not intending to break the window. The question is whether under an indictment for unlawfully and maliciously committing an injury to the window in the house of the prosecutor, the proof of these facts alone coupled with the finding of the jury will do? Now I think that is not enough. The indictment is framed under the 24 & 25 Vict. c. 97 s. 51. The Act is an Act relating to malicious injuries to property, and sect. 51 enacts that whosoever shall unlawfully and maliciously commit any damage, &c. to or upon any real or personal property whatsoever of a public or a private nature for which no punishment is hereinbefore provided to an amount exceeding 5*l*. shall be guilty of a misdemeanor. There is also the 58th section which deserves attention. "Every punishment and for-

feiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise." It seems to me on both these sections that what was intended to be provided against by the Act is the wilfully doing an unlawful Act, and that the Act must be wilfully and intentionally done on the part of the person doing it, to render him liable to be convicted. Without saying that upon these facts if the jury had found that the prisoner had been guilty of throwing the stone recklessly, knowing that there was a window near which it might probably hit, that I should have been disposed to interfere with the conviction, yet as they have found that he threw the stone at the people he had been fighting with intending to strike them and not intending to break the window, I think the conviction must be quashed. I do not intend to throw any doubt on the cases which have been cited and which show what is sufficient to constitute malice in the case of murder. They rest upon the principles of the common law, and have no application to a statutory offence.

BLACKBURN, J.—I am of the same opinion and I quite agree that it is not necessary to consider what constitutes wilful malice aforethought to bring a case within the common law crime of murder, when we are construing this statute which says that whosoever shall unlawfully and maliciously commit any damage to or upon any real or personal property to an amount exceeding 5*l*., shall be guilty of a misdemeanor. A person may be said to act maliciously when he wilfully does an unlawful act without lawful excuse. The question here is can the prisoner be said when he not only threw the stone unlawfully, but broke the window unintentionally, to have unlawfully and maliciously broken the window. I think that there was evidence on which the jury might have found that he unlawfully and maliciously broke the window, if if they had found that the prisoner was aware that the natural and probable consequence of his throwing the stone was that it might break the glass window, on the principle that a man must be taken to intend what is the natural and probable consequence of his acts. But the jury have not found that the prisoner threw the stone, knowing that, on the other side of the men he was throwing at, there was a glass window, and that he was reckless as to whether he did or did not break the window. On the contrary they have found that he did not intend to break the window. I think therefore that the conviction must be quashed.

PIGOTT, B.—I am of the same opinion.

LUSH, J.—I also think that on this finding of the jury we have no alternative but to hold that the conviction must be quashed. The word "maliciously" means an act done either actually or constructively with a malicious intention. The jury might have found that he did intend actually to break the window or constructively to do so, as that he knew that the stone might probably break it when he threw it. But they have not so found.

CLEASBY, B. concurred.

Conviction quashed.

H. OF L.] THE EAST LONDON RAILWAY COMPANY v. WHITECHURCH AND OTHERS. [H. OF L.]

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

May 8 and 19, 1874.

(Before the LORD CHANCELLOR (Cairns), Lords CHELMSFORD, HATHERLEY, O'HAGAN, and SELBORNE).

THE EAST LONDON RAILWAY COMPANY v. WHITECHURCH AND OTHERS.

ERROR FROM THE COURT OF EXCHEQUER CHAMBER IN ENGLAND.

Rating—Liability of company to make good deficiency in rates.

By the East London Railway Act 1865 (28 & 29 Vict. c. li.) the plaintiffs in error were authorised to construct a system of railways, numbered from 1 to 7; and by sect. 128 of the Act it was enacted that "if and while the company are possessed under this Act of any lands assessed or liable to be assessed to any sewers rate, consolidated rate, poor rate, police rate, main drainage rate, church rate, or other parochial or ward rate, they shall from time to time, until the railway and the works thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates by reason of those lands being taken or used for the purpose of the railway or works; and the deficiency shall be computed according to the rental at which those lands, with any buildings thereon, are now rated."

No. 1 railway, which was the principal line, passed through several parishes, among others, B., of which the defendants in error were churchwardens and overseers. The whole of the part which passed through B. was completed and worked; but the part in some other parishes was unfinished, as were other parts of the system.

Held (reversing the decision of the Exchequer Chamber) that the whole of the line in B. parish being complete, and capable of being assessed as a working railway, the company were no longer liable to make good the deficiency in the rates under the above sections, for the provisions of the section relate only to each particular parish.

Reg. v. Metropolitan District Railway Company (L. Rep. 6 Q. B. 698) disapproved.

This was a proceeding in error on the judgment of the Court of Exchequer Chamber, Willes, Keating, Lush, and Brett, JJ., Blackburn and Mellor, JJ., dissenting (reported L. Rep. 7 Ex. 424; 27 L. T. Rep. N. S. 494), reversing the judgment of the Court of Exchequer, Kelly, C.B., Bramwell and Cleasby, BB., Martin, B., dissenting (reported L. Rep. 7 Ex. 248; 26 L. T. Rep. N. S. 635), on a special case stated in an action brought by the defendants in error, the churchwardens and overseers of the parish of St. Mary, Rotherhithe, to recover from the railway company the sum of 310*l.*, the deficiency in the rates upon lands taken by the company under their Act (28 & 29 Vict. c. li.) and claimed by the defendants in error as due under sect. 128 of that Act.

The facts are fully set out in the reports in the courts below.

Sir J. Karslake, Q.C. and Poland for the plaintiffs in error.

Prentice, Q.C. and Morgan Howard for the defendants in error, urged the same arguments, and relied on the same cases as in the courts below.

Our. adv. vult.

May 19.—The LORD CHANCELLOR (Cairns), after going through the facts as to the authorization of the railway under the East London Railway Act 1865 (28 & 29 Vict. c. li.), continued: The railway so authorised passed through different parishes, including the parish of St. Mary, Rotherhithe, and it is completed in that parish, although not along the whole extent of the line contemplated by the Act. Now when an Act is passed authorising a company to construct a railway or other public works, and to take land and houses in a parish for that purpose, if there were nothing further provided, the company would be at liberty to pull down the houses and occupy the lands along their whole line, while it was in course of construction, and if during the process the premises became of a less assessable value, it would be within an ordinary landowner's powers to do as he pleased with his land in any parish, and the parochial authorities would be compelled to submit to the loss. But it has been the habit of the Legislature to take into consideration the inconvenience and loss caused by the land being rendered of little or no assessable value during the progress of the works, and in consequence, the provision contained in sect. 128 of the East London Railway Act, was enacted, and the only question before your Lordships is the proper construction of that section. The question must be approached without any *a priori* view as to what would be the natural course for the Legislature to adopt. I venture to remind your Lordships of this, because some of the learned judges of the court below say that the intention *a priori* must be, that the parishes should suffer no loss. I do not see why this should be so. Some provision should, no doubt, be made as to lands lying unproductive during the progress of the works; but we cannot tell what bargain the Legislature may choose to make. The wisdom of Parliament may adopt either of two courses; they may say that the assessable value of the premises occupied is to be taken as it originally stood, until the whole line is completed; or, looking at each parish separately, that the sum at which the premises were assessed is to be taken to be their value until there is another assessable property in the parish to be assessed, though that may not be as valuable as it was before. I will add, as regards the former of these courses, that it might or might not be beneficial to the parish, when part of the line was completed, it might be more productive than after the whole had been; and according to this view the original assessment would continue until every portion of this line, however minute, was completed. The respondents contend that the original assessment should continue until the whole line authorised by the Act, or at all events, until the whole of the No. 1, or main line, should be completed. The appellants contend that as soon as the railway in any particular parish is completed, although only a portion of a larger line, so that it can be assessed, that is, the terminus of the time during which the old assessment is to continue. The words of sect. 128 are: "If and while the company are possessed under this Act of any lands assessed, or liable to be assessed, to any sewers rate, consolidated rate, poor rate, police rate, main drainage rate, church rate, or other parochial or ward rate, they shall from time to time, until the railway or the works thereof are completed and assessed, or liable to be assessed,

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be liable to make good the deficiency in the assessment for such rates by reason of those lands being taken or used for the purposes of the railway or works, and the deficiency shall be computed according to the rental at which those lands with any buildings thereon are now rated." Your Lordships will observe that two assessments are contemplated, the one present, while the company are possessed of the lands, the other future, which is the terminus of the interval during which the old assessment is to continue. This would lead to the conclusion that they are *ejusdem generis*, and that as the first is parochial the second is also parochial. We shall obtain a clue to the meaning if we insert in the second line of the section after the words, "assessed or liable to be assessed," the words "in any parish," which must necessarily be understood. We then have clearly and plainly the expression of the intention of the Legislature that until the present parochial assessment is replaced by another parochial assessment, always looking to the same parish, the old assessment is to remain. If we adopt the view contended for by the respondents, the words after "completed" should be struck out of the clause. For these reasons I think the judgment of the minority of the court below was correct, and that the decision of that court ought to be reversed. I attach but little importance to arguments drawn from other clauses in the Act; they are of the nature of private bargains with particular parishes inserted at their instance, and ought not to affect the construction of a general clause, such as that now before your Lordships. As the case of *Reg. v. The Metropolitan District Railway Company* (L. Rep. 6 Q. B. 698) was much commented on below, I must admit the view which I take is inconsistent with, and must supersede it.

LORD CHELMSFORD.—My Lords, the question cannot be regarded as free from difficulty when we look at the differences of opinion among the learned judges, and the case of *Reg. v. The Metropolitan District Railway Company* (*ubi sup.*), they thought could not be distinguished from which the present case. It depends on the words in sect. 128, "the railway or the works thereof," whether these words are to be taken to mean the whole railway, or the part of it which is within the particular parish so as to be assessable therein. It is not difficult to understand the reason for the enactment of this section, and of sect. 133 of the Lands Clauses Consolidation Act, which is incorporated with this Act. When the lands taken cease to be valuable it is just that the parish should be protected against the deficiency in the rates, and that the company should be liable for it; but when the reason for it ceases the operation of the provisions should cease also. This renders it probable that there would be some limitation of time, but still the intention of the Legislature must be found from the words themselves. If the contention of the respondents be right—if any portion of the line, however minute, be left incomplete, the company must be charged with the old rate, and if the works are not all completed in the period of five years mentioned in the Act they must be so charged for ever. Your Lordships would not adopt so unreasonable a construction unless compelled to do so by the words of the section. It has been said that the whole railway must be intended, or else the assessment could not be distributed among the several parishes. But

that is not the principle upon which railways are rated; they are rated upon what a lessee would be willing to pay for the line in the parish, and the question of what they are liable to be assessed at is to be determined in each parish. It is a matter of difficulty, but quite as difficult when dealing with the whole railway as with a part of it. Mr. Justice Willes, in the court below, said that it could not be supposed that a railway could be worked successfully within the limits of a single parish; in this case the railway is completed in the parish, and worked by the London, Brighton, and South Coast Railway Company, as the lessees of the appellants, whether successfully or not, does not affect the question. The same learned judge seems to consider the provision as of the nature of an indemnity to the parish, but I do not so read the clause. If the railway is liable to be rated the parish must rate it at its value, though that may be less than the rateable value of the land before the company took it. I lay considerable weight upon the words "liable to be assessed," which Mr. Justice Blackburn rejects as surplusage. When the property is liable to be assessed, the parish is bound to assess it; any ratepayer would be entitled to insist on it, as that learned judge says. The construction contended for by the parochial authorities being unreasonable, as I have said, it becomes necessary to see if we cannot put a different construction upon the section. The words themselves appear to me to be more applicable to a part than to the whole of the line; the assessment must be made in the different parishes, and when the words "liable to be assessed" are added, they can only be applied to the different parishes as it is only there that it can be ascertained what is the property liable in the parish. I do not think it necessary to read in the words "in the parish," as suggested by Brett J., for I think they are involved. I cannot acquiesce in the decision of the Queen's Bench in the case of *The Queen v. The Metropolitan District Railway Company* (*ubi sup.*), or distinguish it from the present case as Cleasby, B., has attempted to do.

LORD HATHERLEY.—My Lords, I am of the same opinion; I rely entirely on the words of sect. 128, without omitting or adding anything. I find the word "railway;" to what does that apply, having reference to the whole subject of the provision? The subject is the parish rate, which must be assessed where the rateable property is found; we must therefore come to the conclusion that the railway spoken of must be the railway in the parish where the rate is to be made; and it cannot be intended that the parochial authorities are to wait for an indefinite time till it is finished in other parishes. We cannot apply the word "railway" in sect. 128 to anything but that which is the subject of assessment in the parish where it is found.

LORD O'HAGAN concurred for the same reasons, admitting that it was a case of great difficulty, in which the arguments were nicely balanced, as the division of opinion among the learned judges below showed. The words would warrant either contention, as one side must insert the words "in the parish," the other the word "whole," in order to maintain their view.

LORD SELBORNE.—My Lords, the words of sect. 128 seem to me to be enough to decide the case in favour of the appellants, and I will not go beyond them. The governing words relate to the paro-

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chial assessment. In the context the particular local assessment is in view, which could not be laid upon the whole railway, but only upon the part of it in the particular parish. The sentence should be read as the Lord Chancellor has proposed, and it seems impossible not to extend the words "in the parish" to the words "liable to be assessed" in the middle of the sentence. Each assessment must be in the particular parish, and the whole sentence relates to the particular lands in the particular parish. I find nothing in it to justify the contention that it contemplates an aggregate assessment of all the parts.

Judgment of the Court of Exchequer Chamber reversed, and judgment given for the plaintiffs in error.

Attorneys for the plaintiffs in error, *Wilson, Bristows, and Carpmael.*

Attorneys for the defendants in error, *Hawks, Willmott, and Stokes.*

Tuesday, May 5, 1874.

(Before the LORD CHANCELLOR (Cairns), Lords HATHERLEY, O'HAGAN, and SELBORNE.)

LAKEMAN v. MOUNTSTEPHEN.

ON APPEAL FROM THE EXCHEQUER CHAMBER IN ENGLAND.

Statute of Frauds (29 Car. 2, c. 3) sect. 4—Promise to be answerable for debt of another—Evidence of primary liability.

The respondent had been employed to construct a main sewer by a local board of health, of which the appellant was chairman. When the sewer was nearly completed the board gave notice, under 11 & 12 Vict. c. 63, s. 69 to the occupiers of the adjoining houses to connect their drainage within twenty-one days, or the board would do the work at their expense. Before the twenty-one days had expired, the respondent, having completed the sewer, was about to leave the place, when the appellant said "What objection have you to make the connections?" The respondent replied "I have none, if you or the board will give the order, or become responsible." The appellant then said, "Go on and do the work, and I will see you paid." The respondent accordingly did the work under the superintendence of the surveyor of the board, and sent in his account to the board. The board refused payment on the ground that they had not authorised the order, and the respondent brought an action against the appellant.

The appellant denied the conversation, but the jury found that it did take place, and the respondent obtained a verdict.

A rule having been obtained to enter a nonsuit on the ground that the conversation did not amount to an undertaking to be primarily liable, but was a promise to answer for the debt of another, within sect. 4 of the Statute of Frauds, and should therefore have been in writing, the Court of Queen's Bench made it absolute, but on appeal the Court of Exchequer Chamber reversed the judgment, on the ground that there was evidence of an agreement on the part of the appellant to be primarily liable. On appeal to the House of Lords: Held that there was sufficient evidence of primary liability to go to the jury.

This was an appeal from a decision of the Exchequer Chamber (reported L. Rep. 7 Q. B. 196;

25 L. T. Rep. N. S. 755) reversing a judgment of the Queen's Bench (reported L. Rep. 5 Q. B. 613) making absolute a rule to enter a non-suit in an action in which the respondent was plaintiff, and the appellant defendant. The facts of the case, and the pleadings are fully set out in the report in the court below.

For the appellant, *Cole, Q.C.* and *Pinder* urged the same arguments, and relied on the same cases as below.

For the respondent, *Lopes, Q.C.* and *A. Charles* were not called upon to argue.

The LORD CHANCELLOR (Cairns) said.—My Lords, the question, and the only question, which your Lordships are called upon to decide is whether there was or was not evidence of an original liability on the part of the defendant to pay the plaintiff on account of the work done by him. I begin by pointing out that it is the only question for the purpose of reminding your Lordships that your decision is not embarrassed by having to consider whether the precise sum which has been awarded by the jury is the sum which ought to have been awarded. What questions have been raised, and what distinctions have been drawn as to the various items in the plaintiff's account this is not the time or place to discuss. It might have been done at an earlier stage of the case, but not here. Taking the question raised by the rule, whether there was any evidence of an original liability, I must remind your Lordships that it is to be determined on the evidence of the plaintiff himself. Other witnesses were called, but their evidence is not material with respect to the point with which alone your Lordships have to deal. The jury might accept it, or might refuse it if they were satisfied with the evidence called on the other side, but the only question before your Lordships is whether at the close of the plaintiff's case the learned judge would have been justified in directing a nonsuit. After all the witnesses have been called the case must depend upon what the plaintiff himself says, and by reading parts of his evidence your Lordships will be better able to understand what was the original contract. Referring to the resolution of the local board, and the notice given to the occupiers, he says "I knew nothing of this." "Adams asked me if I could procure 1300 feet of pipes, and do the work:" two different things, provide the materials, and do the work. "I said I would not, unless the board would be responsible, for I would not take the order from the occupiers." Then the resolution of the board was communicated to him, but he refused to proceed, "unless the board would make itself responsible." It is clear from these statements that the plaintiff had had his attention called to the danger of proceeding in these matters without the sanction of the local authority, and therefore refused either to get the materials or begin the work without it. He got the order for the materials, and was so far satisfied, but not for the work, and he therefore refused to continue it. As to what passed between him and Lakeman, Lakeman said, "What objection have you to making the connections?" He replied, "I have none, if you or the board will give the order, or become responsible for the payment." On this Lakeman said, "Go on and do the work, and I will see you paid." We have had an ingenious argument addressed to us putting a construction on these words to the effect that Mountstephen asked Lakeman for an order from the

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board, and had an order from him as chairman, and had his verbal personal guarantee as well. But this seems to me violent and strained. The natural construction is that Mountestephen, following the course he pursued with Adams, stated that he must refuse to do the work if he could get no order, but would do it if he got an order from the board, or from Lakeman as chairman, or personally. Then Lakeman, wishing the work to be completed, said, "Don't concern yourself about the board; do the work, and I will be paymaster." That is the obvious meaning of the words, and appears to me to be strong evidence that Lakeman gave the go by to the order of the board and stepped in, and took the primary liability. He might expect to be able afterwards to shelter himself as chairman under an after obtained consent of the board to make the order; but that was for him to consider. He did what the contractor required to be done, and the only contract that there could then be between them was a personal one. There was a clear case to go to the jury. No judge could have withdrawn it. I therefore move that the decision of the Exchequer Chamber be affirmed, and the appeal dismissed with costs.

Lord HATHERLEY.—My lords, I entirely concur in what has been said by the noble and learned lord on the woolsack, and for the same reasons. The evidence was sufficient for the jury if they chose to act upon it. Whether one would have done so oneself or not is a different matter. The defendant was anxious that the work should not be stopped, and, hearing that the plaintiff's difficulty was as to whom he should look for payment, made use of the expression "Go on and do the work, and I will see you paid." It might be capable of another interpretation, but it is sufficient that there was evidence enough for the jury to find that he undertook a personal liability. I do not see how there could be a nonsuit.

Lord O'HAGAN.—I am of the same opinion, and for the same reasons substantially. The evidence was abundant to go to the jury. The learned judges of the courts below differed as to its effect, but it is enough for us to say that there was evidence with which the jury could deal. I wish to add that this decision does not in any way affect the section of the Statute of Frauds, or fritter away its obligation. It is only on the question of evidence.

Lord SELBORNE.—I am of the same opinion. Some of the expressions of the learned judges of the Queen's Bench look as if they thought that a secondary liability could exist, even if there were not any principal or primary liability. But there can be no surety unless there is a principal debtor. His liability may be created *ex post facto*; until it is there can be no surety, there cannot be a guarantee unless there is something to be guaranteed. To put this as a guarantee, as seems to have been the tendency of the court below, would defeat the whole purpose of the communication, which was intended to remove the difficulty of the contractor, and to induce him to go on. The double office, which Mr. Justice Blackburn seems to assign to the words, that they were spoken by the defendant as chairman on behalf of the board and as a personal guarantee of its liability, appears to me to be suicidal, for the necessary result is that in that case it becomes strong evidence to make the plaintiff liable on the first count of the declaration (*Cherry v. Bank of Australasia*, L. Rep. 3 P. C. 25; 21 L. T. Rep. N. S. 356), and the case could not be

withdrawn from the jury unless the board was really liable, which the court of Queen's Bench did not find. Mr. Pinder has argued that it was so, but I do not see a particle of evidence to support such a contention.

Decision of the Exchequer Chamber affirmed, and appeal dismissed with costs.

Solicitors for the appellant, Church, Sons, and Clarke.

Solicitor for the respondent, G. E. Philbrick.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROCHE and H. PRAT, Esqrs.,
Barristers-at-Law.

Tuesday, March 10, 1874.

(Before the LORDS JUSTICES.)

THE WILTS AND BERKS CANAL NAVIGATION COMPANY
v. THE SWINDON WATERWORKS CO. (LIMITED).

Canal company—Right to water—Riparian proprietor—Diversion of stream—Injunction.

By an Act of Parliament passed in 1821 for amalgamating two canal companies, the amalgamated company were empowered to maintain and keep navigable the united canal; and for that purpose to supply the united canal at all times for ever thereafter with water from all springs and streams which had been or should be found within 2000 yards of the canal. Under the powers of their Act the company diverted the waters of a stream within the prescribed limits by means of a new channel into their canal:

Held (reversing the decision of Malins, V.C.) that the canal company, although they had suffered no present damage, were entitled to an injunction to restrain a waterworks company from diverting the water of the stream so as to cause injury to the navigation of the canal.

THIS was an appeal from a decision of Malins, V.C.

The hearing in the court below is reported in 29 L. T. Rep. N. S. 722, where the facts of the case are fully stated.

The Vice-Chancellor having dismissed the plaintiffs' bill with costs, the plaintiffs appealed.

John Pearson, Q.C. and C. M. Roupell, for the appellants.—We have even greater rights than ordinary riparian proprietors, and are entitled to an injunction to restrain the defendants from diverting the water of this stream. The defendants are also riparian proprietors, and have no right to abstract water so as to injure other proprietors. We have already suffered considerable damage by the diversion of the water, especially in the dry summer of 1870. But whether we have suffered damage or not, we are entitled to an injunction to restrain the defendants from abstracting this water in such a way as to interfere with the navigation of the canal: (*The Medway Company v. The Earl of Romney*, 9 C. B., N. S., 575.) In *Harrop v. Hirst* (19 L. T. Rep. N. S. 426; L. Rep. 4 Ex. 43) it was held that an action for diverting water was maintainable without proof of any actual personal damage, inasmuch as the act of the defendant in diverting the water might, if repeated often enough without interruption, furnish evidence in derogation of the plaintiffs' legal rights. We ought to have an injunction. [Lord Justice JAMES referred to *The Rochdale Canal Company v. King*, 2 Sim. N. S. 78.]

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Glass, Q.C., Bristow, Q.C., and W. W. Karslake, for the respondents.—The appellants are only entitled to the water for the purposes of navigation. We have never taken water in such a way as to impede the navigation of the canal, and as the appellants have suffered no actual damage they are not entitled to an injunction, and the Vice-Chancellor was right in dismissing their bill.

Without calling for a reply.

Lord Justice JAMES said: I am of opinion that the plaintiffs, the company, are right on the question of legal right which is asserted by this bill. The plaintiffs, the company, obtained an Act of Parliament many years ago by which they were entitled to supply this canal with water from the streams within a certain distance of their canal; and, among other streams, there was a stream within that distance called the Wroughton Stream. They availed themselves of their powers in respect of the Wroughton Stream about the beginning of this century; and in order to get the water from that stream they acquired by purchase a mill a little distance from the line of the canal, and made a new channel, which they lawfully might under those circumstances, to divert the water into their canal. That has been a lawful stream from that time to this. That is the old channel from the Wroughton Stream down to the point of diversion into the canal which it reaches at the middle of the summit level. That was lawful for the purpose of supplying their canal. They acquired all the rights of a riparian proprietor with regard to that stream. They also acquired all the rights of a riparian proprietor which were vested up to the time of the purchase in the then owner of that mill. That being so, it is the right of a riparian proprietor in this country to prevent any other riparian proprietor above him from diverting the stream so as to cause that stream to flow otherwise than in its accustomed channel so far as he is concerned; and he has a right to have the natural flow of water through his land, and into his artificial canal, if he has had that for a sufficient length of time, exactly as it has been before, during past years. All streams are *publici juris*, and all the water flowing down the stream is for the common use of mankind who live on the banks of the stream; and, therefore, no doubt any person living on the banks of the stream has a right to use the water for himself, his family and his cattle, and for all ordinary domestic purposes, such as brewing, washing and so on. Those are the common purposes of water in the ordinary mode of using water. The defendants in this case are a water company who have been minded from public motives partly, and for private profit partly, to supply water to the large towns of Old and New Swindon where, by reason of the works of the railway, a large population has gathered together; and they are asking to use and divert water for the purpose of supplying those towns. That is not a purpose for which a riparian proprietor is entitled to take the water from its natural course. That being so, the defendants are diverting water from the stream for a purpose which is not legal and in manner which is not legal. The plaintiffs are persons, who, being below them on the stream, have a right to say, "You must not divert the water from its natural course." That really is a question of right for the court to decide. It has been settled that actual pecuniary damage is not necessary to give a right of action or suit, because it is sufficient to show that you are inter-

fering with that which is a right, and in a mode which may give a future legal right to interfere with the stream when it may be wanted, or may be useful in a pecuniary point of view to the riparian proprietor below. I am of opinion, notwithstanding the decision of the Vice-Chancellor, that there is a clear legal right in the canal company, whether as owners of the canal, or as owners of the stream diverted into the canal, to say, "You must let the water flow down its ordinary course." That is, of course, assuming we were now merely trying it in an action at law in which action the jury would be directed by the judge to find a verdict for the plaintiff, but possibly without damages, except so far as damage was incurred in the year 1870, which might be one shilling, that is to say, sufficient damages to show that there was a legal right invaded, and that the plaintiff was right in having that vindicated by the courts of this country. Then it is said that if such an action were brought with a view of applying to this court, it would be more with reference to whether there was a substantial wrong done, and that this court will not interfere where there is no substantial damage done. In point of fact it appears to me that in the year 1870 there was what I consider substantial damage. It may be that from the small amount of traffic there may not have been many boats anxious to travel along the canal during the months of September, October, November, and December 1870. If the canal was reduced two feet or three feet below its proper level at the time when the whole of it was wanted for the purpose of the navigation of the boats, it appears to me that that is a serious damage to a canal. It is impossible to say how many barges might have wanted to go along the canal at that time. Then it is said that the plaintiffs might diminish that evil by dredging; but the defendants have no right to tell the plaintiffs how and at what time they are to dredge their canal. That made it more important to keep the water that could be got. It was not in the year 1870, in my opinion, an idle complaint on the part of the canal company, when they said, "You, the defendants, are taking away the water from us so as to make our canal cease to be a canal during those months." The defendants not only allege that there was no damage, but they have put most distinctly and clearly on their answer a claim of right of such a kind as to make it absolutely imperative on this court, as it seems to me, to determine that question of right, and to declare the right one way or the other; and, as the matter now stands with the bill dismissed by the Vice-Chancellor with costs, it is an adjudication in favour of the defendants that they have the right which they claim by the 61st paragraph of their answer, which is in these terms: "We deny that we have threatened, though we admit that we intend (unless enjoined by injunction from so doing) to continue the diversion of the Wroughton Stream into our reservoir for our own purposes and profits whenever the demand on us for water requires us so to do." Then they say that is no injury to the plaintiffs. Of course it does no injury if there is the legal right, but injury is involved in the violation of a legal right. It appears to me that the plaintiffs are entitled to have a declaration from the court that the defendants are not at liberty to divert the water from the Wroughton Stream into their reservoir for their own purposes and profit whenever the demand on them for water requires it. I think they are not entitled to make any

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diversion of the water. Then the canal company only want water legally as a canal company for the purposes of navigation. If they have surplus water there would be great difficulty in saying whether or not they might sell it to other persons. That is a matter as between them and other persons who would be injured by it; but as far as their constitution goes, they are only entitled to take and use the water for the purposes of navigation, and the surplus must be the surplus which arises casually with regard to the water they have so taken. Therefore it would be right, in making the declaration and in granting the injunction, not to grant an injunction which would enable the canal company to play the part of the dog in the manger and prevent the waterworks company from using the water at a time when the canal company were turning it off as waste, as far as they are concerned, under the canal, which, it seems, has been the case in 1870, 1871, 1872, 1873, and as far as we have gone in 1874. In making the declaration of right that the defendants are not entitled to divert the water from the Wroughton Stream into their reservoir, the injunction must be limited to this: to restrain the defendants from so diverting the water as to cause any damage or hindrance to the navigation of the canal. That is all that it is necessary to do for the protection of the right of the one, and not unnecessarily interfering with the objects of the other. The plaintiffs having succeeded as to their legal right, and the defendants being wrong, that will carry the costs of the suit, but there will be no costs of the appeal.

Lord Justice MELLISH.—I am of the same opinion. I think that the canal company, having purchased land on the banks of the stream, have the ordinary right of riparian proprietors, with respect to that stream. I am of opinion also that, besides the ordinary rights of a riparian proprietor, they have, under the first Act of Parliament, a right to take the waters of the stream for the purpose of supplying their canal with water for navigation. I agree that they have no right to take the water of the stream for other purposes, such as for the purpose of selling the water; and if they were to do so, probably any person lower down the stream who was prejudiced by being deprived of the water would have a right of action at law against them; although I think if they really took the water into their canal for the purpose of navigation, and then happened to have a surplus quantity of water in any particular place it would be very difficult to say that they might not legally sell it, but that is quite immaterial for the purpose of this suit. Although I agree that the plaintiffs have the ordinary rights of a riparian proprietor, yet this suit was really instituted in respect of their rights as canal proprietors for the purpose of supplying their canal with water. Now the argument which has been urged upon us, and which is the real argument to consider, is this. It is said that they are only enabled to get the water for the purpose of supplying their canal with water for navigation, and when this suit was instituted (for that is the material time, I suppose) they did not want it for that purpose, and therefore they ought to have no right to a decree; and it is said that they could not bring an action at law for the diversion of the water unless at the time there had been a diversion which took away water which they wanted for navigation. If that was so, and if instead of instituting this suit they had brought an action in Jan. 1871—for there

had been a diversion of water in Nov. 1870 at a time when they did not want it, whether to a greater or less extent it is not necessary to consider—the action might have been maintained, even if the proposition was correct that they could not maintain the action unless there had been a diversion of the water at the time when they wanted it for the purposes of navigation. That proposition is not, in my opinion, correct; and although the canal company have only a right by Act of Parliament to take away the water for the purposes of navigation, yet, having taken it, and legally having made a junction between the stream and their canal for *bond fide* supplying the canal with water, they could maintain an action against the proprietor above who illegally diverted the water, notwithstanding that, at the time, they did not actually want it for the purposes of navigation. The test of it is this. Supposing the person who had so diverted it, had diverted it and used it for twenty years, could he have claimed a right? In my opinion he clearly could. If he had kept up the diversion for twenty years although they never wanted the water, yet when they came to want it at the end of twenty-one years, having allowed him to divert it, their right would be lost, just the same as the right of any other landed proprietor would be lost. For the purpose of maintaining their right they would be entitled to maintain such an action. I quite agree that this Act of Parliament does not give them the entire stream. The proprietors above are not deprived of the rights they have when the stream is diverted, that is to say, all the rights of a riparian proprietor. If the population increases under the stream and the stream gets diverted for the ordinary purposes for which a riparian proprietor is entitled to use the stream, the company have no remedy. The Act of Parliament does not give them any property in the stream, but only a right to make a junction within two thousand yards of their canal, to take all they properly can obtain subject to the rights of the proprietors above, and the rights which the millers above may have gained to use the water for ordinary purposes. If the proprietors above afterwards seek to use it for purposes for which they are not entitled to use it, it appears to me that the plaintiffs have the same right that any other proprietor along the stream would have if his rights were injured, that is to say, a right to use it for ordinary riparian purposes—a right to use it for the purpose of supplying their canal with water; and having these important rights on the stream they are entitled to say that they will not allow a person above to acquire rights to divert the water which may deprive them of the means of exercising their right. Then it is quite plain—indeed I do not know that it is disputed—that the diversion of the water of the stream for the purpose of sending it in large quantities to a mill is beyond all question not within the right of a riparian proprietor. To my mind it follows that, at the time this suit was instituted, the plaintiffs might have maintained an action at law for diversion. Then what relief ought they to have in this court? I quite agree in the modification which the Lord Justice has proposed; and probably the mere fact that previously to instituting this suit they might have sold large quantities of water, makes it more necessary that we should see that our injunction does not enable them to get water for purposes for which they are not entitled to it. Just in the same manner as if they brought an action

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at law for the diversion of the water, though they might maintain the action they could not allege as special damage that they had been deprived of obtaining large quantities of water which they might otherwise have sold for profit. They could not, being only entitled to the water for the purposes of navigation, have recovered damages for that which prevented them from having the water for other purposes. I quite agree that the injunction should be in the form proposed. The arguments did go to the length of saying, on the construction of the Act of Parliament, that really the effect of the Act was only to prevent the branch canal from being supplied from rivers that flowed into the stream, and did not allow the summit level to be supplied by water from rivers flowing into the Thames. That is not so at all, for both in the second and in the third Act, the very sections which say that the branch canal shall not be supplied with water flowing from any stream that would otherwise flow into the Thames, say that it shall be supplied, and only supplied, from the summit level. It is perfectly plain that the Legislature did not intend to make any restriction as to the mode in which the summit level was to be supplied.

Order of the Vice-Chancellor accordingly discharged.

Solicitors for the appellants, *T. White and Sons.*
Solicitor for the respondent, *James Crowdy.*

Monday, April 27, 1874.

(Before the LORDS JUSTICES.)

THE ATTORNEY-GENERAL v. THE WIDNES RAILWAY COMPANY; THE WIDNES RAILWAY COMPANY v. THE WIDNES LOCAL BOARD.

Highway—User by railway company—Railways Clauses Consolidation Act 1845, s. 53—"Extraordinarily inconvenient"—Substituted road.

A railway company, on whose deposited plans a highway is delineated, are not entitled, under the 53rd section of the Railways Clauses Consolidation Act 1845, to lay down rails, and run trains along a portion of the highway, until they have made a sufficient road in substitution for the highway, such a proceeding being necessarily "dangerous or extraordinarily inconvenient to passengers or carriages" within the meaning of the 53rd section of the Act.

THE first of the above suits was commenced by an information by the Attorney-General, at the relation of the Widnes Local Board, in order to restrain the Widnes Railway Company from obstructing a public highway within the jurisdiction of the local board.

The Widnes Railway Company were incorporated under the provisions of the Railway Construction Facilities Act 1864 (27 & 28 Vict. c. 121), and were empowered by a certificate of the Board of Trade to make a railway to connect the Manchester and Liverpool Extension Railway with the town of Widnes, and to enter upon, take, and use such of the lands delineated on the plan as might be required for the purposes of the undertaking.

The deposited plans showed that this railway was to pass along a part of a public highway extending from Tanhouse Lane to a place called Moss Bank, which highway was under the control of the Widnes Local Board.

In Dec. 1873, the company proceeded to lay down sleepers and lines of rail along a portion about 164 yards in length of the highway, but without crossing it. These lines of rail were intended to be used for the construction of the line and were not intended to form part of the permanent way. The company did this without having contracted for the use of the highway, and without having previously to the commencement of their operations caused a sufficient road to be made instead of the road thus interfered with, as required by the 53rd section of the Railways Clauses Consolidation Act 1854.

The second of the above suits was instituted by the company to restrain the local board from pulling up the company's rails and sleepers on the highway.

The Master of Rolls granted an injunction against the company.

In delivering judgment, his Honour said: I must say I am really very much surprised (I may be entirely wrong, for it is said that when a man is very positive he is apt to be very wrong) to have heard the argument that I have heard to day in this case. The facts are short and simple. A railway company, having no power, as I understand it, except the powers conferred by the General Railway Act, takes forcible possession of a public highway, lays down its rails along it, and runs locomotive engines along those rails. Nothing to my mind can be plainer than that such a proceeding is about as lawless, as illegal and as violent an infraction of the public rights as can be imagined or conceived. There is no pretence for saying (although it was argued) that this railway company had any power to take this road. The simple power of taking land is given them by the clause of the certificate, which is a private Act of Parliament, which confines their powers to land which they have already contracted for the purchase of. They have no power, therefore, of appropriating the road in the sense of taking the land from the landowner, but they have undoubtedly, subject to certain restrictions, the power of taking the road, it being delineated on their deposited plans, on making a diverted road in substitution for it, and if they had made that diverted road before they had done what they have done, no dispute would have arisen, and there would have been no occasion to apply to this court. But they do not choose to exercise their parliamentary powers, and they have the courage, the boldness, as it appears to me, and I must say the impudence—because these railway companies are about as impudent a set of bodies as you can well conceive in these matters where they think they can override the law and petty corporations, or the small and comparatively powerless bodies which they meet in some obscure parts of the country—I say they have the impudence to lay down these rails in spite of the remonstrances of the local board, and to run their locomotive engines on them. Of course their counsel is not responsible for what they have done, and he must support their contention which I can only call impudent, as in my view it is—he is bound to support their contention and he addresses a grave argument to the court that taking a half or a third of the width of the public highway, and laying down rails and running locomotives on them, with trucks and tenders, and all the accompaniments of a railway train is neither dangerous nor extraordinarily inconvenient to passengers or carriages.

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traversing that highway. Sitting here as a jury, I can only express again my astonishment at the contention that it is neither dangerous nor extraordinarily inconvenient to passengers or carriages. I cannot express myself in stronger language than I have done, or I would. In my opinion the contention is groundless, both in law and in common sense, and, sitting here as a jury, I repudiate it as emphatically as I can, and say that, in my opinion, the Legislature never intended that a railway company should lay down rails and run engines and carriages on a public highway before they had provided for the public a proper substituted road. That being so, I continue the injunction already granted, until the hearing of the cause. I refuse the motion for an injunction in the second suit. The costs will be costs in the cause in the usual way.

From this decision the railway company appealed.

On the appeal motion coming on to be heard, it was arranged that notice of motion for a decree should be given and that the hearing should take place before the Court of Appeal.

The information and suit now came on for hearing, the main question being the costs, as the railway company had made a sufficient substituted road since the date of the injunction being granted by the Master of Rolls.

Fry, Q.C. and North, for the local board.

The Attorney-General (Sir Richard Bagge), Q.C. and Hemming, for the railway company.

Without calling for a reply,

Lord Justice JAMES said:—I am of opinion that upon the only question before us, whether the local board or the railway company were justified in what they did, the Master of Rolls was quite right. Independently of the balance of evidence, considering the very strong evidence which was given by the local board, I quite agree with the Master of the Rolls that it really ought not to be seriously contended that taking a half or a third of a public highway, laying down rails and running locomotives, tenders, and trucks upon them, is not a dangerous or extraordinarily inconvenient thing to passengers along the road. If it is dangerous and extraordinarily inconvenient, then the obligation of the company to provide a sufficient road in substitution arises. For my own part I should not like to take upon myself the moral responsibility which I should be under if I held out to railway companies that they could do a thing of this kind.

Lord Justice MELLISH.—I quite agree with what the Lord Justice has said.

Lord Justice JAMES.—We make the injunction perpetual with costs. And the bill in the second suit will be dismissed with costs.

Solicitor for the local board, *W. W. Wynne*, agent for *Beasley and Oppenheim*, St Helens.

Solicitor for the railway company, *E. Reddish*, agent for *Reddish and Lake*, Stockport.

COURT OF QUEEN'S BENCH.

Reported by J. SMOYER and M. W. MCKELLAR, Esqrs.,
Barriers-at-Law.

April 28, and May 1, 1874.

COX v. LEIGH.

Writ of fi. fa.—Right of landlord to a year's rent after determination of lease.

The defendant as sheriff, on behalf of an execution creditor, had seized the goods of a tenant while in possession within six months after the determination of his lease: the defendant caused the goods to be sold and the proceeds given to the creditors without satisfying the arrears of rent due to the plaintiffs as landlords:

Held that the landlords' right to a year's rent under the 1st sect. of 8 Anne, c. 141, ceased upon the determination of the lease, although by sects. 6 & 7 they retained a power of distress for six months afterwards.

THIS action was commenced on the 23rd Nov. 1872, by the plaintiffs against the defendant, as sheriff, for the removal of goods taken in execution without alleged rent, amounting to 125*l.*, being paid. And by the order made by one of the Masters of the Court of Common Pleas with the consent of the parties, dated 14th Dec. 1872, it was ordered that the facts should be stated for the opinion of the court without any pleadings; and the parties stated the following case:

The plaintiffs are the trustees for and on behalf of the Derby and Derbyshire Banking Company, and the defendant is the Sheriff of Cheshire.

George Underwood being possessed of or well entitled to the messuage and premises called Baby Hall, in the county of Cheshire, by virtue of an assignment dated 21st Mar. 1868, for the residue of a term of ninety-nine years, to be computed from the 2nd Aug., 1846, subject to the yearly rent of 79*l.* 6*s.*, payable to the Earl of Shrewsbury, the owner in fee, by an indenture dated 21st March 1868, between him, the said George Underwood, of the first part, and Charles Spencer and Thomas Levi Harris, of the other part, Underwood assigned to Spencer and Harris the said messuage and premises, subject to the said yearly rent for the residue of the said term of ninety-nine years by way of mortgage for securing the repayment of 5000*l.* and interest at 5*l.* per cent. per annum advanced by the said Charles Spencer and Thomas Levi Harris to the said George Underwood. And by this indenture, Underwood attorned and became tenant from year to year to the said Charles Spencer and Thomas Levi Harris, or the survivor of them or his executors or administrators their and his assigns for and in respect of the said messuage and premises with the appurtenances at the yearly rent of 250*l.*, clear of all deductions to be paid by two equal half-yearly payments on the 21st March and the 21st Sept. in each year, the first half-yearly payment thereof to be paid on the 21st Sept. then next with power to the said Spencer and Harris or the survivor of them or the executors or administrators of such survivor, their or his assigns, to enter upon and to take possession of the said hereditaments and premises in case of non-payment of the said rent within twenty-one days after the same had become due, or to determine the tenancy created by the aforesaid attornment. And by an indenture of 2nd Feb. 1869, the said Spencer and Harris assigned to Josiah Lewis (since deceased) and

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one of the plaintiffs, the said William Thomas Cox (the then trustees of the said Derby and Derbyshire Banking Company) the said message and premises, and the said debt, security, and all their rights and title in regard to the same, and to the message and premises, subject to the equity of redemption under the last mentioned indenture, and George Underwood having been and remaining in the occupation of the said message and premises, signed the following attornment:

I do hereby agree to pay to the said Josiah Lewis and William Thomas Cox for the same hereditaments and premises, meaning the message and premises called Baby Hall, the same rent as is reserved to the said Charles Spencer and Thomas Levi Harris, by a certain indenture of mortgage bearing date the 21st March 1868, and made between me the undersigned of the one part and the said Charles Spencer and Thomas Levi Harris of the other part; and from such several periods or times as are in the said indenture expressed, and I have given unto the said Josiah Lewis and William Thomas Cox, the sum of 1s. in the name of attornment and in part of the said rent.

As witness my hand this 19th Feb. 1869,

GEO. UNDERWOOD.

Witness, JOHN MOODY, Solicitor, Derby.

The 250*l.* above referred to represented the 5 per cent. interest due on the said advance of 5000*l.* for which the said message and premises were held by the parties as security. And the said Josiah Lewis having died, and the said plaintiff, Samuel Walter Cox, having become one of the trustees of the said banking company, with the said plaintiff, William Thomas Cox, he, the said William Thomas Cox, by deed dated the 8th Oct. 1869 (amongst other things) assigned the said message and premises, and the said debt, security, and all the right, title, and interest of the said Josiah Lewis at the time of his death, and the said plaintiff William Thomas Cox jointly, or of the said plaintiff, William Thomas Cox, as the survivor of the said Josiah Lewis in regard thereto, and the said message and premises, subject to the said equity of redemption, to the use of the plaintiffs.

The said several indentures were referred to as part of this case.

The said George Underwood paid the said yearly sum of 250*l.* to the said Charles Spencer and Thomas Levi Harris, which was due to them up to the 2nd Feb. 1869, and to the said Josiah Lewis and William Thomas Cox, which was due to them to the time of the death of the former, and to the plaintiffs from that time up to the 21st Sept. 1871, and on the 21st March 1872, by a due notice to quit being before then given by the plaintiffs to the said George Underwood, his tenancy to the plaintiffs, if any existed, in such message and premises expired.

On the 21st March 1872, there became and was due from the said George Underwood to the plaintiffs under the circumstances aforesaid in respect of the said yearly sum of 250*l.* hereinbefore mentioned in this case, the sum of 125*l.* for the half-year ending on that day. And on the 26th March 1872, the plaintiffs issued a writ in an action of ejectment against the said George Underwood, brought to recover the possession of the said message and premises; and on the 9th May 1872, judgment was obtained, and the sheriff delivered possession to the plaintiffs on the 22nd June 1872.

An action was brought by John Cash and another, against the said George Underwood, in the Court of Exchequer, and judgment was signed

for the plaintiffs therein, and upon such judgment a writ of *fi. fa.* was issued, and on the 27th March 1872, it was lodged with the defendant as the sheriff of Cheshire, to be executed. By such writ of *fi. facias*, the said sheriff of Cheshire was commanded to levy of the goods and chattels of the said George Underwood, in his bailiwick, 34*l.* 15*s.* 11*d.*, besides, &c., and the defendant as such sheriff by his officer on the same day took goods and chattels of the said George Underwood, then being in and upon the said message and premises in the bailiwick of the said sheriff, to answer the said writ, and left a man in possession thereof, under the said writ of *fi. facias*, and another action was brought by Edward Gilbert, against the said George Underwood, in the Court of Exchequer of Pleas, and judgment was signed for the plaintiff therein, and upon such judgment a writ of *fi. facias* was issued, and it was lodged with the said defendant as such sheriff, on the 11th April 1872, to be executed in like manner to levy 61*l.* 15*s.* 2*d.* besides, &c., and the defendant as such sheriff by his officer, took on the same day the said goods and chattels of the said George Underwood, then being in and upon the said message and premises, to answer such last mentioned writ, and left the same man in possession thereof, under the said two writs of *fi. facias*.

Before these executions were put in, and before the 21st March 1872, viz., on or about the 13th March 1872, the Earl of Shrewsbury had seized a large part of the goods on the said message and premises for arrears of rent due in respect of the said premises, amounting to 220*l.* 10*s.* 4*d.*, being 2½ years of rent in arrear, which goods were sold by the Earl of Shrewsbury in June 1872. The sheriff seized, for the purpose of satisfying the said writs so lodged with him, the residue of the goods on the said premises not seized by the Earl of Shrewsbury. On the 12th April 1872, the plaintiffs caused a distress to be put in upon the said goods and chattels of the said George Underwood then being in and upon the said message and premises, which had been so seized and taken, and were then held in possession under the said writs of *fi. facias* for the said arrears of alleged rent due on the 21st March preceding, and put and left a man in possession of the said goods and chattels under the said distress, and so continued such last-mentioned man in possession of the said goods and chattels, with the said man so put in possession thereof by the said sheriff until the 16th April then following.

The defendant as such sheriff continued also to hold the said goods and chattels under and by virtue of the writs of *fi. facias* before mentioned, and the said goods and chattels so taken in execution and under the said distress then were and continued to be in and upon the said message and premises; and on the 16th April the plaintiffs caused written notice to be given to the said defendant as such sheriff, that the said alleged rent was so in arrear as aforesaid, and requested him not to remove the said goods of the said George Underwood, so then being taken by him in execution as aforesaid, till the said rent so in arrear was paid, and thereupon the plaintiffs withdrew the said man so sent by them to take possession under the said distress.

On the 16th April 1872, a certain other writ of *fi. facias* on a judgment for the plaintiffs in a suit wherein Walter William Wynne was plaintiff

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and the said George Underwood was the defendant, was lodged with the now defendant as such sheriff to levy of the goods and chattels of the said George Underwood then being in and upon the said messuage and premises, the sum of 104*l.* 11*s.* 3*d.*, being the amount of such judgment with interest thereupon; and the now defendant by his officer on the same day took and held the said goods and chattels henceforth under and by virtue of such writ; and on the 30th April then following a certain other writ of *fieri facias* on a judgment for the plaintiff in an action wherein William Ryalls was the plaintiff and the said George Underwood was the defendant, was lodged with the now defendant for execution on the said goods and chattels of the said George Underwood, then being in and upon the said messuage and premises; and the now defendant on the same day took and held the same to satisfy the said writ.

On the 9th May 1872 the plaintiffs obtained judgment in the said action of ejectment herein referred to of the 26th March 1872, and possession of the said messuage was awarded to be given in execution to them on the 1st June then ensuing.

On the 4th June 1872 the defendant caused to be sold the said goods and chattels of the said George Underwood so as aforesaid seized by him; and the said goods and chattels were removed from the said messuage and premises and delivered to the respective purchasers thereof and realised sufficient to pay the plaintiffs if they are entitled to priority as against the execution creditors.

After the said sale of the said goods and chattels of the said George Underwood by the defendant, there remained no further or other goods and chattels of the said George Underwood on the said messuage and premises to answer any distress by the said plaintiffs or to meet the said rent so in arrears as aforesaid.

The question for the opinion of the court is, whether under the circumstances above stated the defendant could legally cause to be sold and removed in pursuance of such sale the said goods and chattels in order to satisfy all the said writs of execution until the said arrears of rent had been paid to the plaintiffs.

If the court should be of opinion in the negative, then judgment is to be entered up for the plaintiffs for 12*s.*, and costs of suit.

If the court should be of opinion in the affirmative, then judgment shall be entered up for the defendant with costs of suit.

Field, Q.C. (with him *J. O. Griffiths*), for plaintiffs.—The 6th and 7th sections of the statute of Anne provide for the right of distress by the landlord, within six months from the termination of the lease: the first section must be read with these. The doctrine laid down in *Woodfall's Landlord and Tenant* (9th edit., p. 444) and *Chitty's Statutes* (note c.) that there must be an existing tenancy rests upon a mistake in the head note to *Hodgson v. Gascoigne* (5 B. & Ald. 88), for in that case this question was not in issue. The question was taken to have been decided in *Riseley v. Ryle* (10 M. & W. 101), but in fact it never has been decided at all.

H. Matthews, Q.C. (with him *Tindal Atkinson*), for the defendant.—All the text books have treated the question as already decided. (See *Cootes's Landlord and Tenant* 464, and *Comyn's Landlord and Tenant* 397.) The 1st section of the statute is quite distinct from the 6th and 7th.

The following cases were also referred to,

Cook v. Cook, Andrews 219;

Wharton v. Naylor, 12 Q. B., 673.

May 1.—BLACKBURN, J., delivered the judgment of the court (Cookburn, C.J., Blackburn and Lush, JJ.).—The point which will decide the whole case is whether or not the plaintiffs have a right to recover against the sheriff for the removal of goods taken under execution, without paying a year's rent to the plaintiffs as landlords. The facts are that under a mortgage deed, which we assume for the purposes of the case amounted to a demise at a rent from year to year, the relation of landlord and tenant existed between the trustees, the plaintiffs, and the execution debtor, notice to quit was given, and that lease was determined. Subsequently to the determination of the lease, and within six months of it, the sheriff seized on behalf of the execution creditor, and as it was within six months, there would, if the premises were still in possession of the tenant, be a right to distrain given by the statute of 8 Anne, c. 14*l.*, ss. 6 and 7. I pass by another point about what the effect of an ejectment being served would be. What we have now to determine, for the first time as I believe, is whether the statute of Anne, which by sect. 1 requires the sheriff before he removes the goods taken in execution, to pay the landlord's rent, applies to a sheriff who takes goods in execution after the lease has expired, but at a time when a landlord can distrain, because the six months are not out. Now, looking at the words of the statute, it seems clear enough that the sheriff can remove the goods without paying the rent. The first section enacts that no goods or chattels shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the execution is sued out shall before the removal of such goods pay to the landlord the rent due, provided it does not amount to more than a year's rent. As the section is worded there is nothing said about the landlord's right to distrain. Then by the second section it is enacted that the landlord may within five days seize the goods fraudulently carried away and sell them, as if they had been distrained; and by sect. 6, it is enacted that the landlord may during six months after the lease has been determined distrain, but in neither section is there any enactment that where there is a statutable power of distress there should be the same obligation on the execution creditor to pay a year's rent, as if the term were still existing. Now the question is, whether we are to extend the enactment of the 1st section to those cases to which by the 6th and 7th sections in the same Act the powers of distress are extended, or whether it is confined to the existing tenancy. In the text books, *Chitty's Precedents of Pleading* and *Chitty's Statutes*, it is asserted that the obligation is only during an existing tenancy, but they cite a case which, though it does support that proposition, does not decide it. There is, therefore, no decision yet. And we do not think the words of the statute sufficiently wide to justify us in putting a construction upon the statute different from that which has been entertained for 160 years. *Judgment for defendant.*

Attorney for plaintiffs, *Redhead* for *Moody*, Derby.

Attorneys for defendant, *Hudson, Matthews and Co.*, for *Tallock*, Chester.

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GASKELL (app.) v. BAYLEY (resp.).

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Wednesday, April 29, 1874.

GASKELL (app.) v. BAYLEY (resp.).

*Smoke issuing from chimney—Nuisance—Not found to be injurious to health.**It is not necessary in an information under the Sanitary Act 1866, s. 19, to show that black smoke sent forth from a chimney is injurious to health as well as a nuisance.*

THIS is a case stated by us, the undersigned, three of Her Majesty's justices of the peace in and for the borough of Bolton, in the county of Lancaster, under the stat. 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before us as hereinafter stated.

1. At a petty sessions holden at the borough of Bolton, in the county of Lancaster, on the 30th May 1872, a complaint preferred by John Gaskell (hereinafter called the appellant), against George Frederick Bayley, Charles Henry Bayley, James Pilkington, and Thomas William Holden (hereinafter called the respondents), came on to be heard before us the undersigned justices, whereby the appellant complained against the respondents for that there then (that is at the time of the making of the said complaint) existed in or upon the premises situate in Gaskell-street, in Little Bolton, in the said borough, occupied by the respondents, a chimney (not being the chimney of a private dwelling house) which on the 20th Feb. then last past, and on divers days between that day and the day of the making of the said complaint, was sending forth black smoke in such quantity as to be a nuisance, and that such nuisance was caused by the respondents as such occupiers as aforesaid. And that the respondents had by notice, dated the 29th April then last, been duly required by the local authority aforesaid to abate the said nuisance, and for that purpose to execute such works and to do all such things as might be necessary within seven days from the service of such notice and requirement to abate as aforesaid, which time had, at the making of the said complaint, long since elapsed, and that the respondents had made default in abating such nuisance accordingly.

2. The appellant is the inspector of smoke nuisances for the borough of Bolton, duly appointed in that behalf, and authorised to institute and carry on the proceedings in question.

3. The respondents are extensive cotton spinners at the borough aforesaid, and the owners and occupiers of a certain cotton mill (including the chimney of the said mill hereinafter mentioned), situate in Gaskell-street, in the said borough, in the vicinity whereof there is a large population and many dwelling houses.

4. It was proved before us that the appellant made five several inspections of the alleged nuisance arising from the chimney aforesaid. Each of the said inspections was for a period of one full hour. The first was upon the 20th Feb. 1872, from forty minutes after eight to forty minutes after nine in the morning of that day. During the hour aforesaid the chimney was sending forth black smoke thirty-five minutes, medium smoke twenty-one and a half minutes, and no smoke three and a half minutes.

By black smoke is meant such a volume of smoke that an object on the opposite side of the smoke to the spectator could not be perceived. By medium smoke is meant such a volume of smoke that an object on the opposite side of the

smoke to the spectator could be perceived. For convenience of reference the following table represents the result of the evidence as to black, medium, and no smoke at the several inspections. (A table then set forth that at five different days during one hour each day black smoke issued from thirty-five to fifty-four minutes during the hour, and medium smoke for nearly the whole of the remaining minutes.)

5. The appellant thereupon delivered a paper to the respondents' book-keeper, informing him that the same was a smoke nuisance notice.

6. The appellant made a second inspection of the same chimney of the respondents on the 21st Feb. 1872, during the period of one hour, beginning at fifty minutes after nine in the morning. During that period the said chimney sent forth forty-six and a half minutes black smoke, and thirteen and a half minutes medium smoke.

7. The appellant made a further inspection of the said chimney on the 8th March 1872, between fifty minutes past eight and fifty minutes past nine in the forenoon. During that period the chimney sent forth dense smoke during thirty-five minutes, medium smoke during twenty-three and a half minutes, and no smoke during one and a half minutes.

8. The appellant in due course reported the result of the said inspections to the local authority, and on the 29th April he served the respondents with a notice, of which the following is a copy:—

Borough of Bolton.—In pursuance of the Sanitary Act 1866, the Council of the Borough of Bolton, in the county of Lancaster, as the Local Board of Health of the said borough, hereby give you notice to abate the nuisance hereunder specified, and for that purpose to execute such works, and to do all such things as may be necessary, within seven days from the service hereof.

The nuisance above referred to:

A chimney upon the premises in Gaskell-street, in the said borough (not being the chimney of a private dwelling-house), sending forth black smoke in such quantity as to be a nuisance.

Dated the 29th April 1872.

R. G. HINNELL, Town Clerk of the said Borough.

To George Frederick Bayley, Charles Henry Bayley, James Pilkington, and Thomas William Holden, the occupiers of the said premises.

9. On the 7th May 1872, the appellant again inspected the said chimney for the hour between five minutes past three p.m., and five minutes past four p.m. of that day. During that time the said chimney was sending forth black smoke during fifty-four minutes, and medium smoke during six minutes.

10. On the 16th May the appellant again inspected the said chimney between thirty-five minutes past two in the afternoon and thirty-five minutes past three. During that time the said chimney sent forth black smoke thirty-nine minutes, medium smoke during seventeen minutes, and no smoke during four minutes. Upon cross-examination, it was proved that there was in the immediate vicinity of the respondents' said chimney other works in connection with which there were chimneys and boilers burning coal and emitting smoke; that the respondents' chimney was a high chimney, and that there were also public works in the neighbourhood. It was also proved that there was a fireman on the premises, and that the place, as far as the appellant could see, was constructed in a proper manner.

11. It was proved by Fergus Ferguson, a medical practitioner and certifying surgeon under

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the Factory Acts, that smoke sent forth in the quantities, and of the character and density proved by the appellant, was a nuisance and annoyance to anyone who might be exposed to it, polluting the atmosphere, and he also believed it to be injurious to health to inhale unconsumed coal in the shape of smoke.

12. No witnesses were called by or on behalf of the respondents, but we were addressed by the advocate of the respondents, who referred us to the terms of the very section under which the proceedings were instituted, namely, "Where a person is summoned before the justices in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustible used in such fireplace or furnace, the justices may hold that no nuisance is created within the meaning of this Act, and dismiss the complaint if they are satisfied that such fireplace or furnace is constructed in such manner as to consume, as far as practicable, having regard to the nature or manufacture of the trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having the charge thereof." He contended that the respondents were entitled to a dismissal of the complaint, as the only evidence was that of the appellant, and that the facts proved did not constitute a nuisance within the terms of the Act under which the proceedings were issued.

Upon the grounds thus urged upon us by the respondents' advocate, we dismissed the summons.

The questions for the opinion of the court are:—First, was it incumbent upon the appellant to prove that the emission of smoke in the quantities and under the circumstances hereinbefore appearing, was an injury to the health of any person or persons? secondly, did the issuing of black smoke in the quantities and manner hereinbefore described constitute a nuisance within the meaning of the 29 & 30 Vict. c. 90? If the court is of opinion that the emission of black smoke, in the quantities and manner stated, was a nuisance within the meaning of the said Act, our judgment will be for the appellant, and the case will have to be remitted for our consideration to make an order of abatement upon the said respondents in the terms of the said Act. If the opinion of the said court is, that the issuing of black smoke in the quantities and manner above stated does not constitute a nuisance under the provisions of the said Act, or that it is necessary in this case to prove that the emission of black smoke in the quantities and under the circumstances mentioned, was an injury to the health of any person or persons, our judgment will stand.

Black, for the appellant, contended that the justices should have convicted.—29 & 30 Vict. c. 90, s. 19, enacts: "That the word 'nuisance,' under the Nuisances Removal Acts, shall include . . . every chimney (not being the chimney of a private dwelling house) sending forth black smoke in such quantity as to be a nuisance, provided . . . that where a person is summoned before the justices in respect of a nuisance arising from a fireplace or furnace which does not consume the smoke arising from the combustibles used in such fireplace or furnace, the justices may hold that no nuisance is created within the meaning of this Act, and dismiss the complaint, if they are satisfied that such fireplace or furnace is constructed in such manner as to consume, as far as practicable, having regard

to the nature of the manufacture or trade, all smoke arising therefrom, and that such fireplace or furnace has been carefully attended to by the person having the charge thereof." It is not necessary, in proceeding under this section, to show that the nuisance is also injurious to health. Secondly, the issuing of black smoke in the quantities and manner described in the case, was clearly a nuisance.

The respondent was not represented by counsel.

By the COURT.—It is not necessary to show that the issuing of black smoke is injurious to health as well as a nuisance, and the issuing of black smoke in the quantities and manner described, was undoubtedly a nuisance.

Case remitted with opinion.

Wednesday, April 29, 1874.

CAMERON (app.) v. FOY (resp.).

Workshop Regulation Act 1867 (30 & 31 Vict. c. 146), sched. 1, sect. 9—Factory and Workshop Act 1871 (34 & 35 Vict. c. 104)—Saturday half holiday—Alteration by Secretary of State—Form of information for not substituting other holiday.

A half holiday of equal length may (under 30 & 31 Vict. c. 146, sched. 1, sect. 9), by permission of the Secretary of State, be substituted on some other day of the week for the half holiday required by the Act to be given on Saturday to children, young persons, and women employed in workshops coming within the Act. Permission having been given to substitute Wednesday for Saturday afternoon in a particular workshop, an information was preferred against the proprietor for employing a young person after two p.m. on Wednesday:

Held, that such an information could not be sustained.

THE following is a case stated by us, the undersigned, two of Her Majesty's justices of the peace in and for the borough of Bolton, in the county of Lancaster, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the Court of Queen's Bench on questions of law which arose before us, as hereinafter stated.

1. At a petty sessions holden at Bolton, in and for the borough of Bolton, in the county of Lancaster, on the 19th May 1873, and afterwards by adjournment on the 12th June 1873, Joseph Foy, mantle maker, &c., the above-named respondent, was charged before us on a complaint made by Henry James Cameron, the above-named appellant, being the sub-inspector of factories for the district within which the said borough of Bolton is situate, "For that he, the said respondent, on Wednesday, the 23rd April 1873, at the borough of Bolton aforesaid, did offend against the Act 30 & 31 Vict. intituled 'The Workshop Regulation Act 1867,' as amended by the Act 34 & 35 Vict., intituled, 'The Factory and Workshops Act 1871,' inasmuch as he, the said respondent, on the said 23rd April 1873, at Great Bolton, in the said borough, being then and there the occupier of a certain workshop within the said borough, the same being a workshop within the true intent and meaning of the said first recited Act, did employ a certain young person, to wit, one Eleanor Townsend, after two o'clock in the afternoon, to wit, at twenty minutes past four o'clock in the afternoon of the same day, the same being an establishment where more than five persons were

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employed, and where such employment consisted not in making articles to be sold by retail on the premises, or in repairing articles of a like nature to those sold by retail on the premises, and the Secretary of State having by order advertised in the *London Gazette*, or otherwise published, giving the permission mentioned in the first schedule to the said first-mentioned Act, that young persons might be employed therein between two and eight o'clock in the afternoon of Saturdays, arrangements having been made to the satisfaction of the said Secretary of State for giving an equal half holiday on the Wednesday in every week to young persons therein employed, contrary to the form of the statute in such case made and provided."

Upon such hearing the appellant and respondent appeared before us.

2. The appellant proved that the respondent is an employer of labour under the Workshops Act 1867, and that on Wednesday, the 23rd April last, at 4.30 p.m., he called at respondent's shop, and on going upstairs into the workroom found two young women at work; Eleanor Townsend was one of them. That the respondent actually employs more than five persons on the premises in the making of articles to be sold not by retail. The respondent had previously obtained from the Secretary of State an authority, under sect. 9 of the first schedule to the Act 30 & 31 Vict. c. 146, to employ young persons and women on his premises after two o'clock on Saturday, he having arranged to have Wednesday afternoon as a half holiday, instead of Saturday afternoon.

Eleanor Townsend, one of the young persons previously referred to, proved that she remembered Wednesday, the 23rd April last, and was working in the respondent's premises at 4.30 p.m. on that day. She was making flags (banners) by hand for sale in respondent's shop. She had not had a half holiday. That when the appellant came she was in the showroom, in which articles were exhibited for sale, and where there was a sewing machine. That out of the showroom there was a recess in which the witness and Miss Morris (another young person) sat at the time of such visit. That witness resided on the premises, but Miss Morris went out to sleep. That witness attended to customers in the showroom, but when not in attendance on customers filled up the time by stitching for the respondent. That mantles were made sometimes in the room in which she was found working, and that she assisted to make these.

3. For the respondent it was contended: First, that the Act gave the justices no power to convict for working on Wednesday afternoon where the afternoon of that day had been set apart as a half holiday instead of Saturday afternoon; secondly, that the women were not employed in a workshop; thirdly, that the respondent was not liable as coming within the exception in sub-sect. 4 of sect. 6 of the said Act, by reason that the nature of employment of the women was making articles to be sold by retail, and that there were not five persons present.

We were of opinion that, as to the first objection, sub-sect. 1 of sect. 9 of the schedule to the Act 30 & 31 Vict. c. 146, did not state that the Wednesday afternoon was to be substituted for Saturday afternoon, but that young persons might be employed on Saturday afternoon if arrangements were made to have a holiday of equal length on another day, and that, therefore, the offence

which would be committed would be working on Saturday afternoon, not having made arrangements for a half holiday on some work day in the week.

That it was not a contravention of the Act to work on Wednesday afternoon, that being expressly allowed as one of the ordinary days of the week.

That the offence contemplated by the Act was that of working on Saturday afternoon, and that the exemption of the penalty on that account only accrued where arrangements were made to grant a holiday on another day, in this case a Wednesday afternoon.

That the Act provided no penalty for permitting work on the Wednesday afternoon.

That as to the second objection, the use of a room not ordinarily a workshop for the purpose of a workshop, within the description given in the Act, renders such room essentially *pro tem.* a workshop within the Act, independently of the number of persons employed therein.

That as to the third objection, after finding as a fact that the articles were being made for sale by retail on the premises, and that there were less than five persons employed, we were of opinion that as fewer than five persons were employed or occupied in the respondent's establishment, and such employment consisted in making articles to be sold in retail upon the premises, no penalty under the Workshops Act was incurred.

We therefore dismissed the case.

The appellant expressed himself dissatisfied with our determination, as being erroneous in point of law, and pursuant to the 2nd section of stat. 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case, setting forth the facts and the grounds of our determination as aforesaid, for the opinion of this honourable court.

Now, therefore, we, the said justices, in compliance with the said application and the provisions of the said statute, do state and sign this case.

The questions for the opinion of the court are: First, whether the employment of persons in the respondent's workshop on the Wednesday afternoon, under the circumstances mentioned in the evidence, is an offence in contravention of the Act for which a penalty is provided; secondly, whether the women were employed in a workshop as defined by the Act; thirdly, whether where, as in the case of the respondent, more than five persons are usually employed in the making of articles to be sold not by retail, the employment of less than five persons in the same premises during the half holiday in the making of articles to be sold by retail, renders the respondent liable to penalties. If it is the opinion of the court that we were wrong in our decision, then the case to be remitted for our judgment thereon.

(Signed) JOHN LIVING.
WM. MAKANT.

O. Bowen, for the appellant.—By sect. 9 of the first schedule to the Workshops Regulation Act 1867 (30 & 31 Vict. c. 146), the Secretary of State, "on proof to his satisfaction that the customs or exigencies of trade, or any other special circumstances, require the alteration to be made, may, by order to be advertised in the *London Gazette*, or otherwise published in such manner as the Secretary of State may think fit, give permission with respect to any particular workshop or class of work-

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shop, for all or any of the following things: namely, (1), that children, young persons, or women may be employed between two and eight o'clock in the afternoon on Saturday, provided that in any such workshop or workshops, arrangements are made to the satisfaction of the said Secretary of State for giving on some work day in every week to every child, young person, or woman employed, a half holiday of equal length, either at the beginning or at the end of their day's work," &c. The difficulty in the way of the appellant is this, that the information is simply for working on the afternoon of Wednesday, not for permitting work on Saturday afternoon.

No one appeared for the respondent.

COCKBURN, C.J.—That is a fatal objection. If the information had been for allowing the child to work on Saturday afternoon, the case would be different.

BLACKBURN, J. concurred.

Judgment for respondent.

Wednesday, April 29, 1874.

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Factory Acts Extension Acts 1867 (30 & 31 Vict. c. 103), s. 3, sub-sect. 7—Factory—Cement works. Cement works, in which over 200 persons are employed, covering about ten acres of ground, and consisting partly of mills separate and detached, with temporary covers over the mills in some places to protect the machinery, most of the other work being carried on under a felt cover open all round, do not constitute a factory, within the meaning of 30 & 31 Vict. c. 103, s. 3, sub-sect. 7.

This is a case stated by us the undersigned, three of her Majesty's justices of the peace in and for the county of Kent, under the stat. 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on the question of law which arose before us, as is hereinafter stated.

1. At a petty sessions holden at the precinct of Rochester Cathedral, in and for the division of Aylesford North, in the county of Kent, on the 27th June 1873, an information preferred by Joseph Alexander Redgrave, sub-inspector of factories for the counties of Kent, Surrey, and Sussex (hereinafter called the appellant), against William Lee, William Henry Roberts, Alfred Dale, and Charles Letchford, in the said information described as William Lee, Son, and Company, of Halling, in the said county of Kent, cement manufacturers (hereinafter called the respondents), under sect. 28 of the Act 7 & 8 Vict. c. 15, charging for that they, the said respondents, on the 10th June in the year aforesaid, at the parish of Halling, in the said county of Kent, being then and there the occupiers of a certain factory, within the true intent and meaning of the Factory Acts, did unlawfully fail to hang up in the entrance of the factory a notice of the names and addresses of the inspector and sub-inspector of the district in which the factory is situated, and other particulars required to be inserted in the said notice, contrary to the form of the statute, was heard and determined by us, the said parties respectively being then present, and upon such hearing we dismissed the said information.

2. And whereas the appellant being dissatisfied with our determination upon the hearing of the said information as being erroneous in point of law

hath, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of this court, and hath duly entered into a recognisance as required by the said statute in that behalf.

3. Now, therefore, we the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case:

4. The appellant, after reading sect. 3, sub-sect. 7, of the Act 30 & 31 Vict. c. 103, which enacts, that for the purposes of the Act the word "factory" shall mean "any premises whether adjoining or separate in the same occupation, situate in the same city, town, parish, or place, and constituting one trade establishment in, on, or within the precincts of which fifty or more persons are employed in any manufacturing process;" and by the same section, "manufacturing process" shall mean "any manual labour exercised by way of trade or for the purposes of gain in or incidental to the making an article or part of an article, or in or incidental to the altering, repairing, ornamenting, finishing, or otherwise adapting for sale any article," called the following witness:

William Rayner: I am general foreman and time-keeper in the employ of Messrs. Lee, Son, and Company, and reside at Halling; the premises over which I am foreman are situate at Halling, they are in the occupation of William Lee, William Henry Roberts, Alfred Dale, and Charles Letchford, and they trade under the name, style, and firm of William Lee, Son, and Company; cement is manufactured on those premises, and lime also is burnt there; I know what cement is made of; chalk is used in its preparation; lime is not used in it; mud is also used. The first process which chalk is subjected to in making cement is placing it in a washmill with mud; the chalk is first dug from a pit; after the chalk and mud leave the washmill it passes through pipes to a force pump; it is then forced through the pump into the backs and there it deposits itself; it is then wheeled from the backs to the fines, and there dries; then passes from thence to the kilns; it is then burnt, then drawn from the kilns, then crushed, then ground between stones, then passed into a shed, and it there becomes cement ready for the market, and is put into sacks and sacks. There are over 200 people employed on the premises of the defendants at Halling. These include pitmen, carters, lime-burners, cement manufacturers, barge loaders, engine fitters, blacksmiths, wheelwrights, sawyers, engine drivers, kiln fillers, coal heavers, barge builders, fluemen, men employed at the washmills, spoutmen, millers, crushmen, kilndrawers, tippers. I recollect the informant paying a visit to the premises on the 10th June inst. There was then no notice on any part of the premises containing the names of the inspector and sub-inspector of factories of the district. I have never seen such a notice upon the premises.

On cross-examination the witness said:

The premises are very extensive. The chalk pit extends over three acres, and is a mile away from the works. There is a railroad from the pits down to the works; it is about a mile long. The other works occupy about ten acres. There is no great building where men and women are employed under cover. The mills are separate and detached, but stand upon the ten acres; there is a hole on the top of them, and on each side there is an open cowl over each of them. There are temporary covers over the mills in some places to protect the machinery. There are no boys working at the mills. I know Philip Peters; he does not work in any covered building; his duty is to tally the chalk into the washmill, and while doing so he stands in the open air; that is his only duty; he is under the age of sixteen years, and he is the only boy under that age employed on the works. The river is on one side of the works, and the works are all open to the country on all other sides. There is no entrance gate

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which is used; there is an ordinary five barred gate from the turnpike road, which is open for cattle to go in. There is no entrance gate or place where a notice could be affixed without being exposed to the wind, rain, or weather.

On re-examination the witness said:

It is the habit of the men to come on the premises just when they can. There is an entrance to drive a horse and trap through, near the fitter's shop. That is the entrance by which strangers would enter the premises. There is an entrance at the end of the backs; this brings the men into any part of the works. The men come on the premises across a field, and through the entrance behind the premises. The men get over the fence and get into the works where they can. A notice could be put up where the entrance is for a horse and trap, but it must be placed outside. There is a boy who works in the engine fitting shop; his name is George Strong; he runs of errands and attends to the men; moves things about from one place to another for the use of the men. I know a boy of the name of Eyles; I do not know whether either of those boys is under the age of eighteen years. Most of the work is carried on under a felt cover, open all round. There is no division between the cement works, the lime works, the carpenters' shop, and the fitting work, only the walls to support the buildings and gear. There is nothing to prevent anyone getting into the works in certain places where there are no fences. The railway runs at the top of the works, but there is a field between the works and the railway; that field is not part of the premises where manufacturing process goes on; the field is the boundary of those premises.

5. It was contended on the part of the respondents, that the premises were not a factory, within the meaning of the Factory Acts; that the manufacture carried on is not one of those mentioned in sect. 3 of the said Act 30 & 31 Vict. c. 103, or of a similar nature; that those Acts apply only to closed buildings; that there is no separate building in which fifty persons are employed; that 30 & 31 Vict. c. 15, s. 3, sub-sect. 7, does not apply to cement works like those in question, and that the principle involved in the case of *Kent v. Ashley* (5 Cox's Mag. Cas. 171) was precisely the same as in the case before us; that the several sheds could not be considered as being joined together for the purpose of bringing them within the provisions of the Factory Acts; that only one boy is employed on the premises under the age of sixteen years, and he is employed out of doors in the open air as a tally boy, to see what chalk and mud is put into certain wash mills.

6. We being of opinion that the evidence so adduced before us did not bring the case within the operation of the said Act of Parliament of the 30 & 31 Vict. c. 103, sect. 3, sub-sect. 7, gave our determination against the appellant in the manner before stated.

7. The question of law for the consideration of the court therefore is, are the cement works and premises before described within the operation of the Factory Acts?

8. If the court should be of opinion that they are, then the case is to be remitted to us.

Given under our hands the 1st Aug. 1873, at Rochester Cathedral Precinct, in the county of Kent aforesaid.

JAMES HULKES.

J. H. BAKER.

JOHN M. KNIGHT.

C. Bowen, for the appellant, contended that the premises of the respondent were a factory within the meaning of 30 & 31 Vict. c. 103, s. 3, sub-sect. 7, where factory is defined to include "any premises, whether adjoining or separate, in the same occupation, situate in the same city, town, parish,

or place, and constituting one trade establishment in, on, or within the precincts of which fifty or more persons are employed in any manufacturing process; the words, "manufacturing process," being by the same section defined to mean, "any manual labour exercised by way of trade or for purposes of gain in or incidental to the making any article or part of an article, or in or incidental to the altering, repairing, ornamenting, finishing, or otherwise adapting for sale any article. The case of *Kent v. Ashley* (L. Rep. 5; Q. B. 19), relied on by the defendants, is by no means decisive of the question. That case decided that a slate quarry, which was a large open space extending over an area of 400 acres, the works of which were carried on in the open air, the only buildings being sheds, and in which more than fifty persons were employed in splitting the rock into slates and shaping them for sale, was not a factory within the meaning of the Act. The court in that case, it is submitted, did not intend to draw a hard and fast line between works carried on in the open air and those carried on under cover; but the decision turned on the particular facts of the case. "No doubt," said Cockburn, C.J., "the object of the Legislature was to prevent the crowding together of workmen and their detention at labour for an undue time, and the mingling of the sexes. By degrees the Legislature has extended the operation of the Acts to manufactures not originally within their scope. But, except in cases which have been specially provided for, it has not as yet included works carried on in the open air, because they are less exposed to the evils incident to manufactures carried on in buildings. Where the mischief is the same the remedy ought to be applied; but we ought not to outstrip the Legislature, and apply these statutes to circumstances to which the Legislature appears to have considered that they could not be properly applied. I cannot think it was intended that where a process like this is carried on in the immediate proximity to a quarry, it is to be included in statutes meant to apply to manufactures carried on in buildings." The inference to be drawn from this judgment is, that the circumstances of each particular case, and the nature of the work carried on, is to be regarded; and the real question in the present case is, whether the place where this cement is made is not a factory, within the meaning of the Act. If, substantially, there is no confinement of the persons employed, then the premises do not come within the Act; but if there is, the object of the Legislature is carried out by holding that the premises are a factory within the Act. Cement manufacture necessitates a great deal more of indoor working than slate quarrying. There is nothing in the Act requiring that all the buildings should form one. [BLACKBURN, J.—No doubt it is always a question of more or less.] The process here was clearly a manufacturing process.

Manisty (with him F. Lee), for the respondents, was not called upon.

COCKBURN, C.J.—I think this case is really governed by the decision in *Kent v. Ashley* (ubi. sup.). I think, when the word "premises" is used for the place where a manufacturing process is carried on, something more is implied than what is carried on in the open air. If, indeed, it were essential to the manufacture of cement to have so many sheds that the buildings would be the pre-

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dominant feature of the whole concern, the case might be different. Here, however, that is not so; and I am therefore of opinion that the case does not come within the Act.

BLACKBURN, J.—I am of the same opinion. I have no doubt that this making of cement is a manufacturing process within the meaning of the Act; and if it appeared that on these ten acres of ground there were so many sheds and other buildings, that the process was carried on for the most part under cover, the justices might have been justified in finding that the place was a factory. Here, however, they have found that it was not; and I think they were right in so finding. If the intention of the Legislature was not to confine the operation of the Factory Acts to processes carried on in buildings, they had an opportunity of making this clear in the Act of 1871, after the decision of the court in *Kent v. Astley* (*ubi sup.*), but they have not said so.

Judgment for respondents.

COURT OF COMMON PLEAS.

Reported by STEPHENSON SMITH and J. M. LELY, Esqrs.,
Barristers-at-Law.

Monday, May 4, 1874.

Bows (app.) v. FENWICK (resp.)

Betting—16 & 17 Vict. c. 119—*Construction*—*Office or place*—*Temporary structure*—*Umbrella stuck in the ground*—*Ascertained place*.

A man took up a position on a racecourse, standing upon a low stool. A large umbrella, capable of covering several persons, was fixed over his head by means of a long jointed stick with a spike at the end, which was inserted into the ground. The umbrella was kept open irrespective of the weather, and on the outside was a placard bearing the owner's name and address, and an announcement, "We pay all bets first past the post." Underneath he made bets upon the races and received deposits of money:

Held, that this was a "place" within the meaning of 16 & 17 Vict. c. 119, s. 3:

Semble, per Lord Coleridge, O.J., that it was an "office."

Held, that "place" in ss. 1, 2, and 3 of 16 & 17 Vict. c. 119, means an "ascertained place."

THIS was a case stated under 20 & 21 Vict. c. 43, by justices of the city of Chester, for the opinion of the Court of Common Pleas, as to the validity of the conviction of the appellant under the following circumstances.

An information was preferred against the appellant for having, on the 19th May 1873, been the occupier of a certain stand on the racecourse at Chester, and having used it for the purpose of betting on a horse race with persons resorting thereto, contrary to the 1st section of 16 & 17 Vict. c. 119.

The appellant was upon the Roodee or racecourse at Chester on the day named in the information, during the races, and stood upon a stool about 2ft. high, and under an umbrella which was 7ft. or 8ft. above the ground, and was capable of accommodating several persons. The umbrella was like a carriage umbrella, but the stick was made with screw joints and had a point at the end, by which it was fixed into the ground. It was a showery day, but the umbrella was kept up, whether it was raining or not, throughout the

whole day. On the outside was painted, "G. Bows, Victoria Club, Leeds," and there was also a card displayed on which was printed, "We pay all bets first past the post." The appellant stood underneath the umbrella, and kept calling out, offering to make bets, and was seen to make several bets with persons upon the races which were being run, and money was deposited with him by the persons betting, to whom he gave tickets. Upon these facts the justices convicted the appellant, and inflicted a penalty of 5l. The question was, whether the stand of the appellant constituted a "place" within the meaning of the Act 16 & 17 Vict. c. 119.

Straight, for the appellant.—This stool with the umbrella over it is not an office or place within the meaning of the Act. It is no more a place than the ground under a tree in Hyde Park, which was held in *Doggett v. Catternes* (12 L. T. Rep. N. S. 355; 34 L. J., 159, C. P.), not to be within the statute. [Lord COLERIDGE, C. J.—This is more like *Shaw v. Morley* (19 L. T. Rep. N. S. 15; L. Rep. 3 Ex. 137), where the judgment of Kelly, C.B. shows what is the meaning of the words in the Act.] But this is not a structure as that was, which had desks and was in a spot railed off and inclosed. The appellant here was only standing as anyone else might have done. He might have been made to move on at any moment. [BRETT, J.—Suppose he had used ropes and spikes as at a prize fight?] This is not fixed so definitely; there was only the umbrella stuck for the time into the ground, and it could have been moved easily and directly. [DENMAN, J.—The 3rd section of the Act seems to contemplate a place of which a man can be owner or occupier.] Yes; that shows the real intention of the statute. There was nothing here which was capable of being owned or occupied. Can it be said that the ground under the umbrella was capable of being owned or occupied when the umbrella might be moved at any moment? [BRETT, J.—Is the test, then, that of being moved on? What, then, if so, could be said with regard to an awning or a waggon?] A waggon might be in itself a defined inclosure, and would come within the structure described by Martin B. in his judgment in *Shaw v. Morley* (*ubi sup.*), but this is surely very different. The words, "or other place," in the first section, show that the place intended must be *ejusdem generis* with a house, office, or room, and not such a thing as this umbrella stuck into the ground. This has been done for years without interference, and it would be straining the Act to include this within it. A penal statute must be construed strictly, and nothing of this sort, it is submitted, is specified in it.

No one appeared for the respondent.

Lord COLERIDGE, C.J.—I am of opinion that in this case the conviction must be affirmed. The conviction proceeded on the terms of the 1st section of 16 & 17 Vict. c. 119, which enacts that "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto;" and the 2nd section has the same words, "every house, room, office, or place opened, kept, or used for the purposes afore-

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said, or any of them shall be taken and deemed to be a common gaming house within the meaning of 8 & 9 Vict. c. 109." Then the 3rd section, which is the one upon which in truth this conviction must be sustained, if sustained at all, though it is nominally stated under the 1st, is, "any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, &c." Now in this case the facts found by the justices are that the Chester races were going on, and the defendant went on the Roodee or race-course, and took up his position, standing on a stool about 2ft. high, over which was placed an umbrella of a size capable of covering several persons: the stick of the umbrella was jointed like a sweep's brush, and had a spike at the end which was stuck in the ground. The umbrella when opened was about 8ft. from the ground, and had on the outside the name of the defendant painted, and the reference to a betting club of which he was a member. He there offered bets in money, and persons came and deposited money, and received a card or ticket. If this umbrella and stool were an office, place, or room within the meaning of the Act, it is clear that the defendant was using them for betting purposes, and the only question therefore is whether this was an office, house, room, or place. It was not a house or room. It might perhaps be said that it was an office; I do not give an opinion on that point, because I am certainly of opinion that it was a place. It was an ascertained place, for the umbrella was fixed; the place whence the defendant came was stated on the outside, and cards were given. Then the umbrella was kept up, whether it was wet or dry, and I am therefore of opinion that he was using a place within the meaning of the Act. A man has a perfect right to evade a stringent Act if he can do so; and this is, as my brother Brett says, a stringent Act, and an interference with the liberty of the subject. Now there were two cases cited, which we have considered as bearing on this case. In *Doggett v. Catterns* (*ubi sup.*) it appeared that a man who was in the habit of standing under a tree in Hyde Park for the purpose of betting was not within the Act. This court had thought otherwise, but their judgment was reversed in the Exchequer Chamber, though certainly on conflicting grounds; the Chief Baron thinking that the *locus in quo*, although not a place because open, yet, because it was in Hyde Park and could not have an owner or occupier, was not within the Act. Baron Bramwell, on the other hand, decided that the defendant was not using an ascertained place, and therefore not within the Act, and half the Court agreed with the Chief Baron and half with Bramwell, B. So, though the judgment of the Court below was unanimously reversed, yet it was reversed on different grounds by the different judges, and we may say, having regard to the facts, that the decision in the Exchequer Chamber does not apply here so as to bind us. There nothing was done in the park; the man only walked under a tree and stood there, so that I do not wish at all to quarrel with the conclusion there arrived at. The other case was *Shaw v. Morley* (*ubi sup.*), where the circumstances were again different. There the appellant had a desk, part of a temporary wooden structure placed on a strip of land, adjoining the Doncaster race course, and behind the desk he conducted his business as

a betting agent. It was held that this structure was an "office" and a "place" within the meaning of the Act, and the conviction of the appellant was upheld; the Chief Baron Kelly saying, "It is no matter whether there is a roof or none, or whether the structure is movable or fastened to the earth, it is clearly an office within the meaning of the act;" and Martin, B. says, "The structure described was both an office and a place," and that it was most like those movable offices in which merchants conduct their business at the docks at Liverpool. Now, without saying that the case is exactly in point, yet I do think that the facts are more like those before us than are those in *Doggett v. Catterns* (*ubi sup.*), and the reasoning of the judges carries us to the conclusion to which we come here. There is an ascertained spot, for the fixing of the umbrella makes it an ascertained place, and under it was carried on what was undoubtedly against the statute. I am therefore of opinion that the conviction was right and must be affirmed.

BRETT, J.—When this Act was passed the Legislature had not made up its mind to prohibit betting altogether, nor has it yet gone so far; but what it had made up its mind to do is expressed in the preamble to the statute. "Whereas a kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices." The kind of betting there described it had determined ought to be suppressed, and the first section shews against what sort of proceeding the Act is directed—viz. the opening of "places for betting purposes, with persons resorting thereto." It desired to prevent fixed places being established to which the unwary might resort for betting. It did not prevent persons betting on the course, but prohibited their having a certain place. No doubt to satisfy the statute a fixed place is required, such a place at any rate as might be ascertained and which could be used. The case of *Doggett v. Catterns* (*ubi sup.*) shews this. So now arises the real question, was this spot a fixed place to which the appellant could invite any other person to resort. It is said that he went on the course with a stool, and with what for his sake is called an umbrella, but it was not an umbrella in the ordinary sense of the word, nor was it used as such; it was an open tent. For why did he take it? Not to shelter himself, but to make for himself a fixed place, and tell people where he was, for he described himself upon it. He put on it, "we pay all bets first past the post," but really that means "we pay here all bets." He did not wish to refer people for payment to the Victoria Club, Leeds; he said if you will resort to this umbrella, here is a place where you can deposit your money, and here you will be paid. It seems, therefore, to me that he comes within the statute, and within the principle in *Doggett v. Catterns* and *Shaw v. Morley* (*ubi sup.*). Mr. Straight says it is not a fixed place, because the appellant was liable to be moved on, and because he does not pay rent, and so is not an owner or occupier, but I do not agree that that is so, and the conviction must be affirmed.

DENMAN, J.—I agree with my Lord that neither of the cases cited is absolutely in point, but I think that *Shaw v. Morley* (*ubi sup.*) is more nearly so than *Doggett v. Catterns* (*ubi sup.*). The question is whether what has been described to us is a

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[C. P.]

place within sect. 3 of the Act. I think it is sufficient to have an ascertained and appropriated place. Here the appellant stood on a stool, and was sheltered above by an umbrella, capable of covering several persons, which was kept there wet or dry, and which required unscrewing before it could be moved. Then there was an advertisement on it with the appellant's name, and reference to his club, and he himself was there offering and making bets and giving tickets. Therefore I am of opinion that it was quite clear that in an ascertained place, and one which he had taken some trouble to appropriate, he was carrying on betting within the Act. *Conviction affirmed.*

Attorneys for appellant, Doyle and Edwards, for Cartwright, Chester.

Wednesday, May 6, 1874.

RAWLINGS v. COAL CONSUMERS ASSOCIATION
(LIMITED).

Action for false imprisonment—Indictment for embezzlement—Agreement not to sue if no evidence offered on indictment—Breach of agreement—Illegality of agreement—Action allowed to be proceeded with.

An agreement between a prisoner and a prosecutor that the prisoner will not sue the prosecutor for false imprisonment if the prosecutor will offer no evidence upon an indictment, is illegal and void, and the prosecutor may be sued by the prisoner for false imprisonment, any such agreement notwithstanding.

The plaintiff had been indicted by the defendants on three separate charges of embezzlement. The jury having acquitted him on the first, it was agreed between the counsel for the prosecution and the counsel for the defence, that no evidence should be offered on the other two indictments in consideration that the plaintiff would not sue the defendants for false imprisonment, whereupon verdicts of not guilty were taken by consent, and counsel indorsed their briefs, "Verdict not guilty. No action to be brought."

Held, that the agreement being void, the action could be brought, and a rule to stay proceedings, as in breach of good faith, refused.

THIS was a rule to stay proceedings in an action for false imprisonment and malicious prosecution brought by the plaintiff against the defendant under the following circumstances:

In Jan. 1874 the plaintiff was committed for trial on various charges of embezzlement of the moneys of the defendants, his masters, at the Lambeth Police Court, and three indictments were preferred against him for embezzlement at the Central Criminal Court accordingly. The plaintiff was tried upon the 7th April upon one of these indictments, before the Common Serjeant, defended by counsel, and acquitted. Thereupon a conference was had between the prosecuting and defending counsel, the result of which was that the brief of the prosecuting counsel was indorsed, "Verdict, not guilty. Second indictment not proceeded with. No action to be brought," such indorsement being signed by both counsel.

The plaintiff denied having given an authority to his counsel to undertake not to sue the defendants; but the affidavit of the attorney for the prosecutors, the now defendants, was to the effect that "he was informed and believed that it was

arranged by and with the consent of the plaintiff and his then attorney, that no evidence should be offered on the remaining indictments, the plaintiff on his part, through his counsel, undertaking that he would bring no action for false imprisonment or malicious prosecution in reference to the charges made against him." The said affidavit was to the further effect that the indorsement of the briefs of counsel was made in good faith, and that it was upon the distinct understanding that no action was to be brought by the plaintiff against the defendants; that no evidence was offered by the counsel for the prosecution against the plaintiff upon either of the other indictments then remaining to be tried; but verdicts of not guilty were taken on both, and that the action was brought against good faith.

Very shortly after his acquittal, under the circumstances above stated, the plaintiff issued a writ against the defendants, whereupon the defendants took out a summons before Archibald, J. to stay proceedings, who granted a summons nisi, but upon cause being shown, referred the matter to the court.

E. E. Webster now moved for a rule to stay proceedings.—This action is brought against good faith and in breach of an agreement made in good faith. There was no compounding of a felony here. [BRETT, J.—It appears to me you are in a dilemma. Either the counsel for the prosecution had some evidence to give, and then it was compounding a felony, or no evidence, and then there was no consideration to support the promise of the plaintiff.] The judge consented to no evidence being taken, and the prisoner was acquitted. The consideration was the release from exposure which a man, however innocent, would naturally dread, and especially as he had already been tried for the same offence. [BRETT, J.—I should be inclined to look very narrowly into an agreement of this character made by a prisoner at the dock.] The agreement was made by the advice of his counsel. [BRETT, J.—Could this have been done before the trial of the first indictment? If not, what difference is there between that and the two others?] *Keir v. Leeman* (6 Q. B. 308; 9 Q. B. 371) will be relied on by the other side; but that case is distinguishable, as there was there a compounding of a criminal offence, whereas here there is no such compounding. [Lord COLERIDGE, C.J.—In *Keir v. Leeman* (*ubi sup.*), Tindal, C.J., in delivering the considered judgment of the Exchequer Chamber, said, "It seems clear that some misdemeanors are of such a nature that a contract to withdraw a prosecution in respect of them, and to consent to give no evidence against the parties accused, is founded upon an illegal consideration. Such was the case of *Collins v. Blantern* (2 Wils. 341, 347, Sm. L. C. vol. 1), which was the case of a prosecution for perjury. It is strange that such a doubt should ever have been raised. A contrary decision would have placed it in the power of a private individual to make a profit to himself by doing a great public injury. . . . It is very remarkable what very little authority there is to be found, rather consisting of *dicta* than decisions, for the principle, that any compromise of a misdemeanor, or indeed of any public offence, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void." It is submitted that if a man be convinced in his own mind that he has no cause against a prisoner, he is justified in withdrawing from it.

G. P.]

JAMES AND ANOTHER v. HENDERSON AND ANOTHER.

[C. P.]

French, who was prepared to show cause in the first instance, was not heard.

LORD COLERIDGE, C.J.—I am of opinion that there should be no rule in this case. It is said that the action was brought in breach of good faith, in breach of an agreement made between the plaintiff and the defendant under the following circumstances: [The learned judge stated the facts as above set forth, and proceeded:] Now I entirely agree with the interlocutory remarks of my brother Brett. I think that the court ought to look with a most scrupulous eye upon these agreements, and with a strong desire to prevent the fulfilment of them; otherwise counsel for prisoner, for inadequate reasons, gives up rights which are justly his, or counsel for the prosecution is a party to that which, by which the course of public justice may be seriously impeded, and foregoes those public rights of which he is the constituted guardian. This is a dilemma which has been put by my brother Brett, and I do not think that it has been answered. On every principle, agreements of this kind ought to be steadily discountenanced, and I cannot help saying that counsel for the prosecution in such a case either puts forward a consideration which is no consideration, or is a party to the stifling a prosecution. So far as to the principle involved in this case. With regard to authority, I find that not only the Court of Queen's Bench, but also a strong court of error, in *Keir v. Leman* (*ubi sup.*), pronounced against an agreement of this kind, and that in a case where the indictment was for an act of far less moral criminality, the taking part in a riot. I have already read the striking language of Tindal, C.J. in delivering judgment in that case in the court of error, and I will not repeat it. But I find the law also laid down in *Collins v. Blantern* (1 Sm. L. C., 5th edit., p. 321), where Gould, J., speaking of an agreement to buy off a witness against a man accused of perjury, says, "This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice." Now, embezzlement is an offence of a very grave kind. This agreement was either an agreement to stifle a prosecution, or it was an agreement made without consideration. Upon strong authority, as well as on principle, I am of opinion that it was utterly illegal and void, and that, consequently, this rule must be refused.

BRETT, J.—If it be the case that these agreements are not uncommon at the Old Bailey, it is highly desirable that the opinion of this court upon them should be made known. That opinion has now been made known by the judgment just delivered by the Lord Chief Justice, and I entirely concur in the way in which the Lord Chief Justice expressed that opinion. The agreement before us, if made for consideration, was tantamount to the prisoner giving a sum of money to the prosecution to desist from prosecuting him, and therefore amounted to the compounding of a felony, which is abhorrent to the law of England.

DENMAN, J.—I entirely agree with the judgment of the rest of the court; and I agree with it upon the grounds which have been already given.

Rule refused.

Attorneys for plaintiff, *Bradford and Co.*

Attorneys for defendants, *Wontner and Sons.*

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Friday, May 8, 1874.

JAMES AND ANOTHER v. HENDERSON AND ANOTHER.

Election petition—Ballot Act 1872, rule 42—Order to produce marked register for inspection.

The marked register of voters being open to public inspection by rule 42 of the Ballot Act 1872, inspection thereof on behalf of an election petitioner will be ordered as of course.

The Durham election petition charged bribery and treating, but did not pray for a scrutiny;

Ordered, per Lord Coleridge, C. J. and Brett and Denman, JJ. that the marked register of voters be exhibited to the agent of the petitioner.

Stowe v. Jolliffe (30 L. T. Rep. N. S. 299) followed.

THIS was a rule obtained on Thursday, 7th May, on behalf of John William James and Henry Ashworth, petitioners, calling upon John Henderson and Thomas Charles Thompson, respondents, to show cause peremptorily on this day why the Clerk of the Crown in Chancery should not be at liberty to open a certain sealed packet, alleged to contain the marked register of voters for the City of Durham, and permit the petitioners and respondents respectively, or their agents, to inspect such marked register, and take copies of the same if required upon paying for the same, the Clerk of the Crown in Chancery taking care that no other papers than the said marked register be inspected. The rule had been drawn up on reading the petition and the following affidavit of the attorney for the petitioners:

1. I have the conduct of this petition in London as agent for Messrs. Trotter, Bruce, and Trotter, of Bishop Auckland in the County of Durham, who act as attorneys for the petitioners.

2. The petition amongst other things charges bribery and treating.

3. I am advised and believe it to be true that it is necessary for the case of the petitioners to inspect and take copies of the marked register of voters for the last election at the said city.

McKellar for the respondents, showed cause. *Stowe v. Jolliffe* (*ubi sup.*) and *Malcolm v. Ingram* (not reported) will be relied on by the other side, but in both those cases a scrutiny was prayed for, so that they are distinguishable. Moreover in *Stowe v. Jolliffe* (*ubi sup.*) Grove, J., agreed, not without doubt. [DENMAN, J.—The majority of the court must be taken to have held that the marked register was to be freely open to inspection.] There is no sufficient reason alleged in the affidavit for the exhibition of this marked register, and although it is open to public inspection by rule 42, it is, according to rule 29, as read by Grove, J., to be sealed up with the counterfoils which by rule 41 are not to be opened without an order of the court. Rule 42 being thus in conflict with the other rules, the court will not give effect to rule 42 without stronger reason being shown than is shown upon this affidavit.

A. L. Smith, for the petitioners.—This is a case of treating, and it is sought to know who voted in order to prove what effect the treating had. [LORD COLERIDGE, C. J.—If rule 42 says that the marked register is to be "open to public inspection," I see no reason why the order applied for should not be made]. A reason has been given, if a reason be required. [He was then stopped.]

LORD COLERIDGE, C.J.—This is a very clear case. We are asked to permit the inspection of a public document, made open "to public inspection" by

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the very terms of rule 42.(a) This order must be made as prayed.

BRETT and DENMAN, JJ. concurred.

Rule absolute.

Attorney for the petitioners, *Crowdy*.

Attorneys for the respondents, *Rogerson and Ford*, for *Marshall*, *Durham*.

Friday, May 29, 1874.

MARSHALL AND ANOTHER (pets.) v. JAMES (resp.)

TAUNTON ELECTION PETITION.

Election petition—Costs—Dissolution same day as determination of petition—Oral order of judge as to costs—Certificate of judge received by Speaker after dissolution—Presumption as to precise time of judicial proceedings—Parliamentary Elections Act 1868, s. 4, sub-sect. 13 of s. 11, ss. 26, 41.

When Parliament is dissolved on the same day as the determination of an election judge is pronounced, the contemporaneous order of such judge as to costs is good.

Judicial proceedings are presumed to have taken place at the earliest period of the day.

The Taunton Election Petition was determined by a judgment of the election judge in favour of the respondent on the morning of the day on which Parliament was dissolved. The judge, in delivering his judgment, ordered the petitioners to pay costs, and forthwith forwarded a report and certificate of his determination to the Speaker, under sect. 11, sub-sect. 13, of the Parliamentary Elections Act 1868. Such certificate was silent as to costs, but the order as to costs had been indorsed on the petition by the registrar at Taunton. The certificate reached the Speaker on the evening of and after the dissolution, but was not reported to the House till the next Session, when it was entered upon the Journals of the House, pursuant to sect. 13 of the Act of 1868:

Held, that the determination of the petition must be presumed to have taken place in point of time before the dissolution; that the order as to costs was good, and a rule to stay taxation discharged with costs.

Semble, that the order as to costs would have been equally good if made on a day subsequent to the dissolution.

THIS was a rule calling upon the respondent to the Taunton Election Petition to show cause why the taxation of costs and all proceedings incident to such taxation, and generally in the matter of the petition, should not be stayed, and why the taxation, if any, should not be set aside.

From the affidavits of Mr. Ellis, one of the attorneys for the petitioners, and Mr. Holmes, the agent for the respondent, and from the statements of Grove, J., who tried the petition, the facts appeared to be as follows:

The petition was presented on the 4th Nov. 1873, against the return of the respondent (Sir Henry James, Q.C.) for the borough of Taunton, and security for costs to the amount of 1000*l.* was on that day given on behalf of the petitioner.

The petition was appointed to be and was heard on the 12th Jan. 1874, and such subsequent

days as were needful, before Grove, J., who delivered an oral judgment about half-past ten a.m. on Monday, the 26th Jan., determining that the respondent was duly elected, and that the petitioners should pay the respondent's costs of the petition. The learned judge immediately afterwards certified the Speaker of the House of Commons in manner hereafter appearing. Such certificate was posted at Taunton about noon, and reached the Speaker on Monday night.

The following indorsement was made upon the petition immediately after the delivery of the judgment:

The Parliamentary Elections Act 1868.

At a court holden at the Shire Hall, Taunton, in the county of Somerset, on Monday, the 12th Jan. 1874, and several days afterwards, before the Hon. Sir William Robert Grove, Knight, the within petition came on to be tried, and the petitioners and respondent, by their counsel and attorneys, severally appeared. And upon hearing counsel on both sides, and the evidence adduced by and on behalf of the respective parties, the said Sir William Robert Grove, at the conclusion of the said trial, determined as follows:—First, that the said Henry James was duly elected and returned; secondly, that the petitioners do and shall pay to the respondents their costs, charges, and expenses, to be taxed in the prescribed manner.

JAS. L. MATTHEWS, Registrar.

On the said Monday, the 26th Jan. 1874, the then present Parliament was dissolved by Royal Proclamation in the ordinary form.

By sect. 13 of the Act of 1868, the House of Commons, on being informed of the certificate and report of an election judge, "shall order the same to be entered in their journals," and the following entry appeared in such journals for the 19th March 1874 (being the day on which the House first met for business), the Speaker of the old Parliament having been re-elected:

"Mr. Speaker informed the House that he had received from Mr. Justice Grove, one of the judges selected for the trial of election petitions, pursuant to the Parliamentary Elections Act 1868, a certificate and report relating to the election for the borough of Taunton.

"Mr. Speaker also informed the House that the said certificate having been given and the report made before the dissolution of the late Parliament, were not received by him until after such dissolution, but he thought it right that the same should be laid before the House."

And the same was read as followeth:

[Then followed the report of the judge, which makes no mention of costs.]

And the said certificate and report were ordered to be entered on the Journals of the House.

There was no affidavit as to the precise time of the delivery of the judgment of Grove, J., which was taken to be half-past ten, from the statement of the learned judge himself; but it will be seen from the judgment that such precise time was immaterial. The precise time of the dissolution was wholly unascertained.

Giffard, Q.C. (with him *R. S. Wright*) now showed cause.—The burden of proof is upon the other side to displace the jurisdiction which *prima facie* exists—the jurisdiction of the election judge. The dissolution of Parliament could not affect that jurisdiction; the certificate to the Speaker is merely the formal mode of signifying that result of the petition which affects the House of Commons—whether the respondent is unseated or not. Whether costs be given and how, is a collateral matter in which the House of Commons as such has no interest. It is true that the effect of a dissolution of Parliament while an election petition is pending, is, that the petition drops, and the court will order

(a) This rule, together with the others cited in the argument, will be found set out at length in the report of *Stowe v. Jolliffe* (30 L. T. Rep. N. S. 300).

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the security for costs to be returned to the petitioners: (*Carter, app. v. Mills, resp. (Exeter petition)*, L. Rep. 9 C. P. 117.) But in that case the dissolution took place before the hearing. And although the court observed that a case having arisen not expressly provided for by the Parliamentary Elections Act, they must guide their proceedings by the old Parliamentary practice, according to which, said Lord Coleridge, C. J., "the petition abated or dropped in such case;" this may be explained by the consideration of the constitution of the Parliamentary Committees. An election committee, being composed of individuals, themselves members of Parliament, ceased to exist at the moment of dissolution, so that the tribunal being gone, the petition was gone also. The election judiciary, on the other hand, survives a dissolution of Parliament, and, what is more, an election judge has to decide many collateral issues, e.g., whether corrupt practices have prevailed, whether the respondent has by bribery disqualified himself from sitting in another Parliament. [Lord COLERIDGE, C. J.—We are expressly referred by sect. 26 to the old Parliamentary practice. BRETT, J.—According to your argument, the whole trial of the petition might be begun, continued, and ended after the dissolution.] That is so, and it is so contended. The Legislature can never have intended that the jurisdiction of an election judge should terminate by a dissolution. The old practice was, that even prorogation terminated the jurisdiction of an election committee. This was altered by 28 Geo. 3, c. 52, s. 33. Parliament has often sat and done business on the day of dissolution, as is shown by extracts from the Journals of both Houses, Dec. 29, 1660, June 10, 1818, July 17, 1837, July 23, 1847, July 21, 1852, March 21, 1857, July 6, 1865. [Lord COLERIDGE, C. J.—William the Fourth once dissolved during debate.] It is a recognised principle of law that judicial proceedings are presumed to have taken place at the earliest possible period of the day:

Wright v. Mills, 4 H. & W. 488; 28 L. J. 223, Ex.;
Shelley's case, 1 Rep. 93.

So that the determination as to costs will be presumed to have been given in point of time before the dissolution, or rather it is immaterial in point of law whether it was given before or after it. [GROVE, J. stated that as a matter of fact his judgment was delivered about half-past ten a.m., and that the certificate to the Speaker was posted before noon. The registrar, he said, had better depose formally to the exact hour, if anything should turn upon that.] However that may be, the certificate has been in fact entered upon the Journals of the House. With respect to the party to whom the certificate is given, the term "Speaker" is satisfied by Deputy-Speaker or Clerk of the House, or even by other officer performing the duties of the Clerk of the House:

Ballot Act 1872, s. 4;
Strachey v. Turley, 7 East, 194;
Ex parte Stockbridge Railway Bill, L. Rep. 2 Eq. 364.

In *Strachey v. Turley* (*ubi sup.*), a very similar objection to that in the present case was raised—that the authority given to a Speaker did not extend to the Speaker of another Parliament; but it was said by Bayley, B.: "It is agreed that the act to be done is merely ministerial, and may as well be performed by one Speaker as another. The Act (28 Geo. 3, c. 52, s. 22) mentions the Speaker generally; and though it does not add for the time

being, yet if such a construction be necessary to advance the remedy, we must so construe the general words. No injustice can ensue from such a construction, but great injustice would ensue from a narrower one, for immediately after a report made of a frivolous and vexatious petition, Parliament might be dissolved before any taxation could be made, and then if the Speaker in the next Parliament could not direct the taxation and grant a certificate, the remedy would altogether fail."

O. Russell, Q.C. and *W. G. Harrison*, for the petitioners, supported the rule.—This is a point of great importance, and being unprovided for by the Act of 1868, the court ought to decide it according to the old parliamentary practice before that Act. The election judges inform the House in the same manner as a parliamentary committee was accustomed to do; they are, in fact, merely the successors of the parliamentary committees, and, except as the Act directs, have the same powers, neither more nor less. The vacancy in the office of Speaker, provided for by sect. 4, did not happen in this case; the determination of the Speaker's office by a dissolution is quite a different thing from the contingency provided for by that section. In *Hurdle v. Waring* (30 L. T. Rep. N. S. 329), it is said by Lord Coleridge, C. J., at p. 331: "The true construction" (of the words "return their names," in sect. 2 of the Ballot Act 1872) "is, that 'return to be made,' means that the officer is to make it in such sense as that the Clerk of the Crown can act upon it." [Lord COLERIDGE, C. J.—That decision was founded on the special circumstances of the case, and on the peculiar position of the Clerk of the Crown.] They also argued that "given," in sub-sect. 13 of sect. 11, implied a donor and a donee, and that the suit being at an end by reason of the dissolution, there was no jurisdiction to give costs under it.

Lord COLERIDGE, C. J.—It is material to state the facts of this case, because I, for my part, wish to decide it mainly upon the facts alone. The petition, then, was filed on the 4th Nov. 1873, came on to be heard before Grove, J. on the 12th Jan. 1874, and the trial of it was proceeded with till the 26th of that month. On that day, about half-past ten in the morning, Grove, J. delivered judgment against the petitioners, and ordered costs to be paid by such petitioners. He also "forthwith"—an expression which I repeat now for an obvious reason—signed a certificate and report to the Speaker of the House of Commons, reporting the non-existence of corrupt practices. The report and certificate were posted at Taunton some time between eleven a.m. and noon, and reached London the same night. The present Speaker, who was also the Speaker of the late House of Commons, received the certificate and report after the dissolution of that Parliament. A curious question might arise in other matters as to the precise period of a dissolution, whether it is to be fixed by the affixing of the sign manual, or the counter signature of the minister, or the publishing of the Royal Proclamation. But we have to deal with judicial proceedings here; and with regard to such proceedings, it is a well-established rule that they are presumed to have taken place at the earliest possible moment of the day. The rule is well laid down in the elaborate decision in *Wright v. Mills* (*ubi sup.*), which exhausts the whole leaning of the subject. This judgment was given, and

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this certificate was written and given during the life of Parliament, and contemporaneously with his judgment, Grove, J., by word of mouth, made the order as to costs which is now called in question. All that could be done physically and judicially by Grove, J., was done by him during the lifetime of Parliament. But then it is said that the Act of 1868 makes two parties necessary to a certificate—that not only should the judge certify, but that the person who is to be certified should be in fact certified, and that the Speaker was not certified, on the ground that when the certificate reached him he was no longer Speaker. It becomes necessary, therefore, to consider the basis of this contention. Various sections of the Act have been referred to, but it is not necessary to examine any of them in detail, except sub-sect. 13 of sect. 11. [The learned judge read the sub-section, and proceeded:] The language of this most important sub-section is most carefully framed. Now, without deciding what would have been the result if the certificate had been given after the dissolution of Parliament, in the present case it is enough to say that the terms of this sub-section have been complied with. When the certificate had once been given by the judge, the determination became final to all "intents and purposes." But we are referred to our judgment in *Hurdle v. Waring* (*ubi sup.*), and it is urged that as in that case we looked to the party receiving as distinguished from the party sending a public document, so in this case, where words of a somewhat similar kind are used, we ought to look only to the Speaker and not to the judge. It is enough to say that the objects of the two sections, sub-sect. 2 and sect. 11, sub-sect. 13 of this Act, are different, and the words are different. In *Hurdle v. Waring* (*ubi sup.*), the time for presenting a petition was to be calculated from a particular event—the making of the return to the Clerk of the Crown in Chancery. Our decision in that case in no manner conflicts with our decision in this. The question of costs is not a matter contained in the certificate, nor has any reference to it. It forms no part of the certificate, and, strictly speaking, has no connection with the certificate at all. Now, can the dissolution take away the validity of the decision as to costs? I think not, if sub-sect. 13 has been complied with. Even from the narrowest construction of that section, it follows that the order as to costs was pronounced at a time when the judge had jurisdiction. The moment that the order was pronounced, a vested right to those costs accrued to the respondent by virtue of the order, and the petitioners cannot defeat that vested right by virtue of the subsequent dissolution. It is not necessary to go into sect. 41, but I strongly incline to the opinion that even if the order for costs had been given after the dissolution, such an order would have been good if the other proceedings in the petition had taken place before the dissolution. The judge might have taken time to consider, and the question of costs is often complex, and always ancillary to the substantial question in the petition. Mr. Giffard has properly laid great stress upon the large and elastic powers given by sect. 41, and it is my present impression that the jurisdiction, well founded upon and well exercised under that section, cannot be ousted. We have been pressed with our decision in *Carter v. Mills* (*ubi sup.*). We are not disposed to go back from that decision, which proceeded upon right grounds, and in no manner

conflicts with our decision here. This petition was prosecuted to the end, and all that remained to be done was to reduce the order as to costs into formal shape by the process of taxation. It is within the words of the Act, it is also consonant with justice, that where petitioners have made a groundless accusation, they should have to pay costs, and the mere accident of a dissolution an hour or two afterwards ought not to excuse them. Still, accident or no accident, we construe the Act as we find it, and I think that the respondent is entitled to the costs which the Election Judge has awarded.

BRETT, J.—I am of opinion that this rule should be discharged. The arguments to the contrary are, that some acts, whence the vested right to costs is sought to be derived, were done after the dissolution of Parliament, and therefore have no validity, and that other acts cannot be done now. But I think that after a petition is once launched, any vested rights given by interlocutory steps in it, might be realised, notwithstanding a dissolution. I am clearly of opinion that it is not correct to say that a petition drops by virtue of a dissolution happening at any time previous to the determination of it, however probable it may be that no new rights could accrue after a dissolution. But the determination of the judge, under sub-sect. 13 of sect. 11, is a determination in open court, and after that determination is once given, I do not see how it can be set aside. Whether a certificate could be given after the dissolution it is not necessary to decide. In this case it is clear that the certificate was drawn up and delivered as final before the dissolution. But it is said that the certificate did not arrive in time; that sub-sect. 13 of sect. 11 presumes a donor and donee, that there was no donee here, the Speaker having vacated his office by the dissolution, and in this respect it is urged that *Hurdle v. Waring* (*ubi sup.*) is an authority for the petitioners. But that case was so decided upon the well established rule that the section there construed was to be construed with reference to the state of things existing before the Act passed. Here, "given" is equivalent to "given by," not "given to," and when the certificate was received is not material. When once given by the judge it became final to all intents. I incline to think that an order for costs would be good, even if made after a dissolution, but it is not necessary to decide that point. Here a final judgment was pronounced, by virtue of which a vested right to costs accrued to the respondent under sect. 41.

GROVE, J.—I have very little to add. I purposely refrained from making any observations in the course of the argument, except for the sake of giving information, inasmuch as my own judicial acts were under examination; however, it appears those acts were not in any way incorrect. I think this judgment was complete when given in open court, and my strong impression is, that an order as to costs, having the same force as the judgment, might be made quite irrespectively of the certificate to the Speaker. The judgment once given, the judge has, by sect. 41, a plenary power as to costs, enabling him if not before, at least after the judgment, to make an order for their payment. Such an order is not a judgment, but rather a judicial adjudication of questions subsidiary to the question determined by the judgment. It must be remembered that in considering costs, we can get nothing from the common law, but must examine

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each statute under which the costs are given. When this certificate was delivered, the work of the judge was done, and it is admitted that all that work was done during the lifetime of Parliament. I do not see how the subsequent dissolution can relate back, and make that work or any part of it *coram non judice*. I think, both on the true construction of sect. 15 and sect. 41, the determination was final. *Rule discharged with costs.*

Attorney for the petitioners, *Ellis*.

Attorney for the respondent, *Holmes*.

EXCHEQUER CHAMBER.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

Nov. 26, 27, 1873, and Feb. 10, 1874.

REG. v. CHURCHWARDENS OF WIGAN AND OTHERS.

Mandamus—Loan for repairing church—Lapse of twenty years—5 Geo. 4, c. 36.

In 1849 the churchwardens and overseers of the parish of Wigan borrowed 4540*l.* from the Public Works Loan Commissioners under 5 Geo. 4, c. 36, s. 1, for the purpose of enlarging and repairing the parish church. The Act requires repayment by assignment of rates, to be made and levied in the same way as church rates, and as the commissioners shall direct, so that the repayment of principal and interest may be secured within twenty years at furthest from the date of the loan. The rates were duly assigned as required, and four annual instalments were paid to the commissioners, but nothing was paid after 1853. Since then the parish has been divided under several Acts of Parliament, and in 1871 the commissioners obtained a writ of *mandamus* to compel payment by the overseers of all the districts comprised in the old parish of the instalment due in 1854.

Held, by the Exchequer Chamber reversing the Queen's Bench, upon demurrer to the return, that the terms of this Act of Parliament both expressly and impliedly prohibit the making of a rate under the circumstances of this case; and that the return to the *mandamus* setting out the dates and facts was a good answer to the writ.

THIS was error from a judgment of the Court of Queen's Bench upon demurrer to the return to a writ of *mandamus*.

The writ was issued on the 15th Dec. 1870, on the prosecution of the Public Works Loan Commissioners, and was directed to the churchwardens of the parish of All Saints, in Wigan, and the overseers of the townships respectively of Wigan, Abram, Aspull, Billinge Chapel End, Billinge Higher End, Dalton, Haigh, Hindley, Ince, Orrell, Pemberton, Upholland, and Winstanley.

The writ, after reciting 5 Geo. 4, c. 36, ss. 1 and 2; 19 & 20 Vict. c. 104, ss. 1, 2, 15, 29; 31 and 32 Vict. c. 109, s. 3; and that before the 17th Sept. 1849, the several ecclesiastical districts, the overseers of which are defendants, were formed within the ancient parish of Wigan by various orders in council, under 59 Geo. 3, c. 134, proceeded: "And whereas we have been given to understand, and be informed in our court, before us, that on the 10th Aug. 1849, the churchwardens of the parish of Wigan aforesaid, and the overseers of the said several townships, did in pursuance of the said Act of 5 Geo. 4, with the consent thereby required, apply to the said Public Works Loan

Commissioners, for a loan of 4540*l.*, for the purpose of repairing, and, in part, rebuilding and restoring the church of the said parish. And that the said commissioners, being satisfied that such consent as required by the said Act of 5 Geo. 4, had been given, did in pursuance of the said last-mentioned statute on the 13th Aug. 1849, duly grant for the purposes aforesaid, a loan of the sum of 4540*l.*, which sum was received by the said churchwardens and overseers, and that afterwards for the purpose of securing repayment of the said loan of 4540*l.*, and interest at the rate of 4*l.* per cent. per annum in manner and form in that behalf directed and appointed by the said commissioners, a certain indenture, dated 17th Sept. 1849, was duly made between the said churchwardens and all of the said overseers of the one part, and John Strettell Brickwood, Esq., the then secretary of the said commissioners, of the other part."

This indenture, which was set out at length in the writ of *mandamus*, recited the said various Acts of Parliament and the completion of the preliminaries thereby required, and also that the thereinbefore named churchwardens and overseers constituted the whole of the churchwardens and overseers acting in or nominated or appointed to act in or for the said parish, or in or for any township, district, or place within the said parish; and witnessed that in consideration of the Public Works Loan Commissioners having caused to be delivered to the said churchwardens and overseers or their order a certificate in respect of which such churchwardens and overseers would be entitled to receive from the Commissioners for the Reduction of the National Debt the sum of 4540*l.*, the receipt of which certificate the churchwardens and overseers did thereby admit, the said churchwardens and overseers did for themselves and their successors thereby assign to the then Secretary of the Public Works Loan Commissioners "all and every the annual or other rates which shall from time to time be made in the said parish of Wigan under or in pursuance of such direction or appointment as aforesaid or which may be otherwise made under or by virtue of the provisions of the said Act of Parliament made and passed in 5 Geo. 4, and all and every sum and sums of money accruing and payable, or which shall or may at any time or times hereafter accrue, become payable, or be made, levied, or collected, or received in the said parish from or in respect thereof, to have, hold, receive, perceive, and take the said rates, sum and sums of money unto and by the said John Strettell Brickwood, his successors and assigns, subject to the proviso hereinafter expressed and contained, that is to say, provided always that if the said churchwardens and overseers of the poor, or other the churchwardens and overseers of the poor for the time being of the said parish, or any of them, do and shall on the 17th Sept. next, and which will be in the year 1850, and on the 17th Sept. in every then succeeding year until the whole of the principal moneys intended to be hereby secured shall have been fully paid off and satisfied, pay or cause to be paid unto the cashiers of the Bank of England at their office for the use of her said Majesty, her heirs or successors, interest at the rate of 4 per cent. per annum on the said sum of 4540*l.*, or on such part thereof as shall for the time being remain unpaid, such interest to be computed from the day to be mentioned for such purpose at the foot of the certificate to be issued for the said sum

of 4540*l.* and the further sum of 227*l.* in or towards the discharge of the said principal sum of 4540*l.*, until the whole of the said principal sum of 4540*l.* and the interest thereof shall be discharged; then and in that case or on any other acceptance of the said sum of 4540*l.* and the interest thereof, by or under the order or direction of the said Public Works Loan Commissioners, the assignment hereby made as aforesaid shall become absolutely void."

The writ went on to recite: "And whereas we have further been given to understand and be informed in our court before us, that of the instalments of principal made payable yearly by the aforesaid indenture, four only, amounting to 908*l.*, were paid with interest thereon, up to the 17th Sept. 1853, by means of general church rates made and levied by the churchwardens of the parish of Wigan over the whole parish of Wigan, including the said townships and districts; and that no further payment has been made in respect of either principal or interest on the said indenture, notwithstanding that applications for payment of the instalments due and the interest thereon have been from time to time duly made; and that no church rate has been raised in the parish of Wigan since the 30th Dec. 1853, which was the day of the date of the last payment, and that the instalments remaining unpaid, according to the said indenture, amounted to 4841*l.* 15*s.* 10*d.* for principal and interest up to the 17th Sept. 1866. And whereas we have further been given to understand and be informed in our court before us that there has been no rate assessment or taxation made by you, the churchwardens of All Saints, in Wigan, and the overseers of the townships of Wigan, Abram, Aspull, Billinge Chapel End, Billinge Higher End, Dalton, Haigh, Hindley, Ince, Orrell, Pemberton, Upholland, and Winstanley, upon the inhabitants and occupiers of lands, tenements, houses, and other things rateable within the said parish and the said townships for and towards the payment of any of the said instalments now remaining due, or of the interest thereon; and that although you, the said churchwardens and overseers, have been often requested to make such rate for the purpose aforesaid, according to the form of the Statutes in such case made and provided, yet you, the said churchwardens and overseers, not regarding your duty in this behalf, have absolutely refused and neglected, and still do absolutely refuse and neglect to make such rate, assessment, or taxation for the purpose aforesaid, according to the form of the Statutes in such case made and provided, in contempt of us, and to the great damage and grievance of the said commissioners as we have been informed. Therefore we, being willing that due and speedy justice should be done in this behalf, as it is reasonable, do command you, the said churchwardens and overseers, and every of you, firmly enjoining you that immediately after the receipt of this, our writ, you do without delay make and publish, levy, and collect, a rate pursuant to the said Statute of 5 Geo. 4, c. 36, for payment of the sum of 227*l.*, one year's instalment, due the 17th Sept. 1854, of the said loan of 4540*l.*, and 145*l.* 5*s.* 7*d.*, one year's interest at the rate of 4*l.* per cent. per annum on 3632*l.*, the unpaid balance of the said loan due and payable to the said Public Works Loan Commissioners, and secured by the said mortgage or assignment, dated the 17th Sept. 1849, of the rates of the parish of Wigan aforesaid; or that you sig-

nify to us cause to the contrary thereof, lest by your default the same complaint should be repeated to us."

Three separate returns were made to the writ of *mandamus*—(1) by the churchwardens of Wigan and the overseers of Wigan, Orrell, and Upholland; (2) by the overseers of Abram, Aspull, Billinge Chapel End, Dalton, Haigh, Hindley, Ince, Pemberton, and Winstanley; and (3) by the overseers of Billinge Higher End.

These returns were at great length; but the only objections to the writ argued before the Exchequer Chamber were those raised as follows in the first of the said returns. The same objections, although not in the same words, were similarly raised in the other returns, together with other objections which need not be particularly set out:

"That the said principal sum of money in the said indenture mentioned was advanced as aforesaid by the said commissioners under the powers and authorities of an Act of Parliament passed in the fifth year of Geo. 4, c. 36, and not otherwise; by which said Act it is directed that all instalments of the principal money advanced, together with all interest on the same shall be repaid within the period of twenty years at the farthest from the advancing of any such sums respectively; and that the said period of twenty years is now long since expired, and had so expired at the time of the date of the said writ of *mandamus*, wherefore the now pleading churchwardens and overseers return to the court here that no rate can or ought to be levied for the amount of principal and interest in the said writ mentioned, and that they cannot make, or ought they to be compelled to make, a rate for the levying or collecting of the said amount."

Of the churchwardens and overseers who made the three above-mentioned returns, those who made the returns numbered above (1) and (3) appeared together, and were represented by the same counsel.

The points relied upon by the defendants, who are above-numbered (1) and (3), and included in the returns, were—First, that the sums of 145*l.* 5*s.* 7*d.* and 227*l.* make up together a much larger sum than the sum due in any one year from the defendants to the said Public Loan Commissioners; secondly, that the said churchwardens and overseers are not the successors of the churchwardens and overseers to whom the loan was made by the said Public Loan Commissioners; thirdly, that the time within which the said loan was to have been repaid, is now long since elapsed, and that the said churchwardens cannot now lawfully make, levy and collect a rate for the purpose of repaying the said loan; fourthly, that by reason of the long time which has elapsed since the making of the said loan, the inhabitants of the said parish of Wigan, and of the townships of Orrell and Upholland, are different persons from those who contracted the said loan, and that the said now existing inhabitants never consented to the contracting of the said loan, and have had no benefit therefrom, and that it is unjust to compel them to repay the said loan; fifthly, by the Act of Parliament, 5 Geo. 4, c. 25, and other Acts in that behalf, empowering the said commissioners to make the said loan, it is provided that the repayment of the said loan shall be made in a certain prescribed manner and not otherwise, and that it

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is now impossible to repay the said loan in that manner by the said Act of Parliament prescribed; sixthly, and the churchwardens of All Saints will contend that if any rate or rates can now be laid such rate or rates must extend over the whole of the ancient parish of Wigan, and that the overseers of all the townships comprised within the said ancient parish, and the churchwardens of all districts therein comprised, which have since the 2nd Sept. 1849 become separate and distinct parishes for ecclesiastical purposes, must join the churchwardens of All Saints in making and levying such rate or rates.

The points relied upon by the other defendants (2), and included in their return, were:—First, That the statute 5 Geo. 4, c. 36, limits the repayment of a loan contracted under its provisions to annual or half-yearly rates, made in such manner and form as the commissioners should direct and appoint, and the commissioners, by the mortgage or assignment, dated 17th Sept. 1849, in the said case mentioned, directed and appointed the manner and form of the rates to be made in repayment of the loan therein mentioned, to wit, that such rates and repayments should be made annually, as therein specified, and that the defendants herein cannot now levy a rate for an instalment of the said loan, or for interest which were respectively due on the 17th Sept. 1854; secondly, that separate ecclesiastical districts formed, under the 58 Geo. 3, c. 45, and subsequent Church Building Acts in manner as certified and returned by the said overseers in their return to the said writ of *mandamus* herein are by the 58 Geo. 3, c. 45, s. 71, exempted from liability to contribute to the repair of the original parish church after twenty years from the consecration of the church or chapel therein, and it was beyond the power of the churchwardens and overseers of the parish church of Wigan to contract an obligation which should bind such districts beyond the said period of twenty years; thirdly, that the indenture of the 17th Sept. 1849, is void, inasmuch as the therein-named churchwardens and overseers, who were parties to the said indenture, did not constitute the whole of the churchwardens and overseers acting in or nominated or appointed to act in or for the said parish of Wigan, or in or for any township, district, or place within the said parish, as by the statute 5 Geo. 4, c. 36, is in that behalf required; fourthly, that the defendants are not proper persons to make and levy a rate for paying and satisfying the claims herein, inasmuch as they are not the churchwardens and overseers of the poor of the parish of Wigan, or their successors.

Manisty Q.C. (with him *Fitz Adam*), argued, on behalf of the overseers of Abram, Aspull, Billinge Chapel End, Dalton, Haigh, Hindley, Ince, Pomberton, and Winstanley, appellants from the decision of the court below.—This loan was obtained under 5 Geo. 4 c. 36, which by sect. 1 enables churchwardens and overseers, with consent of the bishop and a certain proportion of the inhabitants, to apply to the commissioners authorised and empowered to make advances for public works, under the provisions of some previous Acts for such sum in exchequer bills or money as shall be necessary for defraying the expense or any part of the expense of rebuilding, repairing, enlarging, or otherwise extending the accommodation in any church or chapel of any parish, district, or division.

The commissioners are authorised to grant the loan, and the churchwardens and overseers to apply it to the purposes required; the section goes on, "From and after the grant of any such loan or advance it shall be lawful for the churchwardens or chapelwardens and the overseers of the poor of the parish, in respect of which such loan or loans shall be advanced as aforesaid, and their successors from time to time for the time being, and they are hereby authorised and required to make such annual or half-yearly rates for the repayment of the sums so advanced, in such proportions and at such times as shall be directed and appointed by the said commissioners on that behalf, and to assign the rates so to be made as aforesaid, as a security for the repayment of the sums so advanced, in such manner and form as the said commissioners shall direct and appoint; and so as to secure the repayment of all sums so advanced, with interest thereon, at and after the rate of 4 per cent. per annum, by annual or half-yearly instalments, on the amount of the principal money advanced within the period of twenty years at farthest from the advancing of any such sums respectively." Sect. 2 enacts "That it shall be lawful for any churchwarden or chapelwarden or overseer of or in any parish or district, or division of any parish in which any rates shall be made under the provisions of this Act, to collect, demand, and receive, sue for, levy, and recover all such rates, by all such ways and means as any church rates may by law be collected, demanded, received, sued for, levied, and recovered, as fully and effectually as if all powers, authorities, provisions, penalties, and forfeitures relating to the collecting, demanding, suing for, levying, receiving, and recovering of any church rates, or relating to any refusal to pay any like rates, were specially repeated and enacted in this Act, any law, statute, usage, or custom to the contrary notwithstanding." This loan was obtained in 1849, and this *mandamus* directs the payment now, or when it was issued in 1870, of the instalment due in 1854. The inhabitants of this parish in 1870 cannot be liable for the debt of the inhabitants of 1854. The Legislature has prescribed exactly the time and means for the repayment of these loans, and the commissioners, having omitted to adopt the provisions of the statute, cannot employ other means of enforcing payment for which no provisions have been made. It was the intention of the Legislature that the actual inhabitants of the parish which had the benefit of the advance, should repay the loan, and not those who followed after them. Further, the churchwardens and overseers cannot make such a rate. Sect. 2 provides that it shall be done in the same way as a church rate, and there is no power at common law to make a church rate, except prospectively, that is, for expenses not yet incurred. [COLERIDGE, C.J.—Does the 1st section mean that no payment is to be made after twenty years, or merely that the commissioners are so to direct?] No payment can be made after twenty years. The first case on the subject seems to be *Reg v. Dursley* (5 A. & E. 10), in which it was held that under 59 Geo. 3, c. 134, s. 14, churchwardens cannot raise a loan on the credit of the church rates to pay a debt for repairs incurred in a past year. The loan ought to be raised at the time when the repairs are done, and the laying of rates for the repayment should commence immediately, and be continued so as to pay off the debt

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by the annual instalments. [COLERIDGE, C.J.—That is not the question in this case.] But the judgment is with respect to church rates, similarly to which, by sect. 2, these rates are to be levied. Wightman, J. said of that section, in *Reg. v. The Justices of Staffordshire, Ex parte The Churchwardens of Abbots Bromley* (27 L. T. Rep. 284), "Whatever the intention of the Legislature may have been, the words of the Act are so strong and unambiguous that I cannot distinguish this case from that of an ordinary church rate." Lord Denman said, in the former case, at p. 15: "It is a general rule with respect to parish rates, founded on obvious principles of policy and justice, that they are not to be made retrospectively. The payers being a fluctuating body, nothing, generally speaking, is more just or more likely to conduce to economy than to hold that they who create a charge shall themselves bear it." And after alluding to the required sanction of the vestry, bishop and incumbent, and the authority to raise, by rate, a sum not less than 10 per cent. of the principal, he proceeds: "It appears to us that all these provisions point clearly to the limits of departure from the general principle above stated." In *R. v. The Churchwardens of St. Michael's, Pembroke*, the agreement, under 59 Geo. 3, c. 134, s. 40, was that the sum borrowed should not be called in for twenty years, but that interest should be paid in the meantime. Application in that case was made to this court before the end of the twenty years, and one ground of the argument was that the applicant could have no remedy when the time expired. *R. v. Carpenter* (6 A. & E. 794), is another instance of a refusal to grant a *mandamus* to make a rate for the repayment of a loan after the time fixed by statute. *R. v. St. Michael's, Southampton* (6 E. & B. 807), was distinguished from *R. v. Dursley*, in that the loan was for a present, and not a past debt. And in *Piggott v. Bearblock* (4 Moo. P. C. 399), it was held that 59 Geo. 3, c. 134, s. 14, did not authorise churchwardens to borrow money upon the credit of the church rates for repayment of a debt incurred in past years for repairs to the church. In *Cortis v. Kent Waterworks Company* (7 B. & C. 314), it was held that under a local Act, with somewhat similar provisions to these, commissioners could not make a retrospective rate in order to reimburse themselves in one year money which they had paid in a former year on account of the gaol rate. Bayley, J., in delivering the judgment of the court, stated at p. 344, that the first objection to the rates there mentioned, "is that they are retrospective, and have the effect of casting upon the tenants at one period burdens which ought to have fallen on those who were the tenants at a preceding period;" and afterwards, p. 345, "these objections to the gaol rates appear to us to be fatal." So it was held in *Woods v. Reed* (2 M. & W. 777), that under the Municipal Corporation Act, the council of a borough have no power to make a retrospective rate.

Field, Q.C. (with him Barstow), followed on behalf of the other appellants:—This is a *mandamus* to the defendants to do, not what they ought by statute to have done, for that is now impossible, but something quite different, in order that the commissioners may be repaid. The Act gives to the defendants only power to levy such rates as the commissioners directed; those rates were fixed by the deed of assignment, so as to in-

sure payment by certain instalments. Those instalments cannot now be paid, and this *mandamus* asks for payment in a totally different manner. In *Burland v. Local Board of Health of Hull* (3 B. & S. 271), certain occupiers who had paid rates in error applied for a *mandamus* to the local board to levy a rate for the purpose of repaying them; but as it was provided by the Local Improvement Act that any rate to be laid for defraying liabilities incurred should be laid within six months, it was held that as the six months limited by the statute had expired, they were not entitled to the *mandamus*. And further, even if the defendants under any circumstances could be liable now for this claim of the commissioners, it must first devolve upon the latter to explain the delay since default took place. This was so held under 6 & 7 Will. 4, c. 96, s. 3, which provides for payment of a sum charged within a certain time in *R. v. Overseers of Hurstbourne Tarrant* (E. B. & E. 246.) [COLERIDGE, C.J.—Is your construction of this Act necessarily right? May not the limitation of twenty years apply to the assignment only, and not to the security? If so, the liability would continue upon the successors of the original rate-payers.] The natural meaning of the section is that the limiting words apply to both parts of the sentence. In *Waddington v. Guardians of London Union* (E. B. & E. 370), where collected rates were embezzled, it was held that a rate partly to take the place of this lost amount was wholly bad, being partly in the nature of a retrospective rate, although some items were free from objection.

H. Cowie, for the Public Works Loan Commissioners, supported the judgment of the Queen's Bench.—There can be no question before this court of laches on the part of the commissioners, and there has been no suggestion that the loan was not valid and legal. This is in the nature of a demurrer, and the only point to be decided is whether this return is sufficient. There is no suggestion of any laches on the record; and, by directing the writ to issue the court below has decided all the facts in favour of the commissioners. Then it must be remembered that this is not a church rate, although it has to be levied in a similar manner. Special stress was laid upon this distinction by the Privy Council in *Smallbones v. Churchwardens of Whitchurch* (40 L. J. 8, Ecc. Cas.), where it was held that other persons besides those subject to church rates were subject to the payment of rates under this Act. And further, the House of Lords has laid down the rule as to retrospective rates on a common sense basis very different from the contention of the other side; it was held in *Harrison v. Stickney* (2 H. of L. Cas. 108), that there is no rule of law which prohibits a retrospective rate. In every case of rating the question is whether the Act under which a rate is made either expressly or impliedly prohibits such rate from being retrospective. With regard to the main question the three cases *R. v. Carpenter*, *R. v. St. Michael's, Southampton*, and *R. v. Overseers of Hurstbourne Tarrant*, in all of which the earlier cases, although cited were not followed, are distinct authorities in favour of the commissioners. The mortgage in this case is according to the form given in the statute, and its validity throughout has not been disputed. The intention of the Legislature may have been that the money should be repaid in twenty years, but there is nothing in the Act to preclude the com-

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missioners from recovering after the lapse of that period; and this cannot be justly said to be any hardship upon the present inhabitants, for they have the benefit of this public money, and now enjoy the use of the restored church. [BRAMWELL, B.—The state of things seems to me to be this:—you had a right to a rate in 1853; therefore you say you have a right to the same rate in 1873: that is, the churchwardens of Wigan, not having done that which they ought to have done in 1853, you now ask us to mandamus them to do something else. COLERIDGE, C.J.—That objection would have applied to a *mandamus* in 1854 as much as now. BRAMWELL, B.—Perhaps so, but then the prosecutors ought to show in the writ that there have been no laches on their part.] The Queen's Bench have found in our favour on that point, and it cannot now be disputed. The *Hurstbourne Tarrant* case turned on the same point. [DENMAN, J.—There is no statement in the writ that you have not been guilty of negligence. COLERIDGE, C.J.—It is stated that the commissioners made application for payment from time to time.] The case of *Burland v. Local Board of Health of Hull*, was reviewed and explained in *Worthington v. Hulton* (L. Rep. 1 Q. B. 63). Mellor, J., said of it (at p. 66), that "all that was necessary for the decision of the case, and all that can be considered as really decided by it, was that a plaintiff could not claim as of right, a *mandamus* to enforce a judgment, where there was great and unexcused delay in commencing the original action." That the remedy by *mandamus* is not barred by any lapse of time appears from *Ward v. Louwides* (29 L. J. Q. B. 40), and *R. v. Churchwardens of St. Mary, Lambeth* (3 B. & Ad. 651.)

Manisty, Q.C., in reply.—This is not an appeal to review a matter of discretion in the Court of Queen's Bench. That court has a discretion only in its issue of the writ of *mandamus*. After the return to a writ, the court has no discretion at all. Then the matter becomes one of strict law for every court which has to consider it.

Curr. adv. vult.

Feb. 10, 1874.—Lord COLERIDGE, C.J., delivered the judgment of the court (Lord Coleridge, C.J., Bramwell, B., Keating, J., Cleasby, B., Grove, J., Pollock, B., and Denman, J.).—This is a proceeding in which the Public Works Loan Commissioners are attempting, by a *mandamus* issued in the year 1871, to enforce against the present churchwardens of Wigan the repayment to them of the balance of a sum of 4540*l.* advanced by them to the then churchwardens of Wigan in Sept. 1849. The money was originally advanced under the powers of 5 Geo. 4, c. 36, s. 1, and the repayment was secured by a deed by which the commissioners directed the making of certain annual or other rates, and the churchwardens assigned the said rates each respectively on the terms of the Act of Parliament. Four annual instalments were paid amounting altogether to 908*l.*, the last instalment having been paid on the 17th Sept. 1853. Nothing has been since paid. The *mandamus* has been issued to compel the payment of an annual instalment of 227*l.*, which was due on the 17th Sept. 1864, and 145*l.* 5*s.* 7*d.*, one year's interest at 4 per cent. on the unpaid balance of the loan. Various changes and divisions have taken place under various Acts of Parliament in the parish of Wigan since 1854; but it was considered, and

we think rightly, that those made no substantial differences in the question to be determined, and we content ourselves therefore with mentioning the fact in general without pursuing it further in detail. We are unfortunately not in possession of the reasons which led the Court of Queen's Bench to issue the *mandamus*. The Court appears to have given judgment upon the return without much argument, having, as we understand, heard the rule very fully argued before the writ was issued, and given judgment upon the return in accordance with the opinion they had previously intimated; and the Court of Queen's Bench, supposing it to be a matter of discretion, do not state that they have in fact exercised that discretion upon the particular circumstances of this case, or whether they were of opinion that the commissioners were entitled to the writ, *ex debito justitiae*, and that no question of discretion arose. In this state of things the matter comes before us, and the question is whether this peremptory writ of *mandamus* shall or shall not issue. By the terms on which the money was advanced, the commissioners were to be repaid in twenty years by annual payments, the funds for which were to be procured by rates made yearly or half-yearly. This was the bargain in accordance with the statute. The commissioners had no right to assent to earlier payment: they had no power to postpone the time of payment of the whole, or any instalment. No agreement with the parish could make such a postponement lawful. They had no right, therefore, according to the strict words of the statute, directly or indirectly, to two annual payments in one year, nor to any payment after the twenty years, nor to the making of any rate other than those agreed for. In this case, it should be noticed that the amount is not made a charge upon the church rates, or any known fund of a similar description, as in two cases referred to in the argument in *Reg. v. St. Michael, Southampton* (6 E. & B. 807), and *Reg. v. Hurstbourne Tarrant* (E. B. & E. 246). We have only an enactment that it shall be repaid by the means specified. It is true, as Mr. Cowie pointed out, that in the deed the words, "or which may otherwise be made," are used as to rates, with what object does not appear. But the phrase would be satisfied by quarterly rates, or by rates not made precisely half-yearly, but say at intervals of four or eight months in the twelve. The commissioners have no right except to annual payments, the funds for which were to be provided in the year preceding the day of payment. They now say that they are entitled to sixteen instalments at once, the funds to be raised by rate or rates to be forthwith made many years after the first instalment became due, and some years after the last did so. The present *mandamus*, indeed, is in respect of one instalment only, but it is claimed on reasoning which, if good for that one, is good for the whole sixteen; and, indeed, at first the claim was for a rate or rates to raise funds for the whole balance unpaid. It is clear, from what has been said that they are not entitled to this by virtue of the bargain at the time of the advance; if entitled to it at all, it is on some other ground. It must be some right, if any, resulting from the contract and what has followed on it—in fact, resulting from this, that the parish, with the sufferance of the commissioners, has not paid. It

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remains to consider if there is any such right. As already pointed out, the commissioners had a right to require that such rates as agreed for should be made. If the churchwardens and overseers failed to make them, they would probably have been liable to a proceeding in the nature of an action for breach of duty in not making the rate. But the commissioners could not in our opinion have been confined to this personal remedy. Default or not in the overseers, yet if the rate proved insufficient, or could not be collected, or was embezzled by the collector, the commissioners would have been entitled to compel by *mandamus* the parish, which by its officers had made default in making, collecting, or handing over a rate, to pay and make a rate for payment. It is true that the persons subject to such rate would be as to some individuals different from those who would have been subject to the rate which ought to have been made. That is matter which could not have been helped from the nature of the case. But the present proceeding is not that or anything like it; it is a demand on the present inhabitants to pay a debt which ought to have been paid by others; not to make good their own defaults, but those of other people; to make rates now not to provide for instalments becoming due, but for instalments due long ago, and suffered by the commissioners to remain unpaid. It is said in answer to this that if the commissioners might come six months after default, they may come after twenty years, and that the only question would be in each case, have they come in a reasonable time, and that has been decided by the Queen's Bench conclusively. To this answer the following replies seem good and sufficient: There is nothing in the *mandamus* to show that this rate is asked for upon and in consequence of the default of the parish, in such a way as that in which there might have been a right to ask for it. There is nothing shown save that the money has not been paid; and this it may be by consent of the commissioners, though indeed some years ago they appear to have asked for it, but to have made no attempt to enforce compliance with their request by any legal measure. Had this been shown, and if there was a question whether they had come in a reasonable time, calling on the parish, the same persons as near as might be, to make good their default, then, if the right is discretionary, the judgment of the Queen's Bench on the motion for the *mandamus* would be final. But no question of discretion of this nature arises in this case. The writ, no doubt, is a prerogative writ, and not of right. But it is a writ asked for to enforce a private right. The right is one which, but for the technical difficulties of suing, might be claimed in an action. How could a court of law refuse judgment for the plaintiffs on the ground that they had not come within a reasonable time, if they had a right to come at any time? The Queen's Bench exercises discretion as to granting the writ where it is sought to enforce a public, not a private, right, or where there is another remedy, and from lapse of time or other reason that by *mandamus* is inconvenient. But on what ground can the court refuse to enforce a right, barred by no statute of limitations, on the ground that there has been delay? None has been suggested, nor can we suggest one. Suppose the technical difficulty of maintaining an action of *mandamus* did not exist,

and if such an action had been brought by the commissioners, there would have been no question of discretion in this court. The commissioners would have to show that they came at a proper time. Any averment to that effect might have been traversed, and must have been tried by the jury. And surely this case must have been decided on the same principles, although the writ asked is a prerogative writ. It must be remembered that there is here no other remedy, and to refuse this *mandamus* can only be on the ground that there is no right. If their not coming in a reasonable time causes the commissioners to lose their right, their coming in a reasonable time is a step in their title to the remedy, and whether they have come in a reasonable time or not is a question of fact, and this *mandamus* is bad for not averring that they had come in a reasonable time. It is very easy to understand why it is not averred. In *Reg. v. Stainforth Canal Company* (1 M. & S. 32), and in *Reg. v. Leeds and Liverpool Canal Company* (11 A. & E. 316), where the *mandamus* was refused because the application was late, there was another remedy. In another case decided in the Court of Queen's Bench, the writ was refused because there was another remedy, and that by *mandamus* would have been oppressive (see *Norris v. Irish Land Company*, 8 E. & B. 512). As to the authorities on the subject of retrospective rating, it was admitted on all hands that the question depended on the particular statute and bargain in this case; but there can be no doubt that the rule or principle is that parishes are not to get into debt, and leave succeeding inhabitants to pay off what should have been paid by them. Lord Wensleydale indeed, delivering, as Parke, B., the unanimous opinion of the judges in *Harrison v. Stickney* (2 H. of L. Cas., p. 125), expresses himself as follows: "There is no rule of law which prohibits a retrospective rate. That depends upon the intention of the Legislature, and the question is whether the Act under which each rate is made does so expressly or impliedly." We have already explained why we think the court below is not to be taken to have exercised its discretion in this case in any sense which would render it improper for us to review it, and we think that the terms of the Act of Parliament do in this case, in the words of Lord Wensleydale, both expressly and impliedly, prohibit the making of the rate, to enforce the making of which the *mandamus* has been issued. We are of opinion that the judgment must be reversed.

Judgment for defendants.

Attorneys for prosecution, *Barnes and Bernard.*

Attorneys for defendants, the Churchwardens of Wigan, and the Overseers of Wigan, Orrell, and Upholland, *Paterson, Snow, and Burney.*

Attorneys for defendants, the Overseers of Abram, Aspull, Billinge Chapel End, Dalton, Haigh, Hindley, Ince, Pemberton, and Winstanley, *Sharpe, Parkers, Pritchard, and Sharpe, for Mayhew and Son, Wigan.*

Attorneys for defendants, the Overseers of Billinge Higher End, *Gregory, Rowcliffe, and Co.*

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REG. v. C. S. FRANCIS.

[C. CAS. R.,

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

April 25 and May 8, 1874.

(Before Lord COLERIDGE, C.J., BLACKBURN, J.,
PIGOTT, B., LUSH, J., and CLEASBY, B.)

REG. v. C. S. FRANCIS.

Evidence—False pretences—Guilty knowledge.

Prisoner was indicted for an attempt to obtain money from W., a pawnbroker, by false pretences (inter alia) that a ring was a diamond ring; and also for an attempt to obtain money from D. another pawnbroker by a similar false pretence. To show guilty knowledge, evidence that he had shortly before offered other false articles to other pawnbrokers was held to be properly admissible.

CASE reserved for the opinion of this Court by Blackburn, J.

The prisoner was indicted at Northampton Assizes jointly with one Joseph Roberts.

The indictment contained counts for a conspiracy to defraud and also a count for an attempt to obtain money from one George Walters by false pretences *inter alia* that a ring was a diamond ring. And a count for attempting to obtain money from Caleb Dyer by a similar false pretence.

On the trial evidence was given that Francis came on the 8th Jan. 1873, to the shop of Walters, who is a pawnbroker in Northampton, and asked for an advance of 15*l.* on the pledge of a hoop ring which he represented to be a diamond ring, a silver watch, and a gold chain. The pawnbroker examined the ring, and declared it was not a diamond ring. He refused to advance anything on it. The prisoner Francis after asking for an advance of 11*l.* left the shop. Francis immediately proceeded to the shop of Dyer, who is also a pawnbroker in the same street, and asked for an advance of 13*l.* on the same property. He obtained no advance, and was taken into custody on a charge of giving a false name and address under the Pawnbrokers' Act.

The ring was produced in court and evidence was given that the stones were not diamonds, but crystals and were not worth more than 6*l.* each.

Francis's statement when taken and his defence at the trial was that he did not know that the ring was false, he being employed as he said by Roberts to pawn the ring, and believing his assertion that it was a diamond ring.

Evidence was then offered in order to prove guilty knowledge in Francis that he had shortly before offered other false articles to other pawnbrokers. I admitted the evidence, but as the cases relied on for the prosecution were all cases either of forgery or uttering counterfeit coin, I reserved the question whether on such a charge as this, such evidence was admissible for the purpose of proving guilty knowledge.

A witness was called who proved that on the 6th Jan. 1873 at Bedford, the prisoner Francis obtained 35*s.* from a pawnbroker of the name of Lazenby on the pledge of a chain represented by him to be a gold chain, and that he then gave a false name and address. The chain was produced in court and evidence was given that it was silver coated with gold and not worth 35*s.*

On the same day the 6th Jan. Francis at Leicester, offered to a pawnbroker called Stowe, who was called as a witness, in pledge a watch and a cluster ring consisting as he said of diamonds,

and asked for an advance of 15*l.* upon them. The pawnbroker refused to advance anything, telling him the ring was not a diamond ring.

On the same day Francis offered in pawn to Taylor, also called as a witness, the son of a pawnbroker in Leicester, a watch and a cluster ring which he said was a diamond ring, and asked 13*l.* on them. Taylor thought the ring not a diamond ring, but did not say so to the prisoner. He told him that he could not advance so much in the absence of his father, and desired the prisoner to come again next day. He did not do so.

The cluster ring mentioned by these two witnesses was not produced in Court, and the only evidence that it was false was the opinion of Stowe and Taylor that it was so.

There was no sufficient evidence against Roberts, and I directed his acquittal and a verdict of not guilty on the counts for a conspiracy.

I left to the jury the case against Francis on the counts for an attempt to obtain money by false pretences, telling them that it was of the essence of the charge not only that Francis attempted to obtain the advance on the ring as a diamond ring when it was not, but also that he then had guilty knowledge that it was not. And I left to them as evidence of that guilty knowledge the previous transactions. The jury found him guilty. I have no doubt that the evidence admitted had much weight with them and therefore if the evidence was improperly received the conviction should be quashed.

I sentenced the prisoner to five months' imprisonment but respite the execution of the sentence till the point of law was determined, directing that he should be admitted to bail if he could find two sureties in 50*l.* each.

The question for the opinion of the Court is,

Whether the evidence above mentioned was properly received for the purpose of proving guilty knowledge.

(Signed) COLIN BLACKBURN.

Hensman for the prisoner.—The evidence in question ought not to have been received, for it was calculated merely to introduce prejudice against the prisoner, and to embarrass him in his defence by importing a number of other charges into the case without notice, and which he had not a fair opportunity of defending himself against. By the Prevention of Crime Act 1871 (34 & 35 Vict. c. 112), s. 19, evidence of other stolen property having been found in the possession of a person proceeded against for having received goods knowing them to be stolen, may be given, but that is limited to the period of twelve months previously. But here the principle upon which it is proposed to admit the evidence in question, has no limit in point of time. [BLACKBURN, J.—Yes, it must be reasonably near the time to the case before the court, to afford a presumption of the prisoner's innocence.] Evidence of this kind has heretofore been usually confined to cases of passing counterfeit coin, and forged bank notes. In 1 Rus. on Crimes 127 (3rd edit) it is said "For the purpose of proving the act charged in the indictment to have been done knowingly, it is the practice to receive proof of more than one uttering, committed by the party about the same time, though only one uttering be charged in the indictment. This is in conformity with the practice on trials for disposing of and putting away forged bank notes, knowing them to be forged." In *Reg. v. Oddy*

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(20 L. J. 198, M. C.; 5 Cox C. C. 110), where before the 34 & 35 Vict. c. 112, it was held that on an indictment for receiving stolen goods, evidence that the prisoner had at a time previous to the receipt of the prosecutor's goods had in his possession other similar goods stolen from another person, Lord Campbell, C.J. said "that the evidence went to show that the prisoner was a very bad man and a likely person to commit such offences as those charged, but that the law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the same person, that the evidence which was received did not tend to show that the particular goods in the indictment were stolen at the time that he received them, that the rule which had prevailed in the case of indictments for uttering forged bank notes of allowing evidence to be given of the uttering of other forged notes to different persons, had gone to great lengths, and that he should be unwilling to see the rule applied generally in the administration of the criminal law." So in *Reg. v. Holt* (30 L. J. 11, M. C.; 8 Cox C. C. 411) it was held that upon an indictment for obtaining a sum of money from a customer of the prosecutors by a false pretence, evidence that the prisoner had obtained within a week previously another sum of money from another customer by a like false pretence was inadmissible. [Lord Coleridge, C.J. referred to *Reg. v. Gray* (4 F. & F. 1102), where the prisoner was indicted for arson with intent to defraud an insurance company, and in order to prove that the fire was the result of design and not of accident, evidence was admitted that the prisoner had previously occupied two houses in succession both of which had been insured, that fires had broken out in both, and that the prisoner had been paid by the insurance companies in respect of such fires. Again in *Reg. v. Geering* (18 L. J. 215, M. C.) where upon an indictment of a woman for poisoning her husband by arsenic in order to show that his death was not accidental, evidence was admitted that arsenic had been taken by three of the sons a few months after their father's death, and that the husband and the three sons all exhibited the same symptoms, and that the woman had been in the habit of preparing their meals.] In those cases the evidence seems to have been admitted on the ground that it was evidence of one continuing transaction. In *Reg. v. Oddy*, Alderson, B. said one reason why such evidence had been held to be admissible in charges of uttering may be that one act of uttering a forged note or bill may be said to be similar to another act of uttering a forged note or bill. And so it is clear that the Act received in evidence is of the same nature as that which it is admitted to explain." A man has no right to be in possession of forged notes, but he has a right to be in possession of false diamonds. Again the evidence received was of offences against different persons. The cases of *Reg. v. Millard* (Rus. & Ry. 245), *Reg. v. Forbes* (7 C. & P. 224) and *Reg. v. Cooke* (8 C. & P. 582) were then referred to. However it may be with respect to the admission of evidence of the acts themselves, what was said and done by the prisoner and the pawnbrokers at the time was not receivable. Evidence only of the fact of pawning and attempting to pawn false jewellery was admissible: (*Reg. v. Phillips*, 1 Lew 106; *Reg. v. Frindge*, 33 L. J. 74, M. C.; 9 Cox C.C. 430.)

No counsel was instructed to argue for the prosecution.

Cur. adv. vult.

May 8.—The judgment of the court was this day delivered by Lord COLERIDGE, C.J.—In this case the question reserved for the court is, whether the evidence mentioned in the case was properly received for the purpose of proving guilty knowledge. No question is reserved as to the weight of that evidence, the judge who tried the case not entertaining any doubt that if the evidence was properly received the verdict was justified. It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is, whether, at the time he did it, he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible. It tends to show that he had been pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive; for a man may be many times under a similar mistake or may be many times the dupe of another. But it is less likely he should be so often than once, and every circumstance which shows that he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last. This is amply borne out by authority. In the case of *Reg. v. Tattersall*, mentioned by Lord Ellenborough in *Reg. v. Wylie* (1 N. R. 93), the question reserved by Chambre, J., was "Whether the prisoner had not furnished pregnant evidence, and whether the jury, from his conduct on one occasion might not infer his knowledge on another." The opinion of the judges was that the jury were at liberty to make such an inference. The cases in which this had been acted on are most commonly cases of uttering forged documents or base coin, but they are not confined to those cases. Now, in the present case the prisoner was tried on two charges of attempting on the 8th Jan. at Northampton, to obtain money from two different pawnbrokers by the false pretence that a worthless piece of jewellery consisted of real stones, and evidence that he, on the 6th Jan. at Bedford, obtained money from another pawnbroker on the pledge of a chain which he represented to be gold when it in fact was not gold, was surely matter from which the jury might infer that he was pursuing a course of cheating pawnbrokers by knowingly passing off on them false articles under the pretence that they were genuine; and that inference was greatly strengthened by the fact that he at that time gave a false name. And though the charge on which he was tried was for attempting to pass off a false ring, the inference that he had a guilty knowledge is as legitimate as if it had been a second false chain. It was objected that the evidence of what took place at Leicester was not properly received, because the cluster ring which he there attempted to pass was not produced in court, and that the evidence of two witnesses who saw it, and swore to its being false was not admissible. No doubt if there was not admissible evidence that this ring was false it ought not to have been left to the jury. And though the non-production of the article may afford ground for observations more or less weighty, according to circumstances, it only goes to the weight not to the admissibility of the evidence, and no question as to the weight of this evidence is now before us. Where the question is as to the

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effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced, or the non-production is excused, no secondary evidence can be received. But there is no case whatever deciding that when the issue is as to the state of a chattel, e.g., the soundness of a horse or the quality of the bulk of goods sold by sample, the production of the chattel is primary evidence and no other evidence can be given till the chattel is produced in court for the inspection of the jury. The law of evidence is the same in criminal and in civil suits. The conviction therefore should be affirmed.

Conviction affirmed.

ROLLS COURT.

Reported by G. WILBY KING and S. H. S. LOFTHOUSE, Esqrs.,
Barristers-at-Law.

Tuesday, April 21, 1874.

ATTORNEY-GENERAL v. COCKERMOUTH LOCAL BOARD.

Local board—Sewage—Outfall into natural stream—Fouling water—Nuisance—Local Government Act Amendment Act 1861 (24 & 25 Vict. c. 61) s. 4.

Bill and information filed to restrain the local board of health of a town from using an outfall drain without their district, by which sewage was discharged into a natural stream, until such sewage should be freed from all excrementitious or other foul or noxious matter, such as might affect or deteriorate the purity and quality of the water in such natural stream, or occasion a nuisance to the inhabitants of the district represented by the plaintiffs:

Bill dismissed with costs, there being no evidence of nuisance to the plaintiffs, but injunction granted on the information, which was a proceeding by the Attorney-General to enforce the terms of a public Act of Parliament against a public body, and did not require any evidence of injury to support it.

THIS was an information and bill by the Workington Local Board, as relators and plaintiffs, against the Cockermouth Local Board, to restrain the defendants from using an outfall drain, situate without their district (by which the sewage matter was discharged into the River Derwent), until such sewage should be freed from all excrementitious or other foul or noxious matter such as might affect or deteriorate the purity and quality of the water in the River Derwent, or occasion a nuisance to the inhabitants of the district of Workington. The information was filed to enforce the provisions of the 4th section of the Local Government Act Amendment Act 1861 (24 & 25 Vict. c. 61), which is as follows:

Local boards may exercise the powers given by the forty-fifth section of "The Public Health Act 1848," also without their district for the purpose of outfall or distribution of sewage, upon making due compensation, to be settled in the manner provided in the one hundred and forty-fourth section of "The Public Health Act 1848," provided always, that nothing herein contained shall give, or be construed to give, power to any local board, to construct, or use any outfall drain or sewer for the purpose of conveying sewage or filthy water into any natural watercourse or stream, until such sewage, or filthy or refuse water be freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse.

The Cockermouth Local Board had, in pursuance of the Act, constructed certain sewage works for the conveyance of the sewage of the town, with an outfall into the River Derwent, at a point situate without their district. The intake of the Workington Waterworks is situate on the River Derwent, about eight and a half miles below such outfall. From the evidence it appeared that the defendants did discharge sewage, containing foul and noxious matter into the river, but that no trace of sewage matter could be discovered in the water in the river at, and for some distance above, the Workington Waterworks.

Southgate, Q.C., Speed and Parkin, for the information, contended that it was unnecessary to prove a nuisance where the court was asked to restrain an act which had been declared by the Legislature to be illegal (*Attorney-General v. Oxford, Worcester, and Wolverhampton Railway Company*, 2 W. R. 330), and for the bill argued that there was sufficient evidence of a nuisance for the court to grant an injunction in respect of the private injury.

Fry, Q.C. and Davey, for the defendants, contended that the section in the Act meant nothing more than that Local Boards should not be allowed to commit a nuisance, and as the injury was very trifling, the information and bill ought to be dismissed with costs (*Attorney-General v. Gee*, L. Rep. 10 Eq. 131; 23 L. T. Rep. N. S. 299.)

Sir G. JESSEL.—I must say that I think the Act of Parliament is reasonably plain. One must recollect what the position of these bodies is. The defendants are a public body authorised by Act of Parliament to construct works so that they shall not be a nuisance. Originally they could not make outfall works outside their district, but now the Act of Parliament says they may go outside their district, that is to say, they may take people's lands, and do what certainly is very likely to be not pleasant to the inhabitants of another district which is not benefited by the works. But there is a proviso, "that nothing herein contained shall give or be construed to give power to any local board to construct, or use any outfall drain or sewer for the purpose of conveying sewage, or filthy water, into any natural watercourse or stream, until such sewage or filthy or refuse water be freed from all excrementitious or other foul or noxious matter, such as will affect or deteriorate the purity and quality of the water in such stream or watercourse." Now I do not mean to say that clause might not by possibility have been better drawn or expressed, but I think the meaning is pretty plain, and it means this—"You shall not send your sewage water into a natural stream, until you have made it wholesome water; until you have got rid of all the noxious matter in it." That is the short effect of the clause. Well now if that is the meaning of the clause, the next point is, what water is to be affected? You are not to affect or deteriorate the water in the river. Well, what water? I cannot accede to the argument of the defendants that you must poison the whole river; for a river may be hundreds of miles long. I do not think that is the meaning of it at all; I think it must mean what it says, namely, the water in the river where the outfall is—if you at that point pollute the water, you shall not enjoy the privilege given to you by this Act of Parliament of making an out-

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fall outside your district—it is a privilege, and it is a privilege given on those terms.

Now the next question is a question of fact, and there really is no contest upon it. There are several witnesses on behalf of the informant, who say that at various times, fifteen times in all, within a comparatively short period, within about a year, they have gone and seen the sewage fall directly into the river, without passing through the tanks at all, but again when it does pass through the tanks, no witness on the part of the defendants will say the water is pure. One witness says so with certain very remarkable qualifications, and so does the defendant's answer, but still with the same sort of remarkable qualification such as "practically," or some word of that kind, or some qualification or other. Nobody says it does not deteriorate the quality of the water at that place I suppose nobody could say so; however, nobody does say so, and there is really no contest about the matter. The defendants, for instance, in the answer, say that when it reaches the said river, it is substantially free from all excrementitious and other foul or noxious matter, or at any rate has no injurious effect whatever on the river. They do not say it is free, but they use the word "substantially," or the words "at any rate," and again they say, "there is no perceptible deterioration in the purity or quality of the water 600 yards below the point where the said outfall sewer empties itself into the said river." There again admitting that it does so above the point; then they say in another place "it is comparatively free from excrementitious matter and filth." In fact they cannot either in the answer or in the evidence put it higher than that, not that it is free from filth, but that there is a good deal taken out of it, and I have no doubt that that is about the truth of the matter, and that when it flows from the tanks a good deal of solid matter is taken out by subsidence or otherwise, and that when it does not flow through the tanks it is in its natural state, and is very bad indeed. In that state of the case I am of opinion that they have infringed on the terms of the Act of Parliament, and that if they take the privilege at all they can only take it subject to such terms as are imposed by the Act of Parliament. Then this is an information by the Attorney-General to enforce the terms of the public Act of Parliament against a public body. Now if I understand the law upon the subject it is not necessary for the Attorney-General to show any injury at all. It is the Legislature that is of opinion that certain acts will produce injury. The case I have already referred to of the *Attorney-General v. The Oxford, Worcester and Wolverhampton Railway (sup.)* is a case in point, in which the Attorney-General would not even answer the affidavits of the defendants, to show there was no injury caused by the proceedings they were adopting. The Legislature is of opinion that it is desirable to preserve our natural streams in their present state, so far as purity is concerned at least, subject of course to further improvement; they are not to be further injured, and it therefore has said that you shall not injure them at all. The court must assume that the injury—that is the deterioration of the water—is an injury which is not prohibited by the Legislature for no good cause, but for a sensible reason. Again, if I look at the evidence in the case I can see very good reasons for it. We had the evidence of scientific men to this effect, that

there is always a probability of danger when injurious matter is thrown into the stream, because people may drink of that stream, and if any epidemic disease is prevalent in a town from which the sewage matter proceeds that disease may be communicated to the inhabitants of another town owing to the water. Well that alone would be sufficient justification for the Legislature, if it entertained that opinion, in inserting this enactment in the Act of Parliament. Now that being so, I think I am bound to grant an injunction in the terms I have mentioned as regards the information. The bill stands upon a totally different footing. The bill is a bill by the Local Board of Workington, alleging nuisance committed by the defendants. Now I must say I cannot find any evidence of nuisance caused by the defendants' acts. The sewage is thrown into the river in comparatively small quantities, at a distance of eight or nine miles from the town of Workington. The water has been carefully analysed at the intake at Workington, and you cannot discover in it any trace of the sewage. That is to say from some cause or other, that which was polluted water at or near the outfall, has ceased to be polluted water by the time it arrives at Workington. At least, that I take to be the effect of the evidence, and if the plaintiff board can only sue on the ground of nuisance, and they cannot prove nuisance, it follows that their bill must be dismissed, which is the order I am about to make. The only question is one of costs. They are both public bodies; and I cannot see why I should make the Cockermouth people pay costs incurred wrongly by the Workington people or *vice versa*. I think the right course therefore is to dismiss the bill with costs, and to grant the injunction on the information also with costs, letting the taxing master set-off one against the other, a course which in these cases has the effect of giving the bulk of the costs really to the person who obtains the decree. The defendants will be restrained by injunction from conveying sewage or filthy water by means of their outfall drain or sewer out of their district, until such sewage or filthy water shall have been freed from all excrementitious, or other foul or noxious matter, such as may affect or deteriorate the purity and quality of the water in the River Derwent.

Solicitors: Wood and Tinkler, Bischoff, Bompas and Bischoff.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and F. GOULD,
Esq., Barristers-at-Law.

Wednesday, June 3, 1874.

MAYOR, &c., OF HALIFAX v. THE LOCAL BOARD OF SOOTHILL UPPER.

Private Act—Obligation to sell water to a township—Sale by the township of water compulsorily acquired—Demurrer.

A corporation obtained parliamentary power to collect all the water from the gathering grounds of a district, but were bound to supply to the township of T. not less than 25,000 gallons, or more than 75,000 gallons of water per day, at the price of 6d. per 1000 gallons, and the amount to be supplied between the maximum and minimum limits was to be at the option of the purchaser: Held, on demurrer, that the township of T. might

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enforce the supply of more than 25,000 gallons per day for the purpose of selling part of it at a profit to a neighbouring township.

DEMURRER. By the Halifax Corporation Waterworks and Improvement Act 1868, the plaintiffs sought power to make and maintain certain reservoirs and other waterworks, and to appropriate for the purpose thereof all rivers, springs, streams, and waters found in or under certain lands forming part of the Savile estate, of which the defendant, Henry Savile, was the tenant for life. The plaintiffs did not, by their application to Parliament, propose to make any provision for the supply of water to the townships of Mirfield, Soothill Upper, and Thornhill, which were also part of the Savile estate, but situate beyond the ordinary water supply limits of the corporation.

Under these circumstances the defendant Savile opposed the passage of the plaintiffs' Bill, but the ultimate result was, that his opposition was withdrawn to that Bill, and a clause was inserted in the Halifax Water and Gas Extension Act 1870, which so far as material was as follows:

11. With respect to a supply of water to the estates of Henry Savile, Esq., in the townships of Mirfield, Thornhill, and Soothill, in this section referred to as the three townships, the following provisions shall have effect, namely:

[Sub-sect. 2 provided that the defendant Savile should give notice to the corporation of his desire that a supply of water should be given under this section.]

(6) When a meter has been fixed and a main and other appliances have been laid in connection therewith into the three townships, or any of them, either by the corporation or otherwise, the corporation shall commence and (unless prevented by frost, or accident, or other reasonable cause) shall thenceforth for ever continue such supply of water as hereinafter mentioned (that is to say), the corporation shall be bound to deliver into the meter, and the purchaser to take quantities of water, not less or more than the following, namely:

(A) Until the corporation commence taking water from any reservoir authorised by the Act of Parliament of 1868, not less than 25,000 gallons, or more than 75,000 gallons a day.

(7) Within the minimum and the maximum limits . . . the actual daily quantity to be supplied shall be at the option of the purchaser, to be exercised by notice in writing.

(8) The price of water supplied under this section shall be 6d. per 1000 gallons passed through the meter (exclusive of interest and expenses as aforesaid).

An agreement was on the 3rd July 1871, entered into between the plaintiffs of the first part, the defendant Savile of the second part, the defendants the Local Board of Soothill Upper of the third part, and the Local Board of Thornhill of the fourth part, whereby it was agreed, *inter alia*, as follows:

Clause 8. The said local boards shall . . . have the use of all the water to be supplied by the Corporation of Halifax under the said recited Acts in the proportions following, namely:—Three-fifths parts of such water shall be had and taken by the said Local Board of Soothill Upper, and the remaining two-fifths parts of such water shall be had and taken by the said Local Board of Thornhill.

The bill was filed on the 20th May 1874, by the corporation, against the Local Board of Soothill Upper and Savile, stating that the defendants, the local board, had entered into an agreement with the Local Board for the District of Horbury (which was a district not lying within the three townships of Mirfield, Thornhill, and Soothill, or any of them), to supply them with a large quantity of the water which the plaintiffs were bound to supply to the defendant local board, under the agreement of

the 3rd July 1871 and sect. 11 of the Act, and such water was to be sold to the Horbury Local Board at the price of 11d. per 1000 gallons, thus giving to the defendant local board a profit of 5d. per 1000 gallons.

The bill stated that the result of the working of the Local Acts had proved that the price of 6d per thousand gallons, being the price at which the plaintiffs were bound to supply water to the defendants, was not remunerative, and that in fact they could not supply it except at a pecuniary loss; that a water supply of 45,000 gallons a day (being three-fifths of the maximum quantity of 75,000 which the plaintiffs could be called upon to supply under the 11th section of the Act, and to which three-fifths the defendant local board claimed to be entitled under the agreement of the 3rd July 1871), was in excess of the requirements of the defendant local board.

The plaintiffs charged that the defendant local board were not entitled to call upon them to supply them with any water in excess of the legitimate wants and requirements of their own district of Soothill Upper, and that having regard to the origin and nature of the arrangement made with the defendant Savile, and the terms of the 11th section of the Act, it was inequitable, and contrary to the intent and meaning of the parties and of the said section, that they should be called upon to supply water to the defendant local board at a pecuniary loss to themselves.

The bill prayed a declaration that, according to the construction of the several Acts and instruments, and the intent and meaning of the parties, the plaintiffs could not be required to supply the defendant local board with water for the purpose of enabling them to resell it to any person or local authority not within any of the three townships, but only with such water as being within the maximum and minimum limits defined by the 11th section of the Act of 1870, should be needed for legitimate consumption within the township of Soothill Upper, and for an injunction against the defendant local board, restraining them from requiring such supply.

The defendant local board demurred.

Jackson, Q.C. and Ince, for the demurrer.—There is no word in the Act suggesting any limitation as to the purposes for which the water is to be used, and the purchasers are bound to take a certain quantity, whether they require it or not. Clause 8 of the agreement of the 3rd July 1871, provides that the local board "shall have the use of all the water to be supplied by the corporation," which is equivalent to giving them the absolute property in the water.

Kay, Q.C. and W. Barber, for the bill.—The only object of the Act is to enable the defendant Savile and other persons, within the several townships, to take a portion of the water collected by the plaintiffs. The Horbury district, to which the water is now being sold at a profit by the defendant local board, is not within those districts. Having the "use of the water" cannot mean selling it to other persons. A railway company is not allowed to exercise its powers of compulsory purchase in order to sell the land so acquired. They cited:

Wood v. Epsom and Leatherhead Railway Company, 8 C. B., N. S., 731;

Vale v. Cockermonth, &c., Railway Company, 13 W. R. 1015;

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Webb v. Manchester and Leeds Railway Company, 4 My. & Cr. 116;

Flower v. London and Brighton Railway Company, 12 L. T. Rep. N. S. 10; 2 Dr. & Sm. 330.

Jackson, Q.C. was not called upon to reply.

The VICE-CHANCELLOR said that the provisions of the Act were partly beneficial to the corporation, and in part onerous. The corporation were bound to deliver a certain quantity of water, and the purchasers were bound to take a certain quantity. It was said that the defendants were about to make an unfair use of the water, but there was nothing in the Act to restrict them from selling that which they were compelled to buy and did not want. What was to become of it otherwise? Must they waste it? It had been said that this was like the case of a railway company putting into force its compulsory powers of purchase in order to sell the land acquired; but had it ever been held that a railway company, having occasion to use a part of a property, and being compelled to buy the whole, could not sell so much as it did not require? There was no equity on the plaintiffs' part to call for the interference of the court, and the demurrer must be allowed.

Plaintiffs' solicitors, *Williamson, Hill, and Co.*

Defendants' solicitors, *Edwards, Taylor, and Jaques*, for *Scholefield and Taylor, Batley*.

COURT OF QUEEN'S BENCH.

Reported by J. SMYTH and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

Saturday, June 6, 1874.

REG. v. SANDFORD.

Justices' jurisdiction—Small tithes—Custom—Claim of right—Mere assertion of defendant's attorney—7 & 8 Will. 3, c. 6.

Defendant, a householder, was summoned before justices under 7 & 8 Will. 3, c. 6, for non-payment to the rector of the parish of dominicals, a tax in lieu of tithes in respect of dwellings erected on land formerly subject to tithes. Evidence of custom in the parish to pay these dominicals was adduced before the justices, and the attorney who appeared for the defendant objected in writing "to the jurisdiction of the magistrates, on the ground that the defendant had a bona fide objection to the validity of the payment, which being due by custom they could not try." The justices stated that they thought the custom was established, and made an order on defendant for payment of the claim with costs.

Held, upon certiorari to quash this order, that, although a claim of right may oust the jurisdiction of justices under this statute, this mere assertion by the attorney did not sufficiently establish a bona fide objection on the defendant's part.

A RULE nisi had been obtained by defendant calling upon the prosecutor, the Rev. J. B. Strother, Rector of St. Mary Steps, Exeter, to show cause why an order of two justices of the City of Exeter ordering the defendant to pay to the prosecutor the sum of 9s. 4d. as the value of certain offerings, oblations, and obventions in the said order mentioned, and also the sum of 7s. 6d. for the costs and charges of the prosecutor, should not be quashed.

It appeared from the affidavits of the defendant, and his attorney who represented him before the justices, that the offerings for which the

defendant was summoned were generally known in Exeter as "Dominicals," and were alleged to be due by custom to the rector from the householders in each parish of that city. They were payments in the nature of or in lieu of tithes in respect of dwellings erected on land which had formerly been subject to tithes.

The evidence of the custom adduced before the justices on behalf of the rector was proof by the collector that such payments had been made for twenty years, and that defendant himself had on previous occasions paid the claims made upon him.

Defendant's attorney stated in his affidavit that at the end of the complainant's case, "I, on behalf of the said Henry Sandford, submitted to the justices that the claim of the complainant to such moneys or payments was professedly based entirely on custom, that the said Henry Sandford objected to the right and title of the complainant to any such moneys or payments, and denied the existence or legality of any such custom, and further submitted that the said justices had no jurisdiction to try the right of the complainant to such moneys or payments or the validity of such alleged custom, and I cited the case of *Reg. v. Kidd* (Law Journal Notes of Cases for 1866, p. 31); and I also submitted that, supposing the justices had jurisdiction to try a question of custom, the evidence produced was quite insufficient to support such a custom as alleged, but on the ground of want of jurisdiction in the justices I declined to go any further into the case. The attorney for the complainant then contended that the payment claimed was in the nature of small tithes; that the justices had jurisdiction to adjudicate on the matter by virtue of the statute 7 & 8 Will. 3, c. 6; and that as to the custom, the defendant had admitted its existence by part payment: and I, on behalf of the said Henry Sandford, contended to the contrary of each of these, and again objected to the jurisdiction of the justices to try and such alleged custom. The said justices consulted together, and the chairman, the said John Trehane, Esq., then stated that they should adjudicate that they thought the custom was established, and that an order would be made on defendant to pay the money with costs. I then handed into the said justices a note in writing, of which the following is a true copy:

Henry Sandford.

A complaint having been heard before the justices for the City of Exeter against Henry Sandford, who was summoned for payment of offerings and oblations amounting to 9s. 4d., due to the Rev. James Baxter Strother, as rector of the parish of St. Mary Steps, Exeter, Mr. J. W. Petherick appeared as attorney, and objected to the jurisdiction of the magistrates on the ground that he had a bona fide objection to the validity of the payment which, being due by custom, they could not try.

JOHN W. PETHERICK.

Dated 28th May 1873.

The defendant, in his affidavit, admitted he was a resident householder in the said parish, and had made some partial payments of claims for Dominicals; but he said, "I made such payments in entire ignorance as to the legality or otherwise of the claims then made by the rector's collector. I am now advised that the claim cannot be supported at law, and I deny and intend to dispute the right of the rector to recover from me any such payment as that now claimed by him."

The Rector, the Collector of Dominicals, and the

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Clerk to the Justices, made affidavits of cause against the rule, in which they described the alleged custom and the evidence of its existence.

The attorney who appeared before the justices on behalf of the rector, thus described in his affidavit what took place at the hearing of the summons: "In opening the complainant's case I spoke in apology of the course adopted by him in seeking professional assistance, which after the numberless cases in which in past years the justices had granted summonses against persons for nonpayment of dominicals, and had heard and adjudicated upon such summonses must seem to the Bench to be very unnecessary, and I explained that, in consequence of what had then lately appeared from time to time in one of the newspapers published in the city in reference to this particular case and the complainant's conduct in regard to it, he (the complainant) had thought it desirable to be represented by an attorney on the hearing, in order that the real facts of the case might be the better elicited for the information of the justices, and through them of the public; that he had no desire to act harshly; that as trustee of future rectors of the parish he was bound to maintain this claim. I then stated that the payment of 4s. 8d. a year claimed by the complainant as such rector, and which was described in the summons by the terms 'offerings, oblations, and obventions,' were more commonly called and known in Exeter by the term dominicals, which dominicals, as I understood, were payments in the nature of tithes, in respect of houses built upon land originally subject to tithe, which view was supported by the fact that in some of the parishes in the city both tithes and dominicals were payable, but in no instance that I was aware of was the same property subject to both. That the payment of such dominicals was claimed by custom which was not peculiar to the complainant's parish, but was general throughout the city, and I reminded the justices that it was something more than mere custom, for it was a custom affirmed by a verdict in an action tried at the assizes held in that Guildhall upwards of 350 years ago, and I cited the case in the year 1515, mentioned in Izacke's Memorials of Exeter, edition of the year 1724, p. 108, of which case I found that the said justices and their clerk were already well aware, for the clerk immediately produced a copy of the book, and pointed out the passage referring to that case. And I called as witnesses in support of the summons the complainant himself, and his collector, Mr. Henry Pitts Taylor, the former of whom spoke to the facts of the case, and the latter spoke to the custom for twenty years past and upwards. In cross-examination, the said H. P. Taylor stated to the effect that although in former years the defendant had only made a few small payments on account of the dominicals due from him, no steps had been taken for the recovery of the balances, as the rector had deemed him unable through poverty to pay more than he had done, but that he believed the defendant's circumstances were now altered, and that at the present time he was in a position to pay the amount. The defendant's attorney then stated that his client disputed the complainant's right to the said payment, and denied the legality or validity of the said custom; and he claimed that the consequence of such his dispute and denial was to deprive the said justices of jurisdiction to hear and adjudicate upon the said complaint, and he cited the case

of *Reg. v. Kidd* (as mentioned in his said affidavit) in support of his contention. In reply, I referred again to the verdict given in the year 1515, and argued that the custom was too well established and too well known to be disputed, and I referred to the fact of the repeated convictions by that Bench of defaulters upon complaint of non-payment of dominicals, and urged that this case differed from that of *Reg. v. Kidd*, and that the defendant's attorney had shown no ground for depriving the justices of the jurisdiction conferred on them by the Act. 7 & 8 Will. 3, c. 6 (before referred to), which Act I produced and quoted, and lastly I drew attention to the fact that the defendant had admitted the claim by making payments on account. The said justices, after a brief consultation, stated that the custom was well known and established in Exeter, and that they held that they had jurisdiction, and that an order would accordingly be made upon the said Henry Sandford for payment of the amount claimed and the expenses: the chairman, the said John Trehane, remarking to the effect that there was no doubt of the custom. He had himself been summoned many years ago for dominicals, to the payment of which he objected, but he had been obliged to pay them."

Lopes, Q.C. and *Sydney Hastings* showed cause against the rule for *certiorari*.—The statute 7 & 8 Will. 3, c. 6, which is made permanent and extended by 10 & 11 Will. 3, c. 15, and 3 & 4 Anne, c. 18, provides "for the mere easy and effectual recovery of small tithes and the value of them, where the same shall be unduly subtracted and detained, where the same do not amount to above the yearly value of 40s. from any one person;" and enacts, sect. 1, "That all and every person and persons shall henceforth well and truly set out and pay all and singular the tithes commonly called small tithes, and compositions and agreements for the same, with all offerings, oblations, and obventions, to the several rectors, vicars, and other persons to whom they are or shall be due in their several parishes within this kingdom of England, dominion of Wales, and town of Berwick-upon-Tweed, according to the rights, customs, and prescriptions commonly used within the said parishes respectively, and if any person or persons shall hereafter subtract or withdraw or any ways fail in the true payment of such small tithes, offerings, oblations, obventions, or compositions as aforesaid, by the space of twenty-one days at most after demand thereof, then it shall and may be lawful for the person or persons to whom the same shall be due to make his or their complaint in writing unto two or more of His Majesty's justices of the peace within that county, riding, city, town corporate, place, or division where the same shall grow due, neither of which justices of the peace is to be patron of the church or chapel whence the said tithes do or shall arise, nor any ways interested in such tithes, offerings, oblations, obventions or compositions aforesaid." By sect. 2 it is "further enacted by the authority aforesaid, that if hereafter any suit or complaint shall be brought to two or more justices of the peace as aforesaid, concerning small tithes, offerings, oblations, obventions, or compositions as aforesaid, the said justices are hereby authorised and required to summon in writing under their hands and seals, by reasonable warning, every such person or persons against whom any complaint shall be

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made as aforesaid, and after his or their appearance, or upon default of their appearance, the said warning or summons being proved before them upon oath, the said justices of peace, or any two or more of them, shall proceed to hear and determine the said complaint, and upon the proofs, evidences, and testimonies produced before them, shall in writing under their hands and seals adjudge the case, and give such reasonable allowance and compensation for such tithes, oblations, and compositions so substracted or withheld as they shall judge to be just and reasonable, and also such costs and charges not exceeding 10s., as upon the merits of the cause shall appear just." By sect. 3, on refusal to pay in ten days after notice, constables may distrain. By sect. 6, the complaint is to be made within two years. By sect. 7, persons aggrieved may appeal to the quarter sessions. And by sect. 8, there is a particular provision for cases of tithe, which is sufficient of itself to show that this rule should be discharged: "Where any person or persons complained of for substracting or withholding any small tithes or other duties aforesaid shall before the justices of the peace to whom such complaint is made, insist upon any prescription, composition, or *modus decimandi*, agreement or tithe whereby he, or she, is or ought to be freed from payment of the said tithes or other dues in question, and deliver the same in writing to the said justices of the peace, subscribed by him or her, and shall then give to the party complaining reasonable and sufficient security to the satisfaction of the said justices, to pay all such costs and damages as upon a trial at law to be had for that purpose in any of His Majesty's courts, having cognisance of that matter, shall be given against him, her, or them, in case the said prescription, composition, or *modus decimandi*, shall not upon the said trial be allowed; and in that case the said justices of the peace shall forbear to give any judgment in the matter, and that then and in such case the person or persons so complaining shall and may be at liberty to prosecute such person or persons for their said substruction in any other court or courts whatsoever where he, she, or they might have sued before the making of this Act, anything in this Act to the contrary notwithstanding." It is not suggested that any application was made to the justices under the 8th section, nor were the proceedings there required taken by the defendant. Even, therefore, if the general rule as to the ousting of jurisdiction in cases of tithe applied to such facts as these under another statute, it could not apply here except under the provisions of this section. The complainant's main objection, however, is that the general rule requires a *bonâ fide* assertion of right, and intention to prosecute that right in another court; here there was but a mere denial by the defendant's attorney of the existence of the custom. The case of *Reg. v. Kidd* (16 L. T. Rep. 203), cited before the justices, is not in point; but this matter should be governed rather by *Res v. Wrottesley* (1 B. & Ad. 648), which was a decision under 53 Geo. 3, c. 127, s. 7, that a mere statement to the justices by the party complained of for non-payment of a church-rate, that he disputes the rate, and that he has entered a *caveat* in the Ecclesiastical Court against its being allowed, does not deprive the justices of jurisdiction. They must still hear and examine, to ascertain whether the rate is *bonâ*

fide disputed. The case of *Res v. The Chapelwardens of Milnrow* (5 M. & S. 248), is there cited, in which Lord Ellenborough observes, "Perhaps if a person was merely to say before the justices that he disputed the rate, it would not be sufficient, inasmuch as he ought to show something to manifest that he disputed it *bonâ fide*." Again, there is nothing here to show that the justices had no reasonable ground for disbelieving the *bonâ fides* of the objection, which was required for the quashing of the order in *Reg. v. Nunneley* (E. B. & E. 842). Any statute of this kind, giving a summary recovery for rates, might be evaded, if an attorney could oust the justices' jurisdiction by merely denying the custom. The following cases show that there must be some ground for the objection, besides the mere assertion of the defendant or his attorney:

Reg. v. Blackburn, 32 L. J. 41, M. C.;

Reg. v. Huntsworth, 33 L. J. 131, M. C.

Field, Q.C. and *Grantham*, supported the rule.—The three propositions upon which the defendant relies are—first, that upon general principles the jurisdiction of justices is ousted by a claim of right; secondly, that in order to avoid the application of this general principle the justices must specifically find *mala fides* in the defendant's claim of right; and thirdly, that in this case the justices have not so found. In *Reg. v. Pedler* (12 L. T. Rep. N. S. 17), Cockburn, C.J., laid down the rule on this subject as follows: "But it is perfectly clear that we cannot allow magistrates to take on themselves, simply because on the merits they may be of opinion that eventually any attempt to dispute the validity can only end in the signal defeat of the party raising the dispute, to determine that the notice is not *bonâ fide*, and that it is not given with an intention of disputing the validity." [BLACKBURN, J.—I agree entirely with that.] The judgment of this court in *Reg. v. Kidd* is equally in point. "The objection was made by a professional man, and some credit should have been given to his objections. If he had made the objection on oath, what difference ought to have been made? There was nothing to cast any doubt upon his statement that the custom was intended to be *bonâ fide* disputed, and the justices ought to have forbore to exercise their jurisdiction." The order of the justices in that case was made under this very statute, 7 & 8 Will. 3, c. 6, and the attention of the court was called to the 8th section, upon which it was contended that the general principle did not apply so as to oust the jurisdiction given by this enactment. The case, therefore, is a distinct authority against the first point taken for the complainant, as well as upon the sufficiency of the objection taken for the defendant. Not only is there no specific finding by the justices of *mala fides* in the course taken by the defendant's attorney, but it is not even suggested upon the affidavits, and the justices seem to have acted under the impression that the general rule did not apply to that statute.

BLACKBURN, J.—I think this case has been reduced to a question of fact. In *Reg. v. Kidd*, an objection was taken to the jurisdiction upon a complaint under this same enactment, and this court considered there was a *bonâ fide* dispute between the parties, and on that ground held that the jurisdiction of the justices was ousted. I do not know what I might have myself said about

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the effect of the 8th section if there had been no authority upon it; but that case is, I think, a distinct authority that, if a defendant entertains a *bonâ fide* intention to have the validity of a claim under this Act tried in a Superior Court, and disputes a custom for that purpose, then the justices should stay their hands. The authorities are very numerous that if not made *bonâ fide*, objections to the jurisdiction on the ground of a claim of right may be reviewed by this court, and on the other hand justices cannot give themselves jurisdiction merely by finding without sufficient ground that an objection was not *bonâ fide*; a *mandamus* would lie in the one case, and a prohibition by way of a *certiorari*, as this, in the other. Here the magistrates have assumed jurisdiction, and to quash their order we must be satisfied that the defendant made a *bonâ fide* claim of right to refuse payment of these offerings. There was evidence that the custom existed in the time of Henry VIII., and also in this century for twenty years past. We are asked to hold that this was a *bonâ fide* claim of right on the defendant's part, merely because his attorney asserted that he made this objection. We refuse to quash the order, because there appears to be no evidence of any *bonâ fide* objection to the justices' jurisdiction. This will not prevent the question of the existence of the custom being raised, if it be desired, on another occasion.

QUAIN, J.—I am entirely of the same opinion. I agree that on these facts there is no evidence of a *bonâ fide* objection to the jurisdiction of the justices on the ground of any claim of right on the defendant's part. The attorney ought to have stated his reasons for claiming a right if he had any good ones. Merely saying "I dispute the validity of a custom" is not enough, although it be said by an attorney. The affidavit of the defendant merely says, "I deny and intend to dispute the right of the rector to recover from me any such payment as that now claimed by him." This is quite consistent with a mere intention to evade the liability of an order of justices. Except *Reg. v. Kidd*, I have not heard one case cited in which the objection has not been inquired into before the jurisdiction has been held to be ousted. Even in *Reg. v. Kidd* the attorney stated he had witnesses to prove the non-existence of the custom, and it did not appear, as here, that the custom had been uniform. Even when the attorney at the hearing of this case put his objection in writing, he did not suggest what was the ground of it. This may not be absolutely necessary in all cases, but it is a material consideration in deciding the nature of the objection. Here there was a mere assertion in order, as it seems, to prevent a decision against the defendant.

ARCHIBALD, J.—I am of the same opinion. *Reg. v. Kidd* is an authority that a *bonâ fide* claim of right is a good objection to the jurisdiction of the justices in a complaint under this Act, but there must be evidence of a *bonâ fide* objection. Nothing in this case conveys to my mind that the defendant ever entertained an honest intention to dispute the rector's claim in a Superior Court, and I think the magistrates were right.

Rule discharged.

Attorneys for complainant, *Dobinson, Geare, and Son*, for B. C. Gidley, Exeter.

Attorneys for defendant, *Terrell and Chamberlain*, for J. W. Petherick, Exeter.

Wednesday, May 27, 1874.

DAVIES v. HARVEY.

Guardian of the poor—Supply of goods for parochial relief—Knowledge of partner—Loan to pauper—3 & 4 Will. 4. c. 76, s. 77.

The relieving officer of the union in which the appellant was a guardian of the poor, purchased a bedstead for an outdoor pauper at the appellant's shop, where he carried on business as an upholsterer in partnership with his son, in the appellant's absence and without his knowledge. There was no specific written order for this purchase by the relieving officer, but he had authority to procure it from the board of guardians; and it was not intended that the pauper should have the bedstead except as a loan from the board. Upon a case stated on conviction of the appellant under sect. 77 of the Poor Law Amendment Act, 1834:

Held, that a guardian is, a person appointed to an office concerned in the administration of the laws for the relief of the poor; and that the appellant had in this case furnished or supplied for his own profit or on his own account goods for or in respect of the money ordered to be given in parochial relief to a person in that union, within the terms of the Act.

THIS was a case stated by four of Her Majesty's Justices of the Peace in and for the county of Glamorgan under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with their determination upon the questions of law which arose before them, as hereinafter stated, on the 24th Jan. 1873, at Neath in the said county; the appellant having duly entered into a recognizance to prosecute the appeal.

Upon the hearing of a certain information preferred by the respondent against the appellant under sect. 77 of 4 & 5 Will. 4, c. 76, that the appellant on the 26th July 1872, at the parish of Neath in the borough of Neath, in the county of Glamorgan, being one of the guardians of the poor for the parish of Neath in the Neath Union in the county of Glamorgan, and a person concerned in the administration of the laws for the relief of the poor, did furnish or cause to be furnished for his own profit or on his own account goods and materials, to wit, an iron bedstead ordered to be given in parochial relief to a certain poor person in the said Union of Neath, contrary to the statute in that case made and provided. The justices convicted the appellant and adjudged him to pay a penalty of 5*l.* and costs.

The following facts were either proved, or admitted by both parties:

(a) That the appellant was a guardian of the poor for the Neath Poor Law Union, and was so during the month of July 1872. When the said bedstead was supplied the appellant was, and had for many years before that date acted as, guardian for the said Poor Law Union.

(b) That previously to the goods being given or otherwise supplied in parochial relief an application is made to the board of guardians in a prescribed form by the relieving officer, and the order is made by the chairman writing down the terms of the order opposite the application in a book called the application and report book, and putting his initials thereto, and an order to the

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like effect is made in a book kept by the clerk, called the relief order book.

(c) That on the date of the 23rd July 1872 there is an entry, similar to that in the schedule annexed hereto marked A and which said schedule is to be taken as forming part of this case, in the application and report book of the relieving officer of the first central district of the said union in the handwriting of Mr. Thomas William Jones, the relieving officer of the said district of the said union. On the 6th Aug. 1872, the said order was brought up for confirmation by the guardians at their meeting held on that day, and an entry similar to that in the schedule hereunto annexed marked B, and which said schedule is also to be considered as forming part of this case, appears in the said relieving officer's application and report book of that date.

(d) That the appellant, in the months of July and Aug. 1872, and for some years previously thereto, carried on business at Neath aforesaid, as a cabinet maker and upholsterer, in partnership with his son James Fear Davies, under the style or firm of Davies and Son.

(e) That on the 24th July 1872, the said relieving officer purchased at the shop of the said Messrs. Davies and Son from the said James Fear Davies, the son and partner of appellant, an iron bedstead, which was by the direction of the said relieving officer delivered by the said James Fear Davies at the house of one Thomas Beasley, an out-door pauper of the said union; but there was no evidence to show that the said James Fear Davies or the said appellant knew that the said order had been given, or the said application made; nor that either of them knew as a fact that the said bedstead was to be given or applied by way of parochial relief.

(f) That the appellant was not present when the bedstead was ordered, nor when it was paid for, nor when it was delivered; and that the price thereof was paid to the said James Fear Davies alone, who made out the account for the same in his own name, and gave the receipt in the same manner.

(g) That the said bedstead was only lent to the pauper and remained the property of the said guardians.

On the part of the appellant it was contended:—

That a guardian "is not a person appointed to an office concerned in the administration of the laws for the relief of the poor," inasmuch as guardians are elected by the ratepayers, and not appointed by any individual or corporation or otherwise, and that thereupon sect. 77, of 4 & 5 Will. 4, c. 76, does not apply to guardians, but only to appointed officers, such as clerks to guardians, relieving officers, overseers, masters of workhouses, and so forth.

That the appellant did not furnish or supply the goods, the furnishing or supplying by James Fear Davies not being under the circumstances a furnishing or supplying by the appellant.

That the said bedstead was not "goods, materials, or provisions ordered to be given in parochial relief," for although the application was for clothing and a bedstead, the order was only for clothing, and no order was made for the supply of the bedstead.

That the goods were only lent to the pauper and remained the property of the guardians, and therefore they could not be treated, in construing a penal statute, as having been "given in parochial relief."

The justices, however, were of opinion that the evidence given before them as aforesaid brought the case within the operation of the enactment under which the information was laid, and gave their determination against the appellant in the manner before stated.

The questions of law upon which the case is stated for the opinion of this court therefore are first, whether a guardian is "a person appointed to an office" within the purview of the 77th section of 4 & 5 Will. 4, c. 76; secondly, whether the furnishing or supplying the goods in question by James Fear Davies was, under the circumstances, a furnishing or supplying by the appellant within the meaning of the said section of the said statute; thirdly, whether there was a sufficient order for the goods supplied as goods, materials, or provisions ordered to be given in parochial relief; fourthly, whether as the goods were only to be lent, and to remain the property of the guardians, they were given in parochial relief within the meaning of the aforesaid section. If the court should be of opinion in the affirmative as to the whole of the above questions, then the said conviction is to stand; but if the court should be of opinion in the negative as to all, any, or either of the aforesaid questions, then the said conviction is to be quashed.

The schedules mentioned in the finding of fact (c) were separate entries across the application and report book under the same printed headings, and opposite the name of Thomas Beasley in each case, the words "Application for clothing and a bedstead" were in the first entry; but the words in the second were "Application for clothing ordered."

Francis Turner argued for the appellant. 4 & 5 Will. 4, c. 76, s. 77 under which this conviction was made, enacts "that it shall not be lawful for any person hereafter to be appointed in any parish or union to any office concerned in the administration of the laws for the relief of the poor, or for any person who, after the 25th March 1835, shall fill any such office, to furnish or supply for his own profit or on his own account, any goods, materials, or provisions ordered to be given in parochial relief, or to furnish or supply any goods, materials, or provisions for or in respect of the money ordered to be given in parochial relief to any person in such parish or union; and every person holding such office shall, on conviction before any two justices of the peace, be subject to a penalty of 5*l.* for such offence, one-half of which shall be paid to the informer, and the other half in aid of the poor rates of such parish or union." Sect. 51 of this Act throws some light upon the first question submitted to the court, viz., whether a guardian is a person appointed to an office within the purview of the 77th section. By sect. 51 the penalty imposed by 55 Geo. 3, c. 137, s. 6, is "extended and made applicable to every commissioner, assistant commissioner, guardian, treasurer, master of a workhouse, or other officer appointed under the provisions of this Act:" *Proctor v. Manwaring* (3 B. & Ald. 145) limited the prohibition in the Act of 55 Geo. 3 to the supply of goods to a workhouse or the poor generally, and therefore the extension of that prohibition to a guardian cannot apply to this case, which, like *Proctor v. Manwaring*, is the supply of goods to an individual pauper. The 77th section of the later Act no doubt prohibits the supply of goods

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to an individual pauper, but it is made applicable only to the same officers as those named in the previous Act, to which sect. 51 of the later Act added guardians for the purposes alone of the Act of 55 Geo. 3. The Legislature, therefore, seems to have intended to apply to guardians the higher penalty of 100*l.* for supplying goods generally to unions or parishes, but not the lower penalty of 5*l.* for supplying goods to an individual pauper. The second question is whether the appellant could be convicted under this section without any knowledge on his part of what his son and partner had done. This depends upon whether the charge is of a criminal nature which requires a *mens rea* to justify a conviction. The words used in the 77th section, *e.g.*, "conviction," "penalty," and "offence," show that the Legislature intended to provide a punishment for a criminal offence. As to the third point, this section requires, in order to constitute the offence, that goods should be supplied "for or in respect of the money ordered to be given in parochial relief to any person in such parish or union." This must refer to a formal order, of which no evidence in this case appears. Fourthly, the words just quoted do not relate to a mere loan to a pauper, which the case finds this bedstead was.

Poland for the respondent.—The effect of sect. 51 of 4 & 5 Will. 4, c. 76, is to extend all previous provisions for penalties to the officers there named, and at the same time to apply the provisions in the same Act to the same persons. The second is the important question; and although there must be knowledge on the part of the person supplying the goods that they are intended for parochial relief, and not for the private use of the person obtaining them, yet the word "knowingly" does not occur in the section, and there is nothing in it to require proof of personal knowledge on the defendant's part in order to make him liable. Although the word "conviction" is used, the act prohibited is not so much of the nature of a crime as of a nuisance or a public injury, which does not require a guilty mind to make it subject to the penalty imposed. The Legislature has thrown on a guardian the duty that he shall not directly or indirectly make profit out of his office; just as in a recent case this court held that a publican was liable to be convicted under 35 & 36 Vict. c. 94, s. 16, subsect. 2, for the supply by his servant without his knowledge of liquor to a constable on duty. In that case (*Mullins v. Collins*, L. Rep. 9 Q. B. 292), all the authorities on this subject were discussed, and the court decided that all such enactments were to be construed in the way most effective for maintaining the policy of the Legislature. The two last objections cannot be tenable in the face of the words of the enactment, for the goods were supplied to the relieving officer who was acting under the orders of the board, and for the purpose of parochial relief. [BLACKBURN, J.—My doubt is whether under the two statutes a man could be liable to both the penalties for the same act.]

Turner in reply.—That point was decided in *Robinson v. Emerson* (4 H. & C. 352). One element in the consideration of the criminality of this charge is the competency of the defendant as a witness. According to *Paley on Convictions* (5th edit.), p. 108, and the cases there cited, the defendant could not give evidence. With respect to knowledge *Hearne v. Garton* (28 L. J. 217,

M. C.), is an authority that an offence is not committed unless the offender is aware of the nature of his act. [LUSH, J.—Knowledge of the purpose for which the purchase was made is clearly necessary, but the question is whether the defendant can be liable for his partner's knowledge.]

BLACKBURN, J.—I think this conviction should be affirmed. First, we must understand from the case, notwithstanding some of the expressions, that the justices find that the defendant's partner perfectly well knew these goods were ordered for the purpose of being used by the pauper. There is no question as to the sufficiency of the evidence; all that we have to consider is the existence of any ground for the conviction. The first question we are asked is whether a guardian is an officer within the application of the section. Of this I have no doubt; sect. 77 applies to all the persons to whom the 51st section makes the previous statute applicable. The second question is whether the supply of goods by the defendant's partner is the supply by him, although he was ignorant of the fact, which raises the point whether a guilty knowledge is an essential element of an act for which this conviction is provided. If an offence is punishable with hard labour it is a crime, and it requires knowledge to be shown in the defendant; but I do not think this is a crime. The section forbids the supply of goods for parochial relief by any person filling an office concerned in the administration of the laws for the relief of the poor. The mischief provided against is equal, whether the goods are supplied by the defendant himself or his partner or servant. No doubt there must be knowledge in the person actually selling or supplying the goods, but that knowledge must be taken to be that of the defendant. I do not think that to make an officer responsible under this section it is necessary to show personal knowledge on his part of an offence committed by his partner. On the third question, as to the sufficiency of the order, the relieving officer must be taken to have acted upon the authority given him by the board, and the words in the book do not limit the order. The last question is whether, this being an outdoor pauper for whom the bedstead was obtained, and the use of it and not the property in it being that which the relieving officer provided him, the statute applies. It is found as a fact that the bedstead was only lent to the pauper, and remained the property of the guardians; but I do not think this enactment is confined to the case of goods given entirely to a pauper; it must, I think, be a gratuitous provision for the relief of a pauper, but whether given or lent it is equally supplied for or in respect of the money ordered to be given in parochial relief. Our judgment therefore will be for the respondents.

LUSH, J.—I am of the same opinion. I think this case comes precisely within the words of the Act of Parliament. As to the last point I do not think it was intended that the word "given" should be used only in its literal sense; if goods are sent for the use of the pauper it is sufficient. On the substantial question whether a guardian is liable for an act of his partner of which he was ignorant, I think the enactment relates to goods supplied from a guardian's business, and his personal knowledge is unnecessary. It is obvious that on the other points the defendant is within the scope of the section.

Judgment for respondent.

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SMART v. PESSOL.

[Q. B.]

Wednesday, May 27, 1874.

SMART v. PESSOL.

Master and servant—Authority to give notice—Absence from service—30 & 31 Vict. c. 141.

The appellant, a coal miner, had been convicted by justice under 30 & 31 Vict. c. 141, of neglecting to fulfil a contract of service with his employers, the respondents, and absenting himself without just cause or lawful excuse. The contract was to give and take fourteen days' notice, and the respondents had received notice of that length from one of their workmen that the whole of the men employed by them would leave unless two non-union men were discharged. No evidence was given of any authority from the appellant to his fellow workman to give the said notice; and when the period elapsed the non-union men were not discharged. The appellant and some others left work, and the remainder continued in the respondents' employ. Held, upon a case stated that the conviction was right.

CASE stated under 20 & 21 Vict. c. 43.

At a petty sessions holden at Tipton, in and for the division of West Bromwich, Wednesbury, and Walsall, in the county of Stafford, on the 24th May 1873, an information and complaint preferred by Jabez Pessol on behalf of himself and William Pessol (hereinafter called the "respondents"), against John Smart (hereinafter called the "appellant"), under sect. 9 of the 30 & 31 Vict. c. 141, charging for that he the said appellant being the servant of the said respondents in the trade or business of a miner, under a certain contract of service for a period then unexpired, did on the 12th, 13th, and 14th May 1873, at Lower Church Lane, in the parish of Tipton, in the county of Stafford aforesaid, unlawfully neglect to fulfil the said contract, and absented himself from the service of the said respondents without just cause or lawful excuse, and that the amount of compensation which the said respondents claimed for the said breach and nonperformance of the said contract was 1*l.*, and applied that the said appellant might be summoned and adjudicated upon under the 9th section of the Master and Servants Act 1867, was heard and determined, the said parties respectively being then present, and upon such hearing the appellant was ordered to pay to the respondents the sum of 1*l.* forthwith, and also to pay the said respondents the sum of 12*s.* 6*d.* for their costs in this behalf, and if upon a copy or minute of this order being served upon the said appellant either personally or by leaving the same for him at his last or most usual place of abode, the said several sums were not paid forthwith, the justices thereby ordered that the same be levied by distress and sale of the goods and chattels of the said appellant, and in default of sufficient distress in that behalf they adjudged the said appellant to be imprisoned in the House of Correction at Stafford, in the said county, for the space of one calendar month, unless the said several sums, and all costs and charges of the said distress, and of the commitment and conveying of the said appellant to the said house of correction should be sooner paid. And whereas the appellant, being dissatisfied with the determination upon the hearing of the said information and complaint as being erroneous in point of law, had, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to the justices in writing to state and sign

a case setting forth the facts and the grounds of such determination as aforesaid for the opinion of this court, and had duly entered into a recognizance as required by the said statute in that behalf, the said justices in compliance with the said application and the provisions of the said statute stated and signed the following case:

Upon the hearing of the information and complaint, the only witness called and examined on the part of the respondents was William Pessol, one of the respondents, and it was proved by his evidence and found as a fact, that the respondents are in partnership as chartermasters at 'No. 17 pit in Dixon's Field, Lower Church-lane, Tipton; the appellant was employed as a miner; the terms of the contract being to give and take fourteen days' notice. Up to and on the 10th May 1873, appellant was in the employment of respondents. Appellant had given respondents no notice to leave or spoken to them about leaving at all. On Monday, Tuesday, and Wednesday of the following week, the 12th, 13th, and 14th May, the days charged in the information and complaint, appellant absented himself from work, and had not been since. Respondents had sustained 1*l.* damages.

On cross-examination by appellant's counsel, witness stated that the notice produced, of which the following is a copy,—"Messrs. W. & J. Pessol, we, that is, the whole of the men employed by you, do hereby give you fourteen days' notice to leave your employment, unless those two non-union men are discharged, which are Edward Drummond, Edward Allen. No. 17 pit, Messrs. Dixon's Colliery,"—was delivered to the respondent, William Pessol, by a man named Samuel Prince, on Saturday, 6th April. Prince was one of the men working in that pit; he, Pessol, could not read the notice; Prince said he would force those two (non-union) men to go into the union, and he would force respondents to go in. Prince said, if respondents did not discharge those two men they should strike. The notice was afterwards read to the respondent (William Pessol); he then knew the contents of the notice; he knew from the notice that Prince intended to give notice for the whole of the men to leave unless the two men were discharged. Appellant was one of the men who worked in the pit, and he was one of the men for whom Prince was giving the notice. On the next Saturday, 3rd May, respondent (William Pessol) asked Samuel Prince how the men were going to act when the notice was up. Respondent (William Pessol) told him they (respondents) should summon the men up if the pit played.

On re-examination witness stated that eighteen of the men on the pit continued to work, and had been at work ever since, and were at work then; other men had left. The eighteen were at work before the notice was given.

Neither Samuel Prince nor the appellant were called and examined, nor was any evidence given on behalf of the appellant to show that Prince had any authority to give notice on behalf of the appellant.

It was contended on behalf of the appellant that the notice given by Prince was a good and valid one for the whole of the men then working in the pit, including appellant, and was properly served on their behalf by Prince, and was binding both on the respondents and appellant, and that the information and complaint should be dismissed.

It was contended on behalf of the respondents

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that appellant had, in fact, given no notice at all to leave his employ. That the notice produced was bad in law, and not binding upon the respondents; and that it had not been shown that Prince had any authority to give notice on behalf of appellant; and that the notice itself did not disclose any agency of Prince for appellant.

The justices, however, being of opinion that the evidence given brought the case within the operation of the said 9th section of the Act 30 & 31 Vict. c. 141, gave their determination against the appellant in the manner before stated.

The questions of law arising on the above statement for the opinion of this court therefore are: First, whether the notice given by Samuel Prince was a good and valid one on behalf of the appellant; secondly, whether the delivery of the notice by Prince to the respondents was a proper service thereof on behalf of the appellant; thirdly, whether it was sufficiently shown that Prince had authority to act as agent for appellant so as to bind respondents and the appellant by the notice. If the court should be of opinion that the said order was properly and legally made and the appellant is liable as aforesaid, then the said order is to stand; but if the court should be of opinion otherwise, then the said information and complaint is to be dismissed.

Rosanquet (with him *Poland* and *Young*) argued for the appellant.—The 4th section of 30 & 31 Vict. c. 141, provides that "wherever the employer or employed shall neglect or refuse to fulfil any contract of service, or the employed shall neglect or refuse to enter or commence his service according to the contract, or shall absent himself from his service, the party feeling aggrieved may lay an information or complaint in writing before a justice, magistrate, or sheriff, setting forth the grounds of complaint, and the amount of compensation damage or other remedy claimed for the breach or non-performance of such contract." And by sect. 9 "Upon the hearing of any information or complaint under the provisions of this Act, two justices, or the magistrate, or sheriff, after due examination, and upon the proof and establishment of the matter of such information or complaint, by an order in writing under their respective hands, in their or his discretion, as the justice of the case requires," may make one of several directions therein provided. There was no refusal to fulfil the contract of service, the terms of the contract being to give and take fourteen days' notice. This was a sufficient notice to conclude the contract; but even if it were not, the fact, of which there is evidence, that appellant believed notice had been given, rendered the conviction improper. In *Seth Turner's case* (9 Q. B. 80), though the conviction was under 4 Geo. 4, c. 34, s. 3, although the words of the statute were used in the information, it was held that there was no offence unless the absence from the service was without any lawful excuse: the mere belief that this was sufficient notice would, in the appellant's case, be a lawful excuse. So in *Rider v. Wood* (2 E. & E. 338), it was held that to render an artificer liable under the same Act for absentsing himself from service, it is necessary not only that he should absent himself without a lawful excuse, but that he should have a guilty knowledge that he has no lawful excuse. It was held that a similar conviction could not be sustained in *Reg. v. Youle* (6 H. & N. 753), because the defendant

appeared to have been acting *bonâ fide* in the exercise of a supposed right.

Griffiths, for respondents.—This court in *Unwin v. Clarke* (14 L. T. Rep. N. S. 356; L. Rep. 1 Q. B. 417) refused to follow *Reg. v. Youle*, and held that no ignorance of the law could excuse the defendant for mistaking the effect of the notice. This is in the nature of a civil remedy between master and servant, and it cannot be assumed without evidence that the appellant had ever authorised the man Prince to give the notice for him; and it would not have been sufficient, even if it had been proved, that the appellant ratified the notice afterwards.

BLACKBURN, J.—I think there can be no doubt that if the authority had not been given before the notice, it would not have been the notice of the appellant. It is not enough to prove a subsequent ratification of an act done, as was established by *Bird v. Brown* (4 Ex. 417), with reference to a stoppage *in transitu*. Here there was no evidence that any authority to give the notice was obtained by Prince from the appellant before he gave it to the respondents. Whether as a matter of fact there may have been any antecedent authority we cannot tell; at all events no such evidence was produced. *Unwin v. Clarke* shows that the ignorance of the effect of the notice was an ignorance of law, and is no defence to this charge. The conviction, therefore, was right.

LUSH, J., concurred.

Judgment for respondents

Attorneys for appellant, *Makeson, Taylor, and Arnould*.

Attorney for respondents, *F. Needham*.

Saturday, May 30, 1874.

ROBERTS (app.) v. EGERTON (resp.).

Adulteration — Green tea — Colouring matter —
35 & 36 Vict. c. 74, s. 2.

The appellant, who kept a shop for the sale of tea, sold to the respondent, who asked for green tea, some tea as it was imported from China, which had been there painted or faced with gypsum and Prussian blue for the purpose of colouring it. This tea so painted and faced is generally known as green tea in the tea trade, but there is a pure green tea imported from Japan which is not generally known by that name. This practice of colouring tea is not known to the public. Upon a case stated on conviction of the appellant under sect. 2 of the Adulteration of Food, Drugs, &c., Act 1872:

Held (by Cockburn, C. J., Blackburn and Archibald, J.J., dissentiente Quain, J.), that this was an adulterated article, sold as unadulterated, and that therefore the conviction was right.

The following case was stated by two of Her Majesty's Justices of the Peace for the Petty Sessional Division of the Hundred of Wirral in the County of Chester, under 20 & 21 Vict. c. 43.

At the petty sessions holden at Birkenhead in the said petty sessional division of the said county on the 19th June 1873, the appellant by his counsel appeared before the said justices in answer to a summons issued by Richard Barton, one of the aforesaid justices, on an information laid in due form of law against him by the respondent, whereby

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the appellant was charged that he the said Robert Roberts on the 12th May 1873 at the said township of Birkenhead in the said county, did unlawfully sell to one Joseph Millington, as unadulterated, a certain article of food or drink, to wit, two ounces of green tea, which was then and there adulterated contrary to the form of the statute 35 & 36 Vict. c. 74, and which said information then and there came on to be heard, and was heard before the said justices.

By statute 35 & 36 Vict. c. 74 s. 2, it is enacted that "Every person who shall sell any article of food or drink with which to the knowledge of such person any ingredient or material injurious to the health of persons eating or drinking such article has been mixed, and every person who shall sell as unadulterated any article of food or drink, or any drug which is adulterated, shall for every such offence on a summary conviction of the same before two justices of the peace at petty sessions in England, or before two justices of the peace in the justices' of the peace court or before the sheriff substitute of the county, or before any magistrate acting under the general or local police Act in Scotland, or before justices at petty sessions or a divisional justice in Ireland, forfeit and pay a penalty not exceeding 20*l.*, together with such costs attending such conviction as to the said justices, sheriff substitute, magistrate, or divisional justice shall deem reasonable."

The facts are as follows:—

The appellant keeps a shop at Birkenhead for the sale of tea and coffee, and on the 12th May 1873, Joseph Millington went to the said shop for the purpose of purchasing some green tea. He asked for some green tea, which was served to him by one of the shopmen of the said appellant, and he bought two ounces of it for which he was charged the sum of 5*d.*

Joseph Millington informed the said shopman after he had purchased the green tea, and before he left the shop, that he bought it for the purpose of having it analysed by the public analyst; and the shopman then stated that he was authorised by his employers to guarantee all their green teas of the value of 3*s.* per pound and upwards as genuine green teas.

Joseph Millington afterwards delivered the said two ounces of green tea in the same state in which he had received it from the shopman of the appellant to the respondent, who is the officer duly authorised under sect. 6 of 35 & 36 Vict. c. 74, for the said petty sessional division of the said county to submit samples of articles of food or drink to be analysed by the public analyst.

The respondent delivered the same two ounces of green tea to John Campbell Brown, the duly appointed public analyst for the said county, in the same state in which he received it from the said Joseph Millington, for the purpose of analysis.

Afterwards and on the 20th May 1873, the said public analyst delivered the respondent a certificate, of which the following is a copy:—

The Laboratory, Royal Infirmary School of Medicine, Liverpool, 19th May 1873.

County of Chester, No. 66.

The Acts for preventing the adulteration of articles of food, drink, and of drugs (23 & 24 Vict. c. 84 and 35 & 36 Vict. c. 74.)

I hereby certify that for the purposes of the above-named Acts I have analysed a sample of green tea submitted to me for analysis on the 14th May 1873, by Superintendent

Egerton and marked No. 66. And I further certify that such sample is adulterated by a thick facing of mineral matter and Prussian blue.

(Signed) J. CAMPBELL BROWN, D.S.,

Public Analyst for the County of Chester.

The tea referred to in the foregoing certificate is a portion of the green tea purchased, as stated above, by Joseph Millington at the shop of the appellant. It was painted or faced with gypsum and Prussian blue for the purpose of colouring it, and this is the adulteration mentioned in the said certificate.

The green tea in question was sold by the appellant in the same state in which it came from abroad, and the appellant did not in any way cause the tea to be painted or faced in this country.

A sample of tea was produced by the public analyst before the justices which resembled in colour and appearance what is popularly known as green tea. This was proved by the public analyst to be neither painted nor faced. He also proved that he had analysed other samples of tea resembling in colour and appearance green tea, and that they contained no colouring matter. It was also proved that the tea which is imported from China as green tea, and generally known as such in the tea trade, is painted and faced in the manner and for the purposes above described, and that the sample of tea, produced before the justices and proved by the public analyst to be neither painted nor faced, was imported from Japan, and not known generally in the trade as green tea.

It was also contended on behalf of the appellant:

That the merchantable article imported into this country known by the name of green tea in the tea trade is a painted or faced tea, and that it is not a natural simple production of nature; and that therefore a vendor of green tea cannot be taken to represent that he sells only the leaves of the tea plant unaffected by any process;

That green tea was sold in the state in which it was imported from China, and that the painting or facing was done there and not in this country;

That painting or facing tea for the purpose of colouring it is not an adulteration within the meaning of statute 35 & 36 Vict. c. 74, and is not done for the purpose of increasing its weight or bulk.

The said justices were of opinion that as the practice of painting and facing tea sold as green tea (though known to those engaged in the tea trade) is not known to the public, the sale to Joseph Millington, when he asked for green tea, of tea painted and faced under the circumstances of this case, was a sale as unadulterated of an article of food or drink which was adulterated, within the meaning of statute 35 & 36 Vict. c. 74; and they convicted the appellant in a penalty of 5*s.* and costs, and granted a case for the opinion of this court.

The question for the opinion of the court is whether the appellant under the above-mentioned circumstances was legally and properly convicted of the offence charged in the said information. If the court should be of opinion that the appellant was legally and properly convicted, then the said conviction is to stand. If not, then the court is to make such order in the premises as it shall think fit.

Russell, Q.C. (with him Segar), argued for the appellant.—The case finds no knowledge on the

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appellant's part of the process of colouring this tea. [BLACKBURN, J.—We held that to be unnecessary to constitute an offence against the second part of that second section in *Fitzpatrick v. Kelly* (28 L. T. Rep. 558; L. Rep. 8 Q. B. 337.)] It becomes necessary then to show that the seller represented the article to be unadulterated. [COCKBURN, C. J.—The question raised by this case seems to be whether an article cannot be adulterated with impunity if the adulteration be notorious in the trade.] The first question is whether this process was an adulteration. The only attempt to define adulteration in the statute is the third section, which, however, only directs a certain proceeding to be deemed adulteration. Dr. Johnson defines the word as “the act of adulterating or corrupting by foreign mixture—contamination.” Taking this with the effect of the three first sections of the statute, adulteration, to be within the application of the enactment, must mean the admixture of something injurious to the consumer, or something to increase the bulk or weight of the article sold. The case finds nothing of the kind here, for the only object of the facing is to colour the tea, and the effect is not found to be injurious. [QUAIN, J.—Is tea an article of food or drink, or a drug? BLACKBURN, J.—I should say it was all three; at all events it is within the Act.] But the findings in the case do not constitute an adulteration of the tea. Further, even if this be an adulteration, there was no representation, either express or implied, that the article was anything but what it was. The ground of the judgment of Quain, J., in *Fitzpatrick v. Kelly*, as reported in 42 L. J. 135, M. C., was that “what was sold was not butter in the common acceptance of the term.” Here what was sold was green tea in the common acceptance of the term, and there was no misrepresentation in calling it genuine. [QUAIN, J.—Is not the proper question whether this article commercially passes as green tea? BLACKBURN, J.—That would be so if the sale were between merchants, but not upon a sale to the public, who know nothing about it.] This is analogous to the sale of sherry, which is necessarily alcoholized, but not misrepresented if sold as genuine sherry.

Poland, for the respondent.—If, as the case finds, there is a green tea in its natural state, it follows that this article must be adulterated green tea. Here, when the public, who know nothing about it, ask for green tea, and expect to have it genuine and natural, they get instead tea and paint. The tradesman who sells this stuff may free himself from liability by advertising it as green tea from China, or highly decorated green tea; but the case finds it is not the green tea which may be had pure, although the trade call it by another name. The statute lays upon a tradesman the legal duty to find out what articles he sells, and to properly describe them to his customers; and this can be no hardship to a man who must have a knowledge of his trade.

Russell, in reply.—The finding in the recital, before the justices' opinion, is merely to the effect that the public do not generally know the practice. The case nowhere says that the public believe green tea to be anything but coloured tea.

Cockburn, C.J.—I am of opinion that this conviction was right, although the view taken of the matter by my brother Quain has made me hesitate. The statute provides, so far as it is material to this

case, that “every person who shall sell as unadulterated any article of food or drink or any drug, which is adulterated, shall for every such offence be summarily convicted.” The appellant has been convicted for this offence in respect of the sale of some green tea, and two questions for our consideration arise from the case stated by the convicting justices. First, is this an unadulterated article? I think it is. The case finds that a kind of green tea, which is not painted nor plastered, comes from Japan, and resembles in colour and appearance what is popularly known as green tea. Green tea, therefore, may be had unadulterated, and this process of painting or facing, as it seems to me, amounts to adulteration. It is also found in the case that the practice of painting and facing tea sold as green tea is not known to the public, who are the consumers, and further that this tea was warranted as genuine. I conclude from the case not only that this article was adulterated, but also that the fact was known to the appellant, who keeps a shop for the sale of tea, and who must be taken to be one of those engaged in the tea trade, and found by the case to have knowledge of this practice. The statement of the justices may be capable of a construction which would imply that this was a genuine article of commerce known as green tea; but it must be taken with the fact that the consumer knows nothing about the process; he may, therefore, reasonably expect the genuine unadulterated article of the same name, which it appears actually exists, although called by another name in the trade. This being so, the appellant has sold as unadulterated an article which was adulterated. There is no necessity with respect to this provision of the Act concerning the mixture of non-injurious ingredients, that there should be knowledge on the seller's part; but even if it were necessary, I do not think the findings in the case would be sufficient to exempt the appellant. Although he obtained it in the condition in which he sold it, he was bound to make himself acquainted with his business, and must be assumed to have the knowledge which is common to those engaged in the trade. I conclude from the facts stated that this was adulterated green tea, and not the article which the public have a right to expect as green tea. If they knew they were buying a tea faced with gypsum and Prussian blue when they asked for green tea, I should think they would prefer to ask for and get black tea. I think this was an offence within the statute, and the conviction should be affirmed.

Blackburn, J.—I am of the same opinion. The Act of Parliament is oddly and obscurely worded, but the effect of it is, I think, sufficiently clear. The first section imposes a heavy penalty upon persons concerned in the act of adulterating articles of food or drink or drugs; the second section is with respect to persons selling adulterated articles, and it deals with them in two ways: first, if the adulteration is injurious to the health of the person eating or drinking the article, the seller is liable to conviction, whatever representation he makes concerning the article when he sells it, provided that he knows of the fact of the adulteration; secondly, even if the adulteration be innocent in its effects upon the consumer, and even if the seller knows nothing about it, he may be convicted if he represents expressly or impliedly that the article he sells is genuine. The enactment puts upon the tradesman the duty to acquaint

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himself with the materials of which his goods are composed, and he must be careful to represent them accurately to his customers. Upon this second provision of the second section two points arise in this case, and I will return to them presently. The third section of the Act is more obscurely worded even than the second, but I take it to mean that the mixture of two wholesome articles, with the fraudulent object of increasing weight or bulk, is to be deemed adulteration, unless the seller is ignorant of the mixture or declares it to the purchaser. It is admitted that this section gives no definition of adulteration, and for the decision of this case it need not be considered at all. I take it that "green tea" means the young leaf of the plant simply dried, without any paint or mixture of foreign substances. The facing or painting in this case was done in China, and the appellant sold the tea as it was imported. We must take it also, as the case finds, that all green tea from China is of this kind. I doubt myself whether this is so, as a matter of fact; but whether it is or not, it appears from the case that green tea is not necessarily composed of this mixture. Specimens were produced in court free from the consequences of any such process, and I think it of no importance that the trade do not call tea of this kind by the name of green tea. Mr. Russell said every one should know that Chinese green tea was thus made, and by asking for green tea one could only expect the article of commerce known in the trade by that name. If an article is a compound of different substances, or requires some foreign ingredient either to make it or to render it lasting, as for instance curaçoa, which is known to be a mixture of various materials, or sherry, which requires alcohol to make it fit for carriage; then merely to call the article by its received name would not be to represent an adulterated article as unadulterated. But when a simple article like tea has mixed with it foreign ingredients like gypsum and Prussian blue, which are used merely for the purpose of colouring the tea, and are not required in the natural process of drying or preparing, then such a mixture is adulteration. A further question arises as to whether the appellant represented this green tea as unadulterated, when he sold it. It was called green tea, and the case finds by way of recital, but sufficiently for this purpose, that the public are not aware of the process by which it is coloured. Moreover the shopman stated that he was authorised by the appellant to guarantee the article sold as genuine green tea. From these facts it seems to me that the appellant sold as unadulterated this article of food which was adulterated, and that the conviction should be affirmed.

QUAIN, J.—I regret that I cannot agree in the judgment of the rest of the court. This is a matter of great public importance, and it seems to me that a retail grocer at Birkenhead, selling this tea in the condition it was imported by the merchants from China, was not intended to be within the application of the Act. The case finds that an article of commerce known in the trade as green tea is painted and faced in the manner described before it leaves China for this country, and is generally sold for green tea. There is nothing injurious in it, and its appearance is that of green tea. Did the appellant then by selling it for green tea impliedly sell an adulterated article as unadulterated? In my opinion he did not. He sold avowedly an article well known as the green tea

of commerce, and the only article known by that name in the trade. He had not altered it at all, but sold it as he bought it; and I think he ought not to be liable under this statute.

ARCHIBALD, J.—I agree with my Lord and my brother Blackburn that this is a case within the application of this Act. It may be that green tea may come in time to mean pure tea with a facing of foreign materials. According to the case, that is now the opinion of the tea trade, and if it were material it must be taken that the appellant, who is in the trade, is aware of the process by which Chinese tea is coloured. The question, however is, what the public, who are the purchasers and consumers, understand by the expression "green tea," when they ask to buy it. The case finds that the public know nothing about the colouring of gypsum and Prussian blue. Except for its being an article of commerce known in the trade as green tea, this mixture would be admittedly an adulteration; and the fact of the public ignorance makes it so in this case, notwithstanding the received use of the term amongst persons who know what it means.

Judgment for respondent.

Attorney for appellant, *W. Hunter, jun.*, Liverpool.

Attorneys for respondent, *Purkiss and Perry.*

Saturday, May 30, 1874.

HAMPTON (app.) v. RICKARD (resp.).

Bastardy—Personal law—Place of connection—35 & 36 Vict. c. 65, s. 3.

The respondent was mother of a bastard child born in England, of whom the appellant was adjudged to be the father. The appellant was an Irishman, and the connection took place only in Ireland; Held, upon a case stated by the justices, that the Bastardy Laws Amendment Act 1872, gave jurisdiction in all cases where the birth was in this country and the father was present; and that it mattered not what was the country of the parents or the place of their connection.

THIS was a case stated by two of Her Majesty's justices of the peace in and for the county of Cornwall, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with their determination upon the question of law which arose as hereinafter stated, on the 12th Aug. 1873 at the Institution at Torpoint, in the said county of Cornwall, the appellant having duly entered a recognisance to prosecute the appeal.

Upon the hearing of a certain application preferred by the respondent against the appellant under section 3 of the Bastardy Laws Amendment Act 1872, that she had been delivered of a bastard child since the passing of the Bastardy Laws Amendment Act 1872, within twelve calendar months from the date of her application, of which bastard child she alleged the appellant to be the father, the justices adjudged the said appellant to be the putative father of the said bastard child, and ordered him to pay to the respondent certain sums of money as set forth in the order under their hands and seals, dated the 12th Aug. 1873.

The following facts were either proved before the justices or admitted by both parties.

The said bastard child was born on the 4th Sept. 1872 at the parish of St. Germans, in the

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county of Cornwall, where the respondent was then living with her mother; the appellant, who is an Irishman, having been in Ireland at the time of the birth. The connection which resulted in the birth of the child took place in Ireland (no connection having taken place elsewhere than in Ireland), where the respondent was then living in domestic service.

The application for a summons to the appellant was made on the 27th May 1873, and the summons was duly served upon him on the 2nd June 1873, and the hearing of the application was from time to time adjourned until the 12th Aug. 1873, when the order was made as before stated.

On the part of the appellant it was contended that inasmuch as the Bastardy Laws Amendment Act 1872, does not extend to Ireland, and the connection which resulted in the birth of the child took place in Ireland, notwithstanding the fact of the birth taking place in England, the justices had no jurisdiction in this case.

On the part of the respondent it was contended that the child being born of an English woman in England, in the county of Cornwall, the justices had jurisdiction.

The justices, however, being of opinion that as the child was born in England as aforesaid they had jurisdiction in the matter, gave their determination against the appellant in the manner before stated.

The question of law upon which this case was stated for the opinion of the court therefore was, whether the justices had or had not jurisdiction to make the order before stated, and whether the order was valid, or otherwise. And the court was humbly solicited according to the power vested in the said court by the said statute 20 & 21 Vict. c. 43, to remit the case to the said justices, with the opinion of the court thereon, or to make such other order as the court might deem fit.

Anstie argued for the appellant.—All previous legislation on this subject is repealed by 35 & 36 Vict. c. 65; and that is a personal statute. By international law, an act of this kind, which is of the nature of a wrong on the father's part, must be judged according to the law of the country to which the person who is made liable belongs. The Legislature has thought proper to impose different legislation concerning bastardy upon Ireland, from that of this country: for this purpose, therefore, Ireland must be taken to be a foreign country. [BLACKBURN, J.—But this is not a wrong at all; it is a civil remedy against the father for the maintenance of the child.] This exact point has never been raised, but there are two cases deciding closely analogous questions. In *Scott v. Seymour* (1 H. & C. 219), the action was between two British subjects for an assault committed at Naples; the Courts of Exchequer and Exchequer Chamber held that the action lay in this country, but doubted whether any such action could be sustained if one of the parties had been a Neapolitan. And it was held in *The Karnak*, (L. Rep. 2 P. C. 505; 21 L. T. Rep. N. S. 159), that the extent of the authority conferred on the master of a vessel to bind the owners either of the ship or cargo, is derived from and governed by the law of the flag. This rule as to personal statutes is to be found also in M. Felix's *Treatise on International Law*, vol. 1, p. 79. And Dalloz in his *General Jurisprudence*, vol. xxx., p. 166, treats of the rights of family with respect

to foreigners in paragraph 392; he says, "If the relations of family be established between French and foreigners, it is always the personal law of each which shall determine his state and capacity." Again, with respect to the duty of maintenance upon parents so situated, where there is a difference between the French and foreign law, he says, "It seems to us that, from the rule that the personal statute follows each individual, whatever be the place he inhabits, the consequence flows that in principle one must consult only the personal law in order to decide if he is or not held by such an obligation, if he has or not a right to invoke such a protection." [BLACKBURN, J.—That proposition goes to this extent, if it be applicable to this country; that if a Frenchman were to come to England, and have a child by an Englishwoman who had never left this country, he would not be liable under the Bastardy Act.] That is so. [COCKBURN, C. J.—International law has nothing to do with the interpretation of this statute.] The 3rd section, in limiting the time for the woman's application to a justice, implies that the connection must be in England; it says, "at any time within the twelve months next after the return to England of the man alleged to be the father of such child." [COCKBURN, C. J.—That provision merely keeps the jurisdiction alive in the case of the father's absence from this country.] It was held under the previous statutes on the subject that the jurisdiction existed only when the birth was in this country (*Reg. v. Blane*, 13 Q. B. 769), and that decision was based upon the personal law. The same principle, and the implied intention of this statute, both agree in requiring the intercourse as well as the birth to be in this country.

Charles, for the respondent, was not heard.

COCKBURN, C. J.—I think this is the simplest matter possible. The statutes on bastardy were intended to make the father liable and to protect the parish in which the child is born from liability for its maintenance. The last, like the previous Acts, gives the justices jurisdiction to make orders for this purpose whenever the child is born in England. It is perfectly immaterial what may be the rules of international law. It is the law of England that if a woman is delivered of a bastard child in this country, and the father is within the jurisdiction, she may apply for an order against him; and if the paternity be established, he is liable for the child's maintenance. The father's presence is material, and the place of the child's birth; but it matters not where the connection took place, nor to what country the parents belong.

BLACKBURN, J.—I am entirely of the same opinion. If the statute made the illicit intercourse between the father and mother penal, it might have been necessary to show the father's liability according to the law of his country. As it is we have only to apply the words of the statute, which limit the jurisdiction only to the place of the child's birth, and the presence of the father.

QUAIN and ARCHIBALD, JJ. concurred.

Judgment for respondent.

Attorneys for appellant, *Futvoys and Paigs*.

Attorneys for respondent, *Cooke, Kingston, and Cotton* for *Smith and Bennett*, Devonport.

C. P.] DAVIES v. KENSINGTON AND HARDY—HAVERFORDWEST ELECTION PETITION. [C. P.]

COURT OF COMMON PLEAS.Reported by ETHERINGTON SMITH and J. M. LELY, Esqrs.,
Barristers-at-Law.

Tuesday, June 2, 1874.

DAVIES (pet.) v. KENSINGTON AND HARDY (resps.).

HAVERFORDWEST ELECTION PETITION.*Election petition—Refusal of returning officer to receive nomination of candidate not paying election expenses—Return of other candidate paying such expenses—Whether payment condition precedent to taking poll—Ballot Act, 1872, s. 8—Reform Act, 1832, ss. 68, 71.**The payment of election expenses is no condition precedent to the taking of a poll, and a return is void if a returning officer, imposing such a condition, refuses to take a poll on the ground of non-compliance with it.**By sect. 8 of the Ballot Act, 1872, election expenses are payable in the same manner as the expenses of the erection of polling booths are payable; and by sect. 71 of the Reform Act, 1832, such booths are to be erected at the joint and equal expense of the candidates by contract with the candidates themselves if they think fit, and if not, by the returning officer at the expense of the candidates.**Haverfordwest returns one member, and D. and K. were both duly nominated as candidates, K. paying 60l. to the returning officer as his share of the estimated election expenses, and D. not making any payment. The returning officer having formally declined to notice D.'s candidature unless D. would pay, or give security for the payment of 40l. as his half of the expenses, returned K. as duly elected. 40l. was a fair sum for D. to pay if any sum were demandable by the returning officer before taking a poll.**Held, upon a special case, that K. was not duly elected.***SPECIAL CASE.**

1. At the general election in the year 1874 the respondent William Lewis Harding was the returning officer for the borough of the town and county of Haverfordwest.

2. The said borough is entitled to return one member to Parliament.

3. The election for the said borough was duly appointed by the said returning officer to be holden on the 2nd Feb. 1874, in the grand jury room of the Shire Hall at Haverfordwest aforesaid, between the hours of 11 a.m. and 1 p.m.

4. Within the two hours appointed for the election the respondent William Edwards, Baron Kensington, appeared in the grand jury room as a candidate, with two registered electors as his proposer and seconder, and accompanied by his agent; and handed in his nomination paper signed by such proposer and seconder and purporting also to be signed by eight other registered electors, and at the same time deposited with the said returning officer 60l. as a deposit for one moiety of the returning officer's expenses in carrying into effect the provisions of the Ballot Act, 1872.

5. During the two hours aforesaid the petitioner also appeared in the said grand jury room, unaccompanied by any proposer or seconder or other person, and handed in a nomination paper signed by two registered electors as his proposer and seconder, and by eight other registered electors.

6. The petitioner's address to the electors of the said borough was posted in the public places of Haverfordwest several days previous to the day of election, and immediately on its appearance the said returning officer wrote and sent to the petitioner a letter in the following terms:

Spring Gardens, Haverfordwest, 29th Jan. 1874.

Dear Sir,—I observe that you have published an address to the electors of this borough.

As it will be utterly impossible for me to make the necessary arrangements for the poll if the London orders are deferred longer than to-morrow, I must ask you to be prepared with a sufficient deposit or approved security by to-morrow at noon.

Be pleased to let me hear from you in the mean time the course you intend to adopt.—Yours truly,

W. L. HARDING, Sheriff of Haverfordwest.

To this letter no reply was sent by the petitioner. When the petitioner presented his nomination paper the said returning officer demanded of him a deposit of 40l., with which the petitioner was not prepared, and which he did not make.

The said returning officer thereupon wrote out and served upon the petitioner a notice of which the following is a copy:

To Mr. T. W. Davies.

I hereby give you notice and require you to deposit with me the sum of 40l., or to give me approved security for the like sum, by one o'clock (local time) to-day, or in default of your so doing I shall decline to notice your candidature at the present election for Haverfordwest. The above sum is one moiety of the estimated disbursements by the sheriff.—Yours obediently,

2nd Feb. 1874.

W. L. HARDING, Sheriff.

Assuming that the returning officer was entitled to demand any deposit or security from the petitioner, the said sum of 40l. was not an improper or unreasonable sum to be paid as the amount to be deposited or secured, and in fact 40l. was the sum which might properly have been fixed.

7. The petitioner did not either during the two hours appointed for the election, or at any time afterwards pay or tender to the said returning officer the said sum of 40l., or any other deposit, or give or offer to give any security for the said sum of 40l. or any other sum.

8. The petitioner did not during the time appointed for the said election give any notice to the effect that he withdrew from his candidature signed by him to the returning officer.

9. The petitioner did not declare nor was he called upon to declare in writing to the returning officer on or before the day of nomination the name or address of any agent or agents; but the petitioner contends that if he had been nominated properly, he would have had by law the whole of the rest of the day for the purpose of appointing such agent.

10. The said returning officer under the circumstances without adjourning the said election for the purpose of taking a poll, declared the said William Edwards Baron Kensington, to be duly elected, and returned his name to the Clerk of the Crown in Chancery.

The question for the opinion of the court is whether the said William Edwards, Baron Kensington, was duly elected and returned.

Gorst, with him *Alfred Hardy*, for the petitioner. —There is nothing in the Ballot Act 1872, or the Reform Act of 1832, to which sect. 8 of the Ballot Act is intended to refer, which warrants the imposition of this condition precedent to nomi-

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nation by the returning officer. (a) They cited *Morris v. Burdett* (1 Camp. N. P. C. 218 (A. D. 1808); 2 M. & S. 212 (A. D. 1813). In the first case (reported 1 Camp.) Lord Ellenborough, C. J., held that a candidate is only liable for such expenses as are imposed by positive statute, or by his own consent, express or implied, notwithstanding there might have been a long usage for the expenses being rateably defrayed by all the candidates; and in the second case (reported 2 M. & S. 212) Lord Ellenborough, C. J., and Le Blanc, Bayley, and Dampier, JJ., held that a candidate proposed without his consent, but afterwards taking his seat, was not liable to pay hustings expenses.

C. S. Bowen, for the respondent, Lord Kensington.—First, the receiving officer was right in insisting upon having his expenses paid in advance; secondly, even if he was wrong the election is not therefore void. Mr. Davies, by not answering the returning officer's letter, had shown that non-payment of the expenses on his part was a probable contingency. At common law the sheriff was under no liability to provide any material for an election; such liability was first cast upon him by 18 Geo. 2, c. 18, s. 7 (repealed). He further referred to 34 Geo. 3, c. 73 (repealed by the Ballot Act), and 51 Geo. 3, c. 126 (a temporary Act). *Muntz v. Sturge* (8 M. & W. 302) is no doubt an authority for the petitioner, but it is submitted that it was wrongly decided. And such portions of the judgments as make for the petitioners were not necessary for the decision of the case—a qualification which will apply equally to the judgments in *Morris v. Burdett* (*ubi sup.*)

Le Marchant for Mr. Harding, the returning officer, argued as to costs only.—The returning officer ought not to have to pay costs; there are decisions, of election committees only, it is true, to that effect. [BRETT, J.—To my knowledge, Willes, J. read all the decisions of election com-

(a) Ballot Act 1872 (35 & 36 Vict. c. 33), s. 8. "Subject to the provisions of this Act, every returning officer shall provide such nomination papers, polling stations, ballot boxes, ballot papers, stamping instruments, copies of registers of voters, and other things, appoint and pay such officers, and do such other acts and things as may be necessary for effectually conducting an election in manner provided by this Act.

"All expenses properly incurred by any returning officer in carrying into effect the provisions of this Act, in the case of any parliamentary election, shall be payable in the same manner as expenses incurred in the erection of polling booths at such election are by law payable.

Reform Act 1832 (2 Will. 4, c. 34), s. 71. "All booths erected for the convenience of taking polls shall be erected at the joint and equal expense of the several candidates, and the same shall be erected by contract with the candidates, if they shall think fit to make such contract; or if they shall not make such contract, then the same shall be erected by the sheriff or other returning officer at the expense of the several candidates as aforesaid, subject to such limitation as hereinafter next mentioned, (that is to say) that the expense to be incurred for the booth or booths to be erected at the principal place of election for any county, riding, parts or divisions of a county, or at any of the polling places so to be appointed as aforesaid, shall not exceed the sum of 40*l.*, in respect of any one such principal place; and the expense to be incurred for any booth or booths to be erected for any parish, district, or part of any city or borough, shall not exceed the sum of 25*l.* in respect of any one such parish, district or part; provided always, that if any person shall be proposed without his consent, then the person so proposing him shall be liable to defray his share of the said expenses in like manner as if he had been a candidate."

mittees from the earliest times downwards, and said that he had not found any which did not appear to him to be right.] He then cited the *Warrington case* (1 O'Mall. & H. 42), and further stated that in the *Hackney case* (not reported). Grove, J., ordered all parties to pay their own costs.

Lord COLERIDGE, C.J.—In this case we are asked to say whether Lord Kensington was duly elected to serve in Parliament for the borough of Haverfordwest, in which it appears that the sheriff acted as returning officer. Lord Kensington had been duly proposed and seconded, and Mr. Davies had been duly proposed and seconded within the meaning of par. 1 of sect. 1 of the Ballot Act 1872. The sheriff, however, declined to put Mr. Davies in nomination on the ground that Mr. Davies declined to find funds for the expenses of the election, which are to be defrayed in the first instance by the sheriff himself. It is beyond doubt that the sheriff imposed the giving of this deposit as a condition precedent to the taking of a poll, and I may say that nobody impeaches the motives of the sheriff in so imposing it. The case finds that the amount of 40*l.* was no exorbitant deposit to ask for, if the sheriff were entitled to ask for any deposit at all. Now, was he justified in imposing this condition precedent or not? I am of opinion that he was not. The question depends on the construction of sect. 71 of the Reform Act of 1832, upon which section we have opinions of the highest authority. The Ballot Act in no way helps us, inasmuch as sect. 8 of that Act merely directs that election expenses are to be payable in the same manner as the expenses incurred in the erection of polling booths are by law payable. Now the law as to the payment of such expenses is contained in two sections of the old Reform Act of 1832, s. 68 and sect. 71. Sect. 68 is not of much importance because the greater part of it has been repealed, but is of some use in illustrating the meaning of sect. 71. [The learned judge then read sect. 71, and proceeded:] Here there is no trace of any condition precedent, no trace of an enactment that if a candidate refuses to pay expenses he shall not be allowed to proceed to election. Yet so serious a matter as the refusing to allow a candidate to be placed in nomination would have been put in clear words, if it had been intended that such should be the law; and it would not have been left to be got at by what I must call a far-fetched and strained construction of words. But we are not left to decide between such a far-fetched construction and the reasonable construction. The section received judicial construction in 1841 in *Muntz v. Sturge* (*ubi sup.*), decided by such high authorities as Lord Abinger, C.B., and Parke and Anderson, BB. In that case the plaintiff was returning officer for Birmingham, and sued the defendant, who had been put in nomination but declined to go to the poll, for one-third part of the expenses incurred by the plaintiff in erecting the polling booths under sects. 68 and 71 of the Reform Act. So the Act came before the court to be construed, and I find that the very argument that has been urged before us to-day was pressed upon the court. "It was urged upon us," said Lord Abinger, C.B., "that this cannot be the true construction of the Act" (that the candidates designated by sect. 71 are only those who go to the poll) "inasmuch as the returning officer is necessarily obliged to incur a large portion of the expense before the day fixed for the

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[Ex.]

nomination, it being often impossible to erect the necessary booths between the time of the nomination and the actual commencement of the poll. . . It must be admitted that the construction which we put on these clauses may in some cases possibly, though not very probably, cast on the returning officer the burthen of preparing at least for the erection of booths, when there may be never any person answering the description of a candidate eventually liable to reimburse him. But at most this only shows that in certain rare cases the post of returning officer may be one of an onerous character; and the Legislature may well have considered that to be a far less evil than it would be to prevent proper persons from being proposed, under the fear that the proposers might afterwards become liable to the expense of a poll, in which they may have taken no part. . . Our attention was pointed in the argument to the passage in sect. 18, which directs the returning officer to give two days' notice. . . This certainly shows that in some cases the returning officer must erect, or at all events have made preparations for erecting booths, before he knows whether there will or not be any necessity for them; but, as we have already stated, we do not feel the argument of the plaintiff resulting from that state of things, as amounting to anything like a *reductio ad absurdum*." This was a written and considered judgment, and is of the very highest authority. But our attention has also been called to the earlier authorities, bearing upon the earlier state of the law. These only make in the same direction. In *Morris v. Burdett* (1 Camp. 218), I find Lord Ellenborough saying: "To proclaim the election is a duty which the law casts upon the high bailiff." The second decision (2 M. & S. 212) proceeded upon a narrower ground, but is as authority for the petitioner as far as it goes. I am of opinion, therefore, that Mr. Davies had a right to refuse to comply with a condition which the returning officer had no right to impose, and that the return of Lord Kensington is void. As to costs, Lord Kensington did nothing wrong, so that we do not give costs against him. The case of the returning officer is more doubtful. I think on the whole he will be sufficiently punished by having to bear his own costs.

BRETT, J.—It is said on the one side that the returning officer committed such a breach of duty as to avoid the election; it is replied on the other that he was entitled to impose a certain condition precedent, and to refuse to receive the nomination of Mr. Davies as that condition was not complied with. It is maintained that he was entitled to force Mr. Davies either to pay the expenses of the election or to find security for their payment. Now the Ballot Act clearly casts upon the returning officer the duty of finding all things necessary for the election, and the attendant expenses are to be payable, it appears on reference, in the same manner as the expenses incurred in erecting polling booths under the Reform Act of 1832. [The learned judge read the earlier portion of sect. 68 of that Act and proceeded:] I think this section necessarily implies that polling places are intended to be erected in every borough in England. Then sect. 71 provides that booths shall be erected, but omits to say expressly by whom. If it had been meant that the candidates should erect them, there would have been nothing easier than to say so. The section then goes on to pro-

vide for contracts, meaning thereby that the candidates are not to be bound by the sheriff's estimates, but may force him to conclude a specific contract with the parties providing the booths. But it has been argued that the words of 51 Geo. 3, c. 126, s. 1, imply that the payment of expenses was a condition precedent. I think it unlikely that this should be so, and Mr. Bowen is driven to say that the returning officer would be entitled to call for the payment of the money into his hands. But however that may be, the point was clearly decided by Lord Ellenborough, C. J., and the rest of the court in *Morris v. Burdett* (2 M. & S. 212), and by the Court of Exchequer in *Muntz v. Sturge* (*ubi sup.*). But it is said that the conclusions of the court upon the point were not necessary for the decision of the case. I think that is but a weak argument in a case where the point was raised before the court, when the court chose to take it into consideration, and pronounced a considered judgment upon it. I am clearly of opinion that under the Ballot Act the payment of expenses is no condition precedent to the receiving of a nomination, and that all the returning officer has to do is to see that the provisions of sect. 1 are complied with. The refusal to receive a nomination going to the very substance of the election, and not being an infringement of merely directory rules, our judgment is for the petitioner. I agree with what my lord has said as to costs. Lord Kensington has done nothing wrong, so that there is no reason that costs should be given against him. I am disinclined also to give costs against the returning officer, because I cannot think that Mr. Davies did a handsome thing. Mr. Davies was no doubt entitled to stand upon his strict rights, but looking to the universality of the practice which he chose not to follow, I think we ought not to give him costs as against the returning officer.

Judgment for petitioner: Election certified to speaker as void.

Attorneys for petitioner, *Ellis and Co.*

Attorneys for respondent, *Wyatt, Hoskins, and Hooker.*

Attorney for returning officer, *T. H. Smith.*

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LING, Esqrs.,
Barristers-at-Law.

SECOND DIVISION OF THE COURT.

Monday, June 8, 1874.

(Before BRAMWELL and PIGOTT, BB.)

NEVILLE v. BRIDGER.

Ecclesiastical law—Burial in vault in church—Burial fees—Right of parson to charge fee for—Parson's claim as freeholder—Action for burial fee—Jurisdiction of Common Law Court over—Custom—Reasonableness of fees—Non-parishioner.

On an application to the vicar of a parish for leave to open a vault in the church, and to bury the corpse of a non-parishioner therein, the vicar, as having the soil and freehold of the church in himself, may make a bargain with the applicant for the payment of a special fee for giving his consent, and may enforce such bargain by an ordinary action in a common law court.

So held, by Bramwell and Pigott, BB.

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[Ex.]

THIS was a case stated on appeal by the defendant from the decision of the judge of the County Court of Berkshire, holden at Windsor, as follows ;

1. The action came on to be heard before the judge of the County Court of Berkshire, holden at Windsor, without a jury on the 24th March, and by adjournment on the 20th April and 22nd May 1873.

2. On the first adjournment, viz., the 24th April, at the commencement of the hearing, the counsel for the plaintiff applied for leave to amend his particulars of demand ; and the learned judge allowed the proposed amendment, subject to any objection to be made thereto at the then next monthly meeting of the court, and he adjourned the further hearing and proceedings until the same day.

3. At the ensuing monthly sitting, viz., on the 22nd May, in the year aforesaid, objection was taken on the part of the defendant (the now appellant) to the proposed amendment, and after argument the learned judge overruled the objection, and allowed the amendment.

4. The question first hereinafter raised and stated is, whether the learned judge had or had not power or authority so to allow the amendment of the statement of the plaintiff's particulars. The particulars as amended are as follows :

The following are the particulars of the plaintiff's claim in this action: For that it was agreed by the plaintiff and the defendant that, in consideration that the plaintiff (then being the vicar of Wrybury, in the county of Buckingham) would give his consent, licence, and permission to the defendant to bury the body of Mrs. Elizabeth Bathsheba Davies, deceased, in the parish church of Wrybury, situate within the district and jurisdiction of the said County Court, and would do and cause to be done in the said church all things necessary and incidental to the said burial in and about the opening a vault and otherwise, the defendant promised the plaintiff to pay to him a certain sum of money, to wit, the sum of twenty guineas in that behalf ; and the plaintiff says that he gave his consent, licence, and permission so requested as aforesaid to the defendant, and the body of the said E. B. Davies was buried by the defendant in the said church ; and the plaintiff did and caused to be done all things necessary and incidental to the said burial in and about opening a vault in the said church and otherwise, yet the defendant has not paid the said plaintiff the said sum, or any part thereof, and the same remains due and unpaid. And the plaintiff also sues for money payable by the defendant to the plaintiff on an account stated between them ; and the plaintiff claims 21l. And the plaintiff withdraws his claim from the consideration of the said County Court as set forth in the original particulars in this action, that is to say—

	£	s.	d.
Entrance fee	2	2	0
Church service... ..		9	0
	£2	11	0

The original particulars were as follows :—

For the following fees due from the defendant to the plaintiff, then vicar of the parish of Wyardsbury, in the county of Buckingham, in connection with the funeral of the late Mrs. Davies.

	£	s.	d.
1868. Jan. 30.—Entrance Fee	2	2	0
Church Service	0	9	0
Burial in the Church. 21	0	0	0
	£23	11	0

And this sum is also claimed on an account stated.

5. Before the plaintiff's case was opened on the first day of hearing (20th March) the defendant's counsel objected to the jurisdiction of the court, on the ground that the particulars of demand, as then annexed to the plaint, showed that the

amount claimed was for fees alleged to be due for the burial of Mrs. Davies, and that such fees were recoverable (if at all) only in the Ecclesiastical Courts. Thereupon, the counsel for the plaintiff stated that he intended to rely on the special contract or promise of the defendant, for a valid and lawful consideration, to pay the said sums demanded, or some or one of them, and that he was entitled to proceed in support of his case on the particulars as originally framed and annexed to the plaint, viz., on the claim "on the account stated." The learned judge permitted the case to proceed, and reserved his decision on the point till the evidence should be before him.

6. The counsel for the plaintiff then opened his case, submitting, amongst other grounds, that the court had jurisdiction, partly on the ground that there was a contract between the parties, and also on the ground that burial fees may be the subject of proceedings in a court of common law, if the amount of fee or the custom of the parish be in dispute.

7. The following facts were proved by the evidence given for the plaintiff. No witnesses were called for the defendant.

8. The plaintiff, the Rev. Seymour Neville, was, in Jan. 1868, at the time of the burial of Mrs. Davies, hereinafter mentioned, vicar of Wyardsbury, or Wrybury, in the county of Buckingham, situate within the jurisdiction of the said County Court. The defendant, Mr. Edward Bridger, is the sole executor and residuary legatee of Mrs. Elizabeth Bathsheba Davies, widow, deceased.

9. In the year 1852, Mr. Henry Davies, the husband of Mrs. E. B. Davies, died and was buried in a brick vault or grave, belonging to the family of Mrs. Davies, in the aisle of Wrybury Church. He was not a parishioner of Wrybury, and his friends (for obtaining the consent of the vicar of Wrybury to his interment in the church, and leave to break the soil and open a vault therein for the purpose) paid the vicar the sum of 30l. 6s. 6d., such sum being the amount paid and charged by the vicars of Wrybury, for the interment of any non-parishioner.

10. On the 24th Jan. 1868 Mrs. Elizabeth Davies died, and was not, at the time of her death a parishioner of Wrybury. By her will she appointed the defendant her sole executor, and gave directions that she was to be buried at Wrybury church, near her husband. The defendant authorised and gave orders to Mr. Theophilus Watkins undertaker, of No., Lamb's Conduit-street, London, who had conducted the burial of Mr. Davies, to make all necessary engagements and arrangements for the burial of Mrs. Davies in Wrybury church, if possible, and to do all that was requisite for the purpose.

11. The plaintiff was, at the end of Jan. 1868, absent from England. His office was temporarily filled, and its duties discharged for him, by a curate. The fees due to the vicar and the charges made by him in relation to his office were always received and claimed on his account by the parish clerk of Wrybury. The curate and the parish clerk were duly authorised to make all necessary engagements and arrangements for burials.

12. Mr. Watkins communicated with the authorities on the spot, and applied for permission to open the Davies vault or grave in the church, and

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[Ex.]

to bury Mrs. Davies there. Mr. Watkins was informed by the parish clerk that the fees would be high, or that the charges would be heavy, in consequence of the vault being in the church. Mr. Watkins stated to the parish clerk that he was requested to bury Mrs. Davies in the grave of her late husband within the aisle; that he had conducted the burial of Mrs. Davies's late husband, and had paid the charges made in respect thereof. The necessary consent was then given, and the bricked vault mentioned in par. 9 was opened in the aisle of the church, and on the 30th Jan. the said Mrs. Elizabeth Davies was interred therein. The plaintiff's curate officiated, and the defendant was present at the funeral.

13. The parish clerk, who had resided for fifty years in the parish, and who succeeded his father in the office of parish clerk in 1845, and had since filled it, produced an old book. The said book is ordinarily kept in and was taken from the iron chest in the parish church, which the witness, the parish clerk, received at the time he took office, containing, amongst other things, the scale of fees and charges made in respect of burials in the parish of Wraysbury for parishioners and out parishioners. The scale of fees and charges were proved by him to be in the handwriting of the deceased vicar of Wraysbury, and had been in force as long as he could remember, and had been always adhered to. No claim in respect of fees had been resisted before. The scale of fees and charges was a matter of common knowledge in the parish. For out parishioners all fees and charges were, as appeared in the entries in the said book, exactly double what is received and claimed from the parishioners.

On first making a vault within the church, the sum of ten guineas was the invariable charge shown by the said book as made by the vicar of Wraysbury, whether for parishioners or non-parishioners. On the opening of a grave or vault within the church, and for the consent of the vicar for the burial, the sum (independent of the fees for church service) of ten guineas, was the charge shown by the said book as made by the vicar of Wraysbury for parishioners, and twice that sum for non-parishioners.

14. Taylor, the parish clerk, also deposed that it is usual for the undertaker to pay all fees and charges at the time of the funeral.

Shortly after the funeral the parish clerk handed to Mr. Watkins an account, of which the following is a copy.

Wraysbury, 30th Jan. 1868.				
For the funeral of the late Mrs. Henry Davies.				
	£	s.	d.	
Fees due to the vicar	...	...	...	2 2 0
Church service	...	...	...	0 9 0
Burial in the church	...	...	...	21 0 0
Fees due to the clerk for entrance	...	...	...	0 10 0
Clerk and sexton's fee for opening and closing vault	...	...	...	1 1 0
Clerk and sexton's fee for burial in the church	...	...	...	2 2 0
	£27 4 6			

Mr. Watkins thereupon promised the parish clerk to send him a cheque by return of post for the amount. He did not, however, do so, but sent the account, and afterwards referred the parish clerk, to the defendant.

15. The parish clerk having applied to the defendant, received the following reply:

37, King William-street, London Bridge, E.C.
27th Feb. 1868.

Sir,—The account of fees to which you allude in your letter, without date, just received, has been handed to me by Mr. Watkins. It appears to be solely for the liberty to bury the late Mrs. Davies in her own vault, and the amount thereof, £27 4s. 6d., seems to me so outrageously exorbitant that I cannot believe it has been sent with the knowledge or sanction of the Vicar of Wraysbury, who was a friend of the deceased. I cannot, therefore, comply with your request to forward you a cheque, but shall wait the return of Mr. Neville, who, I understand, is at present abroad.—I am, &c.,

Mr. Henry Taylor,
Vicarage Farm, Wraysbury, Staines.

In reply, Taylor wrote the following letter:

Wraysbury, 28th Feb. 1868.

Sir,—I beg to inform you that I have received all fees due to the vicar for the last twenty-five years in Wraysbury, and have to hand them over to the vicar, who looks to me for the same. Mr. Neville has buried a great many of his friends at Wraysbury, but I never knew him to give any one his fees. We have a list of fees, which I dare not alter. Although Mr. Neville gave permission to bury the late Mrs. Henry Davies in the vault, he did not mention anything about the fees to be given. It is always usual for the undertaker to pay me at the time, the day of the funeral.—I am, &c.,

Hr. TAYLOR, Parish Clerk.

E. K. Bridger, Esq.

16. On the parish clerk again applying to the defendant, he received the following letter:

87, King William-street, London Bridge, E.C.,
12th June, 1868.

Sir,—I have already stated to you my objection to the account you sent me for fees in respect of the late Mrs. Davies's funeral, and that I shall be happy to pay any reasonable amount.—Yours, &c.,

E. K. BRIDGER.

Mr. H. Taylor, Wraysbury.

Nothing had been paid by the defendant to the plaintiff, or to the parish clerk, in respect of the fees and charges mentioned, and this action was brought to recover the sum claimed by the plaintiff.

17. On these facts being proved the counsel for the plaintiff contended that the court had jurisdiction to hear and determine the plaintiff's demand, and that there was evidence to support it.

18. The counsel for the defendant objected that the facts proved showed that the sums claimed being burial fees, could not be recovered in the County Court; that even if they could, burial fees could only be due by immemorial custom, and that there was no evidence of such custom in this case; and that the amount claimed was excessive, and disproved an immemorial custom, and that there was no evidence of any contract or promise to pay the sums claimed, nor of any account stated. The learned judge upon this part of the case expressed his opinion that the amount claimed for the opening the vault or grave for the interment of an out parishioner, or non-parishioner, was not excessive; but he reserved his judgment until the next sitting of the court. And at the next sitting, which was held on the 20th April 1873, the counsel for the plaintiff applied for leave to amend his particulars of demand, which amendment the learned judge allowed, subject to any objections to be made at the then next court day, and further reserved his judgment until the same day.

19. At the next sitting of the court, namely, on the 22nd May 1873, the objection on the part of the defendant to the said amendment was renewed, but was overruled by the learned judge, and the

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amendment was allowed, and made as set forth in par. 3 of this case.

20. The learned judge ruled that he had jurisdiction to determine the portion of the plaintiff's demand which had not been withdrawn from the consideration of the court. He found that the sum claimed was a reasonable sum, and was the sum customarily charged by, and paid to, the Vicars of Wraybury for their consent to the burial of out parishioners within the parish church, and their leave to open the soil for that purpose; and that the defendant had himself, and by his authorised agent, agreed to pay such reasonable amount as would be required, and the learned judge gave judgment for the plaintiff for the sum in the amended particulars demanded—viz., 21l.

From this judgment the defendant now appeals. The questions for the decision of the court are: first, had the learned judge the power or authority to allow the amendment of the particulars of the plaintiff's demand under the circumstances stated; secondly, had the County Court jurisdiction to entertain the plaintiff's demand as set forth in the amended particulars in par 4; thirdly, can the verdict for the plaintiff be supported with or without the amendment.

Bayford, for the defendant (appellant), contended, first, that on the particulars of demand as originally delivered, the County Court had no jurisdiction in the matter, inasmuch as it was an action for the recovery of burial fees which were recoverable only in the spiritual or ecclesiastical court; secondly, that the amendment of the plaintiff's particulars of demand was such as the judge had no power to allow, and that it ought not to have been made; and, thirdly, that even if the amendment was rightly made, yet the County Court had still no jurisdiction in the matter. The claim in the original particulars was not for an agreed amount, but expressly for "fees due from the defendant to the plaintiff as vicar," for the burial of the deceased, under the three heads of "entrance fee," "church service," and "burial in the church," in all amounting to 23l. 11s. Now, unless due by custom, burial fees are not chargeable or recoverable; and when so due, the remedy is in the Ecclesiastical Court, which alone has jurisdiction, and to that court the plaintiff should have gone. No doubt, if the custom be disputed, prohibition, if applied for, would be granted; but not, as it is said, in the books, "*propter defectum jurisdictionis*," but *triationis*.

Dean and Chapter of Exeter's case, 1 Salk. 334;

Spry v. Gallop, 16 M. & W. 716; 16 L. J., N.S., 218, Ex.

Spry v. The Directors, &c., of St. Marylebone, 2 Curtis Cons. Rep. 5.

No valid custom for payment of a uniform fixed sum was proved in the present case; indeed, it appeared, on the contrary, that the sums charged for burying in the church varied on different occasions. He cited on the point:

Mills v. The Mayor, &c., of Colchester, 16 L. T. Rep. N.S. 626; L. Rep. 2 O. P. 476; 36 L. J. 210, C. P.

Shepherd and another v. Payne and another, 6 L. T. Rep. N. S. 716; 12 C. B., N. S., 414; 31 L. J. 297, C. P.; s. c. affirmed in error, 10 L. T. Rep. N. S. 192; 33 L. J. 158, C. P.; 16 C. B., N. S., 132.

Bryant v. Foot, 16 L. T. Rep. N. S. 55; 36 L. J. 65, Q. B.; s. c. affirmed in error, 18 L. T. Rep. N. S. 578; L. Rep. 3 Q. B. 497; 37 L. J. 217, Q. B.

The word "fee," in the particulars, must mean an customary payment. [BRAMWELL, B.—On that

point we are both against you, and think the particulars are supportable.] Again, though the vicar has power to give consent to bury in the church, yet he ought not to exact a money payment for it. In Gibson's Codex, 2nd edit. of 1761, Tit. 23, cap. 2, sect. 3, p. 453, it is said, "No person may be buried in the church, or in any part of it, without the consent of the incumbent." . . . "Our common law hath given this privilege to the parson only, exclusive of the bishop," . . . "which right of giving leave will appear to belong to the parson, not as having the freehold (at least not in that respect alone) but in his general capacity of incumbent, and as the person whom the ecclesiastical law has appointed the judge of the fitness or unfitness of this or that person to have the favour of being buried in the church." . . . And then, after stating the probable origin of churchyards, "in which everybody had always a right to be buried," the learned writer goes on to say, "But, as to the church, the canon law adds, '*Nullus mortuus intra ecclesiam sepeliatur, nisi Episcopus, aut Abbates, aut digni Presbyteri vel fideles Laici*,' and what we are to understand by *fideles* the laws of our Church will best inform us. Of which merit (and by consequence of the reasonableness of granting or denying the indulgence) the incumbent was in reason, the most proper judge, and was accordingly so constituted by the laws of the church, without any regard to the common law notion of the freehold being in him; which, if it prove anything in the present case, proves too much, that neither without the like leave may they bury in the churchyard, because the freehold of that is also declared to be in him." [BRAMWELL, B.—In the case of a non-parishioner at all events, who has no right to be buried in a foreign parish, may not the vicar, who has the freehold, on the principle of *cujus est dare, ejus est disponere*, say "I will not consent unless you pay me such and such a sum?" He may refuse; but if he consent he can only recover the customary fee. [BRAMWELL, B.—Then you would say that the freehold is in him, and he may refuse or give leave, and that in so doing he is discharging a duty, not for his own benefit, but a public duty, and so can make no charge, and can receive only the customary fee. That, I think, is your argument?] Just so. It would be contrary to public policy that a man having to exercise a quasi judicial discretion, should have that discretion regulated by the amount of money he is to receive for its exercise in a particular way. In *Rich v. Bushnell* (4 Hagg. Eccl. Rep. 164), an application was made by a lay rector for the grant of a faculty for a vault in the chancel of a church, to which the vicar had refused his consent, except on payment of what was called his "reasonable fee," and Sir J. Nicholl, in his judgment (at p. 173), said: "If the cause shown by the vicar be not something better than his mere will and pleasure, it will be insufficient to stay the issuing of the faculty, still more so if his consent be matter of purchase and barter. If he is to judge in each particular case whether it will occasion inconvenience or deformity, or be otherwise improper, that judgment must be formed, not "by a reasonable payment," but without money and without price. If the vault were allowed to be constructed, and the vicar's consent to interment therein were necessary, he might object on proper ground, such as that the party was not *fidelis*;

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but it cannot be tolerated that his decision on the moral fitness of the individual to be buried in the chancel should be guided by the amount of the fee to be paid," &c. Those observations are strongly in favour of the present contention on the part of the defendant (appellant). To the same effect also is *Maidman v. Malpas*, before Sir W. Scott (1 Hagg. Cons. Rep. 205). There is a dictum in an old case, *The Dean and Chapter of Exeter's case* (1 Salk. 334) to the effect that on giving a licence the parson "may stand on his own price," which has been adopted by many text writers, and will no doubt be relied on by the plaintiff to-day. In the last edition of Burn's Ecclesiastical Law, by Phillimore, however, it does not appear, though nothing is said against it, and it is submitted that it is not sufficient to outweigh the numerous authorities to the contrary. And now as to the amendment. [BRAMWELL, B.—We think the amendment is only an expansion of the original particulars.] Then the plaintiff has not given his consent. He cannot depute or delegate his vicarial powers in this respect to the parish clerk. [BRAMWELL, B.—At any rate you have had the benefit of it; you are buried.] Lastly, the learned judge was not warranted in finding that this was a customary and reasonable fee, and there was no evidence in support of the custom, and nothing on which to ground it. [BRAMWELL, B.—Is not the case on the defendant's side reduced to this, that this is not the subject of a bargain?] Yes, I think that must be so.

H. D. Greene, for the plaintiff (resp.), contra.—[BRAMWELL, B.—The only point to which we think it necessary for you to address yourself is whether the plaintiff's claim in this case can be made the subject of a bargain.] This is simply an action on a contract to recover a sum agreed to be paid by the defendant to the plaintiff in consideration of the latter's doing that which he alone had a right to do, viz., giving leave and licence to the defendant to break the soil of the church, and to open a vault underneath the church for the purpose of burying therein the body of the deceased. This is a bargain which, as having the freehold of the church in him, the plaintiff had a clear right to make. In *Frances v. Ley* (Cro. Jac. 366), it is laid down that "neither the ordinary himself, nor the churchwardens, can grant licence of burying to any within the church, but the parson only; because the soil and freehold of the church is only in the parson, and in none other;" and that resolution of the court is cited by Gibson in his Codex, p. 453. That the plaintiff was legally justified in demanding the fee charged here as the price of his consent, *The Dean and Chapter of Exeter's case* (1 Salk. 334), is an express authority. In that case cause was shown against a rule for a prohibition to the Spiritual Court to stay a suit there for a customary fee of 10l. to the Dean and Chapter of Exeter, for burying in the cathedral church, and the report states, "*Sed non allocatur*, for no fee is due for burial of common right. But where a licence is necessary, the person giving it may stand upon his own price, and if there be such a custom it is triable at common law." In *Andrews v. Cawthorne* (Willes 536), Abney, J., in delivering the judgment of the court, alluding to the rule of the common law as to the burial of only the *fideles laici* within the church, says: "And as the parish priest by the canon was the

sole judge of the merits of the dead, and the fitness of burial in the church, and he only would determine who was a faithful layman, they only were judged faithful whose executors came up to the price of the priest, and they only were allowed burial in the church; and the poorer sort were buried in the churchyard. But in neither case was any fee claimed or pretended to be due for the celebration of the office. But, in the first place, as the church was the rector's freehold, the payment was made in consideration of breaking the ground and floor, and the sum was contracted for; and in the latter case some small voluntary oblation was frequently made, and which by length of time has grown up in many parishes into a customary payment." So in *Ex parte Blackmore* (1 B. & Ad. 122), which was an application for a *mandamus* to compel a rector to bury the corpse of a parishioner in a vault in the churchyard, built by the deceased some years before for the interment of himself and family, the rector refusing to allow the vault to be opened except on payment of a fee of two guineas and a half, but intimating that burial might take place in the churchyard without payment of any fee, the court of Queen's Bench refused the *mandamus*, and Littledale, J., in his judgment there said: "The clergyman is bound by law to bury the corpses of parishioners in the churchyard, but he is not bound to bury in any particular part of the churchyard. He and the churchwardens exercise a discretion on the subject, and if a rector is asked to do that which by law he is not bound to do, he may refuse, except upon certain conditions." That is a distinct authority to show that he may impose what conditions, e.g., ask what price, he pleases. In other words, the privilege of *intramural* sepulture may, as Abney, J., said in *Andrews v. Cawthorne* (*ubi sup.*) "be contracted for." The remarks of Sir J. Nicholl in *Rich v. Bushnell* (*ubi sup.*), relied on by the other side, are not, it is submitted, applicable here, as they had no reference to the vicar's freehold in that case, but merely to the possible exercise of his vicarial judgment as to the "moral fitness of a person for burial within the building." And against them may be set what fell from Sir W. Scott in *Maidman v. Malpas* (1 Hagg. Consist. Rep. 205), a case promoted by a rector against the defendant for erecting a monument in the chancel without a faculty, where, in allusion to observations about extortion, that learned judge says (at p. 208), "I conceive the clergyman may legally demand and accept a fee for his consent; nor is it an improper thing that the Ecclesiastical Court should see that it is done, and that all temporal interests are duly protected, as in other instances, in the putting up of an organ, &c., the temporal interests are always attended to." That the parson, as the freeholder of the church, may "stand on his own price," is stated without qualification or hesitation in the following text books;

Dr. Prideaux's Churchwardens, edition by Tyrwhit, p. 120;

Stephen's Ecclesiastical Law, p. 207;

C. G. Prideaux's Churchwarden, 12th edition, p. 388.

Bayford in reply.—*Andrews v. Cawthorne* (*ubi sup.*), decides that no burial fee is due at common law, and can only be claimed by custom. The remarks of Littledale, J., in *Ex parte Blackmore* (*ubi sup.*), do not go to show that the parson may demand more than the customary fee. In the present case the fee claimed, if reasonable, was certainly not customary.

[R.]

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[Q. B.]

BRAMWELL, B.—This case has been exceedingly well argued on both sides, so well, indeed, that I think we may feel tolerably safe in pronouncing our judgment with some degree of confidence, though it is upon a subject with which I confess that I myself, at all events, am not very familiar. I think, then, that the plaintiff is entitled to recover in this action. One or two points that were originally made have in the course of the argument been given up by the learned counsel for the defendant. Mr. Bayford has agreed with the view taken by the court, that the amendment of the plaintiff's particulars allowed by the judge of the County Court is after all nothing more than an expansion of the original particulars. In the next place, it has been conceded by him that the plaintiff was entitled to a reasonable fee as the freeholder of the soil and ground of the church. The only question remaining, therefore, is that which has been argued with so much ability, namely, whether, although the freehold of the soil is in the vicar, and with him lies the power of saying whether or not it shall be interfered with for the purpose of the interment of a body in a vault beneath, he is bound, as exercising the spiritual functions of his vicarial office, to give judgment, and to withhold or grant his permission for such interference and interment, solely on a consideration of the moral fitness or unfitness of the person whose body is proposed to be interred; or whether, as the owner of the freehold, he may ground his judgment upon a pecuniary consideration, and grant or withhold his permission according to the amount of money, more or less, that may be paid to him. Mr. Bayford, on the part of the defendant, has contended that the former of these two views is the correct one, and that the bargain in the present case, if not absolutely illegal, is at all events without consideration, and that a contract for the payment and receipt of a sum of money for such a purpose is not good at common law; and he has adduced authorities, and especially the passage in Gibson's Codex, in support of his proposition. I do not propose to go through them; but it seems to me, on the best consideration that I have been able to give the matter, that the balance of the current of authorities is in favour of the plaintiff. There are the case in Cro. Jac. Reports—the *Dean and Chapter of Exeter's* case in Salkeld, the cases in 1 and 4 Hagg. Rep., the judgment of Abney, J. in Willes's Rep.—what was said by Littledale, J. in the case in Barnewall and Adolphus, and the summing up of the matter in *Prideaux's Churchwardens*. They are all in point, and the authority of *Rich v. Bushnell*, cited in favour of the defendant, so far as it is contrary to the above cases, is, I think, satisfactorily explained by Mr. Greene. Now, it may be that on some more important occasion than the present, these authorities may be more minutely looked into, and Mr. Bayford's argument that this claim can only be enforced in the Ecclesiastical Court may be adopted, and these several cases may be overruled; but on the present occasion I am not prepared to decide contrary to them. In my opinion this was an ordinary common law bargain between the plaintiff and the defendant, enforceable in the ordinary way in a common law court, and the respondent (plaintiff), therefore, is entitled to our judgment on this appeal.

PIEOTT, B.—I am entirely of the same opinion, and for the same reasons. Nothing has been

brought before us to show that this is not the proper subject of a bargain. Indeed, I think the contrary is the fact.

Judgment for the plaintiff (resp.).

Decision of the County Court Judge affirmed.

Attorney for the plaintiff (resp.), C. T. Phillips, 7, Gray's-inn-square, W.C., and Windsor.

Attorneys for the defendant (app.), Bridger and Collins, 37, King William-street, London-bridge, E.C.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Tuesday, June 30, 1874.

EASTWOOD (app.) v. MILLAR (resp.)

Betting—Pigeon shooting—Place kept or used for betting—Betting Houses Act (16 & 17 Vict. c. 119) s. 3.

Appellant was the occupier of certain inclosed but uncovered grounds, between 3 and 4 acres in extent, to which persons were admitted through a gate, by ticket, for which they paid. On the occasion on which the grounds were visited by a policeman, a pigeon shooting match was going on between two persons for a wager, and bets were made by several persons, two bookmakers shouting out and offering odds. After the shooting match there was a foot race at which bets were similarly made. Appellant was standing by, taking no part in the betting, but he could hear what the bookmakers and others were saying.

Held (1), that these grounds were a "place" within sect. 3 of the Betting Houses Act (16 & 17 Vict. c. 119); and (2), that the evidence was sufficient to justify the finding of justices that the place was permitted by the appellant to be "kept or used" for the purpose of betting.

CASE stated under the 21 & 22 Vict. c. 43, at the request of Solomon Eastwood, hereinafter called the appellant, who is dissatisfied with our determination in convicting the said appellant of the offence charged as hereinafter mentioned as being erroneous in point of law.

The information is laid under the 16 & 17 Vict. c. 119, s. 3, which enacts that—

Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned (sect. 1), or either of them, and any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used, by any other person for the purposes aforesaid, or either of them; and any person having the care or management of, or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty not exceeding 100*l.*, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable, and, on the non-payment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months.

The following is the material part of the information laid by Alexander Millar, the superintendent of police for the borough of Dewsbury

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against the said appellant, who saith, that on the 15th Nov. 1873, at the borough of Dewsbury aforesaid, Solomon Eastwood, of Dewsbury aforesaid, being then and there the occupier of a certain place, to wit, certain inclosed ground called the Borough Park Ground, did knowingly and wilfully permit such place to be opened, kept, and used by other persons for the purpose of betting on a certain pigeon shooting match for money, contrary to the form of the statute in such case made and provided.

At the hearing, which took place at the Court House, Dewsbury, on the 20th of November 1873, the following facts were proved by George Forbes Whittet, police constable, and two other officers:

That on Saturday, the 15th Nov. 1873, about half-past 2 o'clock in the afternoon, he and the other officers went to the Borough Park Ground occupied by the appellant. That on arriving at the gate at the entrance a man stopped him, and asked him for a ticket. That Whittet told the man at the gate he was a policeman, and did not require one. That he saw other people pay money and receive a ticket, who were then admitted into the grounds. That he and the other officers were admitted into the grounds, which are inclosed (the grounds contain an area of 3a. 3r. 25p). He there saw a number of people, and amongst them two bookmakers, with books in their hands. These two men were shouting out "twenty to two on the match." That the match about to take place was a pigeon shooting match for 10l. a side between a person of the name of Parkinson, and a person of the name of Wooler. That two men came alongside Whittet, and up to one of the bookmakers, and one of them gave to one of the men with a book a sovereign. As this man was getting some change back, the other man said, "Hold on, that will do for both of us." The bookmaker took a ticket out of his book and gave it to one of the men, and said "That's on Wooler." Soon after this Wooler was going to shoot at a pigeon, when another man shouted out "Four to one he kills." This bet was taken, and the man said "Three to one he kills." Persons were shooting all over the grounds. Appellant was standing near to Whittet, and could hear what the bookmakers and other persons said, but did not take any part or say anything. That after the pigeon match a foot race took place, at which bets were made as before on the pigeon shooting match.

Mr. Ibberson, solicitor, appeared on behalf of the appellant, and contended: first, that the ground was not used or permitted to be used by the appellant for betting; and, secondly, that the ground was not a "place" within the meaning of the Act of Parliament.

Mr. Ibberson quoted the case *Doggett v. Catterns* (12 L. T. Rep. N. S. 355; 34 L. J. 159, C. P.), in which the appellant in that case was in the habit of going beneath a tree in Hyde Park, and there received bets from persons on horse races.

We, however, answered that as the appellant was the sole occupier of the inclosed ground, and received money (3d. from each person) for admission, that it was a "place" within the meaning of the Act, and that the appellant knowingly used or permitted the same ground to be used for the purpose of betting, and convicted the appellant in a penalty of 10l.

The appellant, being dissatisfied with our determination as being erroneous in point of law, requested a case to be stated for the opinion of your honourable court.

Should the court be of opinion that the ground as stated in the case was used or permitted to be used by the appellant for the purpose of betting, and that the ground was a "place" within the meaning of the Act, then the conviction to be confirmed; and if not, to be quashed.

JOSEPH DAY.

MATTHEW RIDGWAY.

JOHN BATES.

Forbes for the appellant, contended that the Act 16 & 17 Vict. c. 119, was not intended to apply to such a case as the present. It is entitled, "An Act for the Suppression of Betting Houses," and the preamble to it shows the kind of betting places which the Legislature intended to suppress. It states, "Whereas a kind of gaming has of late sprung up, tending to the injury and demoralisation of improvident persons, by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promise to pay money on events of horse races and the like contingencies; for the suppression thereof be it enacted," &c. A field such as that where the pigeon shooting took place here, covering several acres of ground, is not a "place" within the meaning of the 3rd section of the Act. In *Doggett v. Catterns* (12 L. T. Rep. N. S. 355; 34 L. J. 159, C. P.), where the defendant, a betting agent and bookmaker, was in the habit of standing under certain trees in Hyde Park and there making bets on horse races, and receiving deposits, it was held by the Court of Exchequer Chamber, reversing the decision of the Court of Common Pleas, that the ground underneath a tree in Hyde Park was not a "place" within the meaning of 16 & 17 Vict. c. 119. "The Act," said Bramwell, B., "was intended to put down ascertained places of resort. I think the place here was not capable of being a place within the meaning of the statute." In order to come within the Act, the place where betting takes place must be "kept" for that purpose. In the present case the betting was merely incidental, or, as the evidence goes, might never have taken place before; the place was "kept" for a different purpose. In *Clark v. Haynes* (2 L. T. Rep. N. S. 85; 29 L. J. 105, M. C.), a decision under 12 & 13 Vict. c. 92, s. 3, which enacts that "every person who shall keep or use, or act in the management of any place for the purpose of fighting or baiting any bull," &c., shall be liable to a penalty, "and every person who shall in any manner encourage, aid, or assist at the fighting or baiting, &c., as expressed," shall be liable to a penalty, it was held, that in order to constitute an offence under this enactment, the aiding or assisting at the fighting or baiting must occur at a place kept or used for the purpose. The evidence there being that the appellants resorted to a bowling alley, with the intention of causing certain cocks to fight, and that they did encourage, aid, and assist at the fighting of the cocks, but it not being proved that in any other instance cocks had been fought there, the conviction was quashed. So in *Morley v. Greenhalgh* (32 L. J. 93, M. C.; 7 L. T. Rep. N. S. 624) it was held to be no offence under sect. 3 of 12 & 13 Vict. c. 92, to assist at a

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cock fight, unless in a place kept or used for the purpose, the cock fighting having there taken place in a quarry, where it was not proved that cocks had been fought before. [LUSH, J.—In the present case the justices have found that this place was kept for the purpose of betting.] There is really no evidence to show that betting ever took place there before. [ARCHIBALD, J.—But may there not be such a use of a place on one particular day as to lead irresistibly to the conclusion that the place is kept for the purpose of betting?] That might be so, but it is submitted that there was no evidence of such a user on the day in question here. [LUSH, J., read the evidence of what took place, and considered it sufficient to prove that the place was kept or used for the purpose of betting.] If the primary object for which a place is kept is sport, though betting may be generally or even always incidental to the sport, the place is not "kept" for the purpose of betting, but for the sport. [LUSH, J.—Suppose the place is kept for both purposes: it is not the less kept for each.] The preamble to the Act shows what was the mischief which the Legislature intended to remedy, and that cases like the present were not contemplated. [LUSH, J.—I once heard Maule, J., say that the preamble cannot be taken as a key to the interpretation of the rest of an Act, but only as a reason for passing the Act, which often goes much beyond the preamble. The third section of the present Act says nothing about the primary object for which a place is kept, but makes it an offence to permit it to be "used" for the purpose of betting.] In the case of *Coyne v. Brady* (12 Ir. Com. L. Rep. 577) the words of the Irish Act (12 & 13 Vict. 92) relating to cock-fighting were similar to those in the present case. Sect. 3 enacted that any person who "shall permit or suffer any place to be so used," i. e., for the purpose of fighting or baiting, &c., should be liable to a penalty; yet the court held that the conviction was bad, because no evidence had been given to show that the place where the cock-fighting took place had been previously used for that purpose.

The respondent was not represented by counsel.

LUSH, J.—The question in this case is, whether there is evidence to justify the justices in coming to the conclusion that the appellant used or permitted to be used the place in question for the purpose of betting; and that question resolves itself into two, (1) Whether the ground where the betting took place was a "place" within the meaning of the Act; and (2) Whether from the evidence, it can be said that the appellant used or permitted it to be used for the purpose of betting. Now the facts are that the appellant is the occupier of certain enclosed grounds containing an area of between three and four acres, with a gate through which admittance was obtained by ticket; that the policeman on arriving at the gate found a man there who asked him for a ticket; that he replied he was a policeman and did not require one. [His Lordship then read the evidence above set out as to the betting.] Does that evidence justify the magistrates in coming to an affirmative conclusion on the two questions which I have stated? I am of opinion that the evidence was sufficient to justify them in coming to the conclusion at which they arrived, namely, (1) that this was a "place" within the meaning of the Act of Parliament; and, (2) that the appellant

used or permitted it to be used for the purpose of betting. First, is it a place within the meaning of the Act? It has not been denied that an open ground, one not covered over, could be a place within the meaning of the Act. I can see no reason why an enclosed area, though uncovered, should not be a place within the meaning of the Act as well as a building. It is an enclosed place, occupied exclusively by the appellant, it is, therefore, quite within the words of the Act, and quite within the intention of it too. That it is a large enclosure—between three and four acres in extent—does not at all affect the question whether it is or is not a "place" within the meaning of the Act, the enclosure being a place to which persons are admitted only by leave of the occupier, the appellant. The cases which have been cited do not in any way limit the construction to be put upon this part of the Act. In *Doggett v. Catterns* (*ubi sup.*), where the person stood under some trees in Hyde Park for the purpose of betting, it could not be said that that was a place kept or used for the purpose of betting. The person betting was not the occupier, and in no sense could he be said to have kept or used the place for the purpose of betting. The same thing may be said as to the case of *Morley v. Greenhalgh* (*ubi sup.*), where the persons proceeded against resorted to a quarry for the purpose of cock-fighting, and it was held, on the authority of the previous case of *Clark v. Hayne* (*ubi sup.*), that as the quarry was not kept by the owner for the purpose of cock-fighting, it was not a place within the meaning of the Act. The part of the Act dealing with that offence was not directed against the persons who took part in the cock-fighting, but against the person who kept a place for that purpose. A similar remark applies to the case of *Clark v. Hayne*, where two persons went to a bowling alley belonging to the appellant for the purpose of cock-fighting; and it was not shown that the owner or occupier had anything to do with the cock fighting, or even knew of its existence. Here, what was done was with the knowledge and consent of the appellant, who was the sole occupier of the ground. The facts, as proved in evidence before the justices, satisfy the words of the Act. The next question is whether the evidence was sufficient to show that the place was kept or used for the purpose of betting. It has been said that the evidence is only of what took place on one occasion, and further, that the primary object for which the place was kept or used was not betting, but pigeon shooting, and that we should look to the primary object, and not to the incidental user on one occasion. I cannot take that view of the matter. I think the evidence was sufficient to justify the justices in coming to the conclusion that the place was kept or used for the purpose of betting as well as for the purpose of pigeon shooting; and I think there was good reason for coming to the conclusion that it was kept for the one purpose as well as the other. There is no decided case against this view of the matter. The case cited from the Irish Common Law Reports is very like the Hyde-park case; there was no permission by the owner. That case does not touch the case of the occupier of the premises where betting is carried on allowing his premises to be used for the purpose. I am, therefore, of opinion that the justices were right in convicting.

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ARCHIBALD, J.—I am of the same opinion. The two questions for our determination are: First, whether this was a "place" within the meaning of the Act; secondly, whether there is evidence sufficient to show that it was by the appellant permitted to be used for the purpose of betting. Now I think we should fall very far short of our duty in carrying out the intention of the Act, if we held that it was necessary that the betting should be carried on in a room or office, or an erection on some land, in order to come within the Act. There may be a "place" used for the purpose of betting, though it is open to the air; there may be a place for that purpose, though there be no erection at all. As the facts appear upon this case it seems to me that the justices were justified in holding that this was such a place as came within the Act. It was enclosed, it was entered by a gate; people were admitted through that gate only by tickets for which they paid; the appellant was the occupier who received the money paid for admission. Under these circumstances it cannot be said that it was not a place within the meaning of the Act. In *Doggett v. Catterns* (*ubi sup.*), persons who made the bets had no more right to resort to the spot where the bets were made in Hyde Park than anyone else. The same may be said of the Irish case. It must depend on the facts of each particular case whether the place where betting is carried on comes within the Act or not. The second question is whether the facts justified the conclusion that the appellant "knowingly and wilfully permitted the place to be opened, kept, or used for the purpose of betting." It has been argued that the primary object for which the place was kept or used was pigeon shooting, and that betting was only an incidental to that, and therefore that the place was not "kept or used" for a purpose prohibited by the Act. It seems to me that that contention cannot be upheld; and that, though persons may go there for the purpose of seeing the pigeon shooting, if they are allowed, as a practice, to bet, it cannot be said that the place is not used for the purpose of betting; the manner in which the place was used on one particular day being quite sufficient to satisfy the justices that that was the ordinary custom and practice of the place. On all these grounds, I think the case comes within the third section of the Act, and that the cases cited on behalf of the appellant do not touch the point, those cases being cases where the user for the prohibited purpose was not with the permission of the owner or occupier. The occupier was the person who gave admission here, and that makes all the difference.

Judgment for respondent.

Attorneys for appellant, *Blakeley and Beewick*, for *Ibberson*, Dewsbury.

Friday, May 22, 1874.

REG. v. THE INHABITANTS OF BRADFIELD.

Highway—Dedication to the public—Private road set out under inclosure award—Liability to repair.

Commissioners had in 1789, by an award under an inclosure Act, set out a road as an occupation road road, and ordered that the adjoining landowners or occupiers should ever after keep the road in

repair. On the trial of an indictment against a parish for non-repair of the road as a highway, sufficient evidence of user was given to support a presumption of dedication to the public in an ordinary case before the General Highway Act 1835 (5 & 6 Will. 4, c. 50):

Held, that the fact of the road having been set out as a private road by the award to be ever afterwards repaired by the adjoining landowners or occupiers, did not prevent its becoming a public highway repairable by the parish.

In this a rule nisi had been obtained by *Field, Q.C.* to enter for the defendant a verdict which had been entered for the Crown at the trial of an indictment against the inhabitants of Bradfield, in Yorkshire, for non-repair of a road called Myers-lane.

In the year 1789 the road in question had been set out as an occupation road by an award under an inclosure Act, by which award the adjoining landowners or occupiers were to keep the road in repair ever afterwards. It was admitted on behalf of the parish that there was sufficient evidence of user by the public to prove a dedication of the road to the public before the General Highway Act, 5 & 6 Will. 4, c. 50, (a) in an ordinary case, but the parish denied its liability to repair on this ground, that the award setting out the road had thrown the burden on the adjoining landowners or occupiers.

Maule, Q.C. now showed cause against the rule, and contended that the fact that the road in question was originally set out under the award as a private road and repairable by private individuals did not of itself present such a road from ever after becoming a public highway and repairable by the parish. *Res v. St. Benedict* (4 B. & Ald. 447), relied on by the other side, does not go any such length. There the road, which was proved to be out of repair, was originally made under the provisions of

(a) Sect. 23 of 5 & 6 Will. 4, c. 50, enacts "that no road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private driftway or horsepath in any award of commissioners under an inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair; unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent; and shall have made or shall make the same in a substantial manner and of the width required by this Act, and to the satisfaction of the said surveyor and of any two justices of the peace of the division in which such highway is situate in petty sessions assembled; who are hereby required, on receiving notice from such person, &c. to view the same, and to certify that such highway has been made in a substantial manner and of the width required by this Act, at the expense of the party requiring such view, &c.; provided nevertheless that on receipt of such notice as aforesaid, the surveyor of the said parish shall call a vestry meeting of the inhabitants of such parish; and, if such vestry shall deem such highway not to be of sufficient utility to the inhabitants of the said parish to justify its being kept in repair at the expense of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party proposing to make the new highway to appear before the justices at the next special sessions for the highways to be held in and for the division in which the said intended highway shall be situate; and the question as to the utility aforesaid of such highway shall be determined at the discretion of such justices."

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a local Act passed 41 Geo. 3; and by a clause in that Act the commissioners were directed to set out two specific private roads therein particularly described, which, when set out, were to be used by such persons only as were entitled to use an old occupation road running in the same direction as the latter of the two roads, and the commissioners by their award, dated 27th June 1803, set out the road presented as one of these two roads. From the date of the award, however, until the finding of the presentment [the case was tried in 1820] the road had been used by the public without interruption as a carriage way; and the question was whether, under these circumstances, this was a public road which the parish was bound to repair; and the court held that it was not. [BLACKBURN, J.—I must confess I do not understand the judgment as reported, delivered by Abbott, C.J. in that case.] If the *ratio decidendi* of this case was that a private road can never by user become a public highway, it has been overruled by subsequent cases. In *Reg. v. East Mark* (11 Q. B. 877) the road had formed part of the waste of a manor, and had been set out as a private road by award of commissioners under a private inclosure Act, and had been used by the public generally ever since it had been so set out, a portion of the waste land having been allotted to the lord as directed by the Act, in respect of his interest in the soil. After verdict for the Crown it was argued for the defendants, on motion to enter a verdict for them, that the soil of the road had been taken from the lord and transferred to no other person, and therefore there was no owner, or none against whom a dedication to the public could be presumed; and that, if the Crown were the owner the jury should have been directed that stronger evidence was necessary to raise a presumption of dedication than if the owner had been a private person; but this court held that dedication might be presumed against the Crown from long acquiescence in public user, and that the jury were rightly directed to consider whether the owner, whoever he might be, had consented to the public user in such a manner as to satisfy the jury that a dedication to the public was intended. Lord Denman, C. J. said: "I think the public are not bound to inquire whether this or that owner would be more likely to know his rights and to assert them, and that we have gone quite wrong in entering upon such inquiries. Enjoyment for a great length of time ought to be sufficient evidence of dedication unless the state of the property is such as to make dedication impossible." *Reg. v. Wright* (3 B. & Ald. 681), which was the case of an indictment for encroaching on a public highway, is an express authority on the present point. There commissioners had, in 1771, set out the road in question under an inclosure Act which empowered them to set out public and private roads, the former to be repaired by the township, the latter by such persons as the commissioners should direct, the public roads to be 60 feet wide between the fences. The commissioners in their award described a road as private and eight yards wide, but in setting it out a space of 60 feet was left between the fences; and they directed both the public and private roads to be repaired by the township; the centre only of the 60 feet was ordinarily used as a carriage road, and the township repaired it; the space said to be encroached upon was at the side of this road and there was a diversity of evidence as to the use made of this space by the public, and

its condition since the time of the award. It was held that the commissioners had exceeded their authority in awarding that private roads should be repaired by the township; but that on the whole of the evidence it was a proper question for the jury, whether or not the road in question, though originally intended to be private, had been dedicated to and adopted by the public. [BLACKBURN, J.—Was not the case of *Res v. St. Benedict* reviewed in some later case? Yes, in *Res v. Leake* (5 B. & Ad. 469). In that case, referring to the dictum of Bayley, J. in *Res v. St. Benedict* that notwithstanding a dedication to the public "I think that in consequence of the want of some Act of acquiescence or adoption by the parish, they are not liable to the repair of the road." Parke, B., says "with every respect for that very learned judge, I must say I cannot accede to the doctrine there laid down, and I am not aware that there is any authority in support of it. The repair by the parish of the part in question is undoubtedly a sufficient adoption, if adoption be necessary, which I am clearly of opinion it is not."

Field, Q.C., in support of the rule, contended that the defendants were not liable to repair the road in question. The reason why the charge of repairing highways is thrown on the parish is because the owner of the soil has given a consideration for it in giving up the exclusive right which he formerly possessed of passing over it; and it is only fair that they who enjoy the benefit should pay the expenses of the necessary repairs. [QUAIN, J. referred to an anonymous case in Lord Raymonds' Rep. p. 725 where it was laid down by Holt, C.J. that the inhabitants of every parish of common right ought to repair the highways; and therefore if particular persons are made chargeable to repair the said ways by a statute lately made and they become insolvent, the justices of peace may put that charge upon the rest of the inhabitants.] The language of Abbott, C.J. in *Res v. St. Benedict* (*ubi sup.*) is distinctly in favour of the view now contended for. He said "I am of opinion that this was not a public road, and that the parish are not bound to repair it. It was in this case, as appears from the clause in the local Act, compulsory on the owner of the soil to permit a qualified passage, viz., to all persons entitled to use the old occupation road. That circumstance distinguishes this from the cases cited. If this be a public road, it would follow that whenever, under an inclosure Act an occupation road was set out and it happened to be convenient for passage, it would become, almost immediately, a public road and the burden of repairing it would be thrown on the parish." [BLACKBURN, J.—I must say that I find a difficulty in following that reasoning. ARCHIBALD, J.—May not the explanation be that the Chief Justice was under the same impression as Bayley, J. in the same case, that the consent of the parish was necessary?]

BLACKBURN, J.—I think that this rule must be discharged. The fact that the road was originally set out under an award by inclosure Commissioners as a private occupation road, to be used and repaired by particular individuals, no doubt prevented its being a highway then; and the land over which the road passed was held by the owners of it subject to this qualified easement in favour of particular persons, but there was nothing whatever to prevent the owners of the soil, if they were so minded, from dedicating it to the public so as to

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become a public highway. There the common law steps in and says that when once a road becomes a public highway, the parish, or township must repair that highway. The difficulty is that in the case of *Rea v. St. Benedict* (*ubi sup.*) Lord Tenterden uses language which appeared to me to express an opinion that where a road was originally set out as a limited occupation road, it could never afterwards become a highway repairable by the parish; but when the case is looked at closely it is found not to go so far as that. We find that the road there was set out in 1803, and the case was tried in 1820—seventeen years only after the road was set out under the award; and it was found as a fact that “from the date of the award until the finding of the presentment, the road had been used by the public without interruption as a carriage way; and the question was whether, under these circumstances, this was a public road which the parish was bound to repair.” If the question were whether on that evidence, extending over that period of time, it was incumbent on the jury to find that it was a public highway, then the case would be intelligible, for it clearly was not incumbent on the jury to find so on that evidence. I can see good reason for not hastily assuming a dedication to the public, otherwise you would, as Lord Tenterden says, almost always make a public road. I think there must be some mistake in the language attributed to Lord Tenterden in the report of that case. All he meant, I think was that in the case of a road which was originally a private one, the degree of user by the public should be looked at more cautiously than in the case of a road which has never been private. Since the General Highway Act this point has become of far less consequence than it would otherwise be. I think that the rule should be discharged.

QUAIN, J.—I am of the same opinion. The parish is bound to repair public highways, though some other persons may be also bound to do the same. I am not prepared to say that because under an inclosure Act a road is set out as a private road, it is therefore impossible that it should ever become a public road repairable by the parish. The evidence of public user in the present case is admitted to be sufficient to render the parish liable in ordinary cases. That being so the liability to repair is in the nature of a “public tax,” as it has been called in one of the cases, on the inhabitants of the parish, unless they can show that some other persons are liable to repair. Though private persons may be bound to repair, still if they fail the parish must do it. “The inhabitants of every parish” said Lord Holt in the case to which I have already referred “of common right ought to repair the highways; and therefore, if particular persons are made chargeable to repair the said ways by a statute lately made, and they become insolvent, the justices of peace may put that charge upon the rest of the inhabitants.” No authority has been cited to show that a road set out under an award as a private road cannot become a public highway, except *Rea v. Benedict*; and I do not understand that case as going to that extent. The judges seem to me to have considered simply the question whether there was sufficient evidence in that case to show a dedication to the public; and, as far as I understand the case, we are not now deciding anything inconsistent with it. I am of opinion that the rule should be discharged.

ARCHIBALD, J. concurred. Rule discharged.

Attorneys for the prosecution, *Pilgrim and Phillips* for *Smith and Hinde*, Sheffield.

Attorneys for the defendants, *Torr and Co.* for *Dransfield and Sons*, Penistone.

Wednesday, May 27.

CHELTENHAM UNION GUARDIANS (apps.) v. GUARDIANS OF BIRMINGHAM (resps.)

Pauper—Settlement—Occupation for one whole year—Notice of grounds of removal—Jurisdiction of quarter sessions to decide on a point not included in grounds of removal.

The notice of the grounds of removal of a female pauper from the respondent parish, having alleged a settlement in the appellant parish, gained by the pauper's deceased husband, by renting a tenement and payment of taxes under 4 & 5 Will. 4, c. 76, s. 66, the quarter sessions, though of opinion that a good settlement under that statute had not been proved, and though no other was alleged in the notice, upheld the order of removal, on the ground that a good settlement had been proved by payment of parochial rates under 6 Geo. 4, c. 57, s. 2.

Held, that the quarter sessions had jurisdiction to confirm the order of removal on a ground not stated in the notice.

AN appeal against an order of two justices removing *Isabella Mitchell* and her eight children from the parish of Birmingham, in the borough of Birmingham, in the County of Warwick, to the parish of Cheltenham, in the Cheltenham union, in the county of Gloucester, was heard at the Easter quarter sessions for the borough of Birmingham, held the 21st April 1873, when the recorder confirmed the order subject to the opinion of the court upon the following case:—

The order of removal was dated the 23rd Dec. 1872, and on the same day the respondents sent to the appellants the proper notices, and also the following grounds of removal and particulars of settlement.

“Take notice that the following are the grounds of the said removal and the particulars of the settlement or settlements relied upon in support thereof, that the said paupers had come to and did then inhabit in the said parish of Birmingham, and had become and then were actually chargeable to the said parish of Birmingham, not having acquired any settlement there, nor having produced any certificate acknowledging them to be settled elsewhere, and that the last place of lawful settlement of the said paupers is in the said parish, township, or place of Cheltenham, in the county of Gloucester, being one of the places comprised in the said Cheltenham union, in the county of Gloucester.”

And the following are the particulars of the settlement or settlements relied upon in support of such order of removal:—

“That the said *Isabella Mitchell* is the lawful wife of *Joseph Mitchell*, deceased, and the said eight children are their lawful issue.

“That the said *Joseph Mitchell*, the husband of the pauper, in or about the year 1869, commenced *bonâ fide* renting and actually occupying as yearly tenant thereof, a certain tenement consisting of a separate and distinct dwelling-house or tenement of the full yearly value of ten pounds and upwards, situate and being *Hungerford Villa*, in the parish of Cheltenham in the Cheltenham

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union, in the county of Gloucester, which he continued so to rent and occupy as such yearly tenant thereof for the space of one whole year and upwards, and during the whole time he so occupied the said tenement, he paid the rent for the same to the amount of 14*l.* per annum, and was charged with and paid his share towards the public levies and taxes of the said parish of Cheltenham, including the rates made and assessed to the relief of the poor thereof, for and in respect of such tenement rented and occupied by him as aforesaid."

2. The following are the grounds of appeal so far as is material:—

"That the said paupers at the time the said order was made were not lawfully settled in the parish of Cheltenham, in the said Cheltenham Union, as alleged.

"That Joseph Mitchell, the husband of the said pauper Isabella Mitchell, did not, in or about the year 1869, commence *bonâ fide* renting, and did not actually occupy, as yearly tenant thereof, a certain tenement of the full yearly value of 10*l.* and upwards, being Hungerford Villa, in our said parish of Cheltenham, and did not continue to rent and occupy the same as such yearly tenant for the space of one whole year and upwards, and did not, during the whole time he so occupied the said tenement, pay the rent for the same, and was not charged with and did not pay his share towards the public levies and taxes of the said parish of Cheltenham, including the rates made and assessed for the relief of the poor thereof for and in respect of such tenement."

3. At the hearing, the respondents proved that Joseph Mitchell occupied Hungerford Villa as a yearly tenant, at a rent of 14*l.* per annum, from June 1870, till Aug. 1871, when, being in poor circumstances, he made an arrangement with his landlord and left. It was admitted by the appellants that an amount of rent had been paid requisite for a settlement by renting a tenement.

4. With regard to the payment of rates the respondents proved the following facts.

On the 30th April 1870, a poor's rate was duly made for the parish of Cheltenham for the then ensuing twelve months, payable by two instalments, on the 2nd May 1870, and on the 30th Oct. 1870.

When the rate was made Hungerford-villa was unoccupied, but it was charged with a rate of 1*l.* 11*s.* 6*d.*, payable by two instalments of 15*s.* 9*d.* each.

When Joseph Mitchell came into occupation his name was inserted in the rate book, and he was served with a demand note for 15*s.* 9*d.*, being the whole of the first instalment of the rate. This amount he objected to pay, and eventually 7*s.* 9*d.* was deducted in consequence of the house having been void previous to his occupation, and he paid the remaining 8*s.*, and afterwards paid the whole of the second instalment.

Another rate was made on 29th April 1871, for the then ensuing twelve months, likewise payable by two instalments, and no portion of this rate was paid by him, but no demand of the first instalment was made on Mitchell before he gave up possession of the house.

The counsel for the respondents, on the counsel for the appellants intimating that he did not intend to call witnesses, summed up the case, and relied on the settlement gained by the pauper's

husband, Joseph Mitchell, by his having rented a tenement of the value of more than 10*l.* per annum, and having paid the rent for the same for one whole year, and the rates and taxes due and payable thereon. The counsel for the appellants thereupon objected that the rates and taxes had not been paid for one whole year as required by statute 4 & 5 Will. 4, c. 76, s. 66, and asked the court to quash the order on this point. The recorder, however, after examining the order and grounds of removal, declined to quash the order, being of opinion that although the respondents had not proved a good settlement by renting a tenement and payment of rates and taxes under statute 4 & 5 Will. 4, c. 76, s. 66, yet that the respondents had proved a good settlement by payment of parochial rates under statute 6 Geo. 4, c. 57, s. 2, and decided that the order was therefore good. The counsel for the appellants thereupon objected that this ground of settlement had not been set out by the respondents in the grounds of removal, nor alluded to by their counsel during the trial; but the recorder adhered to his decision, and declined to quash the order of removal, but granted a case for the opinion of the Court of Queen's Bench.

The questions for the opinion of the court are:

—Was the recorder bound, under the circumstances above set out, to question the order of removal as asked for by the appellants? If the court should be of opinion that the recorder was not so bound, did the grounds of removal sufficiently set out a settlement of the pauper's husband gained by payment of parochial rates? and was there a sufficient payment of rates to establish a settlement by payment of rates, the renting and occupation having been sufficient to satisfy the statute 6 Geo. 4, c. 57? If the court should be of opinion that the recorder's judgment was wrong on any one of these questions, then the order of sessions confirming the order of removal is to be quashed, otherwise the order of sessions is to stand.

Soden, in support of the order of sessions, contended that a settlement had been acquired under 6 Geo. 4, c. 57, s. 2, which enacts "that no person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of settling upon, renting or paying parochial rates for any tenement not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling-house or building or of land, or of both *bonâ fide* rented by such person in such parish or township, at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house or building or land shall be occupied under such yearly hiring, and the rent for the same, to the amount of 10*l.* actually paid, for the term of one whole year at the least; provided always that it shall not be necessary to prove the actual value of such tenement." There was an occupation here for a whole year, and rent to the required amount was paid, the payment of any parochial rates being sufficient. 4 & 5 Will. 4, c. 76, s. 66, enacting "that from and after the passing of this Act no settlement shall be acquired or completed by occupying a tenement, unless the person occupying the same shall have been assessed to the poor rate, and shall have paid the same in respect of such tenement for one year," leaves unaltered the acquisition of a settlement by payment of parochial rates.

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On this point *Reg. v. St. Mary Kalendar* (9 A. & El. 626) is conclusive. There it was held that since the passing of 4 & 5 Will. 4, c. 76, s. 66, a person cannot gain a settlement by renting and occupying a tenement, unless he has been assessed to and paid the poor rate in respect thereof for a year; but he may gain a settlement by payment of rates under 3 & 4 Will. & M. c. 11, s. 6, if he has been assessed to and paid poor rate for part of the year only, provided his renting and occupation have been such as to satisfy 6 Geo. 4, c. 57, s. 2. There the pauper, ten days before the end of the year, quitted the premises with his family, locked up the house, leaving only some few things in it, and went into another house. He likewise offered the key to his landlady, but she refused to accept it till the end of the year, when he gave it up to her, and paid the full rent, and this was held to be a sufficient occupation by the pauper for a year under 6 Geo. 4, c. 57, s. 2. In the next place, this court cannot review the decision of the recorder as to the sufficiency of the statement of the grounds of removal. 11 & 12 Vict. c. 31, s. 4 enacts that upon the hearing of any appeal against an order of removal, no objection whatever on account of any defect in the form of setting forth any ground of removal or of appeal in any such statement shall be allowed, and no objection to the reception of legal evidence offered in support of a ground of removal or appeal alleged to be set forth in any such statement, shall prevail, unless the court shall be of opinion that such alleged ground is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and to prepare for trial." And sect. 7 provides that the decision of the court upon the hearing of any appeal against any order of removal, as well as upon the sufficiency and effect of the statement of the grounds of removal and of appeal, and of the notice of chargeability, and of the copy or counterpart of the order of removal sent to the appellant parish, as upon the amending or refusing to amend the order of removal as aforesaid, or the statement of grounds of removal or appeal, shall be final, and shall not be liable to be reviewed in any court by means of a writ of *certiorari* or *mandamus* or otherwise. In *Reg. v. Ewyton* (1 B. & S. 544), Crompton J. said: "I am disposed to take a very wide view of the enactment of statute 11 & 12 Vict. c. 31, and to hold it applicable to every case where an objection is made that the grounds of removal are not sufficient to let in the case of the party; and if this be so, it would determine the present case in favour of the respondents, as the only point made for the appellants is as to the evidence not being admissible on the grounds of removal stated. I am disposed to think that the effect of the 7th section of statute 11 & 12 Vict., c. 31, is to prevent any question as to the grounds of removal not being sufficient being brought into this court, and to make what is done by the court below final. The grounds of removal seem to me to be put by the enactment in question in exactly the same position as particulars in a trial at Nisi Prius now stand. If there is an objection to the sufficiency and effect of the grounds of removal the court of quarter sessions is to consider, just as in the case of particulars, whether they really let in the case of the party; and, if not, to amend them and adjourn the case, &c., so as best to meet the ends of justice;

and by the 7th section the decision of the court of quarter sessions is to be final. The doctrine of defects and variances in the examinations and grounds of removal before the trial of appeals had been mischievous; and the statute in question was a most beneficial alteration of the law, designed to check a practice which had introduced lamentable and disgraceful technicalities into the trial of settlement cases, and I should be sorry to put a narrow construction on so useful an enactment."

Dugdale, for the appellants, contended that the recorder could not give judgment on a ground of removal not stated in the notice, and indeed not alluded to by either party at the hearing. [BLACKBURN, J.—If a judge sees clearly in a trial at Nisi Prius that there ought to be a nonsuit, is he bound to refrain from nonsuiting because neither of the counsel has seen the point?] 11 & 12 Vict. c. 31, which (sect. 1) did away with the necessity of accompanying notices by a copy of the examination upon which the order was made, provides (sect. 2) "that instead thereof such notice shall be accompanied by a statement in writing under the hands of such overseers or such guardians, or any three or more of such guardians, setting forth the grounds of such removal, including the particulars of the settlement or settlements relied upon in support thereof; provided always that on the hearing of any appeal against any order of removal, it shall not be lawful for the respondents to go into or give evidence of any other grounds of removal than those set forth in such statement," a distinct and positive enactment which, it is submitted, prevented the consideration of any grounds of removal not set forth in the statement of particulars. Before that enactment any grounds of removal might be taken into consideration, and it was upon the old state of the law, prior to this statute, that *Reg. v. St. Mary Kalendar* (*ubi sup.*) was decided. No settlement was acquired here under 3 W. & M. c. 111, because to gain a settlement under that statute the person must have resided forty days in the parish after payment of the rate. See *R. v. Ringslead* (B. & Cress. 607). [LUSH, J.—The whole series of such discreditable decisions was swept away by the Act of 1848.] Sect. 4 of that Act (11 & 12 Vict. c. 31) does not come into operation unless the objection relied on is taken at the trial, and that was not so here.

BLACKBURN, J.—I think it is quite clear that the recorder was not bound to quash the order of removal under the circumstances. If the facts were so incorrectly set forth as really to mislead the parties, the case might be different; but as the facts were, I think he was right in not giving effect to the objections of the appellants.

LUSH, J. concurred.

Order of sessions confirmed.

Saturday, May 30, 1874.

REG. v. THE NORWICH INCORPORATION.

Settlement by renting a tenement—Yearly rent—Construction of lease.

The tenant of a public-house had agreed to hold the same for the term of three calendar months thenceforth next ensuing, at the rent or sum of 15l. per quarter; the landlord agreeing that he should continue to occupy the premises as tenant from

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quarter to quarter at the like rent, until the receiving or giving three months' notice to quit by either of the parties, ending at one of the usual quarter days in the year :

Held: that this agreement did not constitute a yearly hiring of a tenement for the sum of 10l. a year at the least, within the meaning of 6 Geo. 4, c. 57, s. 2; and that, therefore, the occupation did not give the tenant a settlement.

At the general quarter session holden for the county of Middlesex, on the 26th April 1873, an appeal against an order of one of the magistrates of the police courts of the metropolis for the removal of Ellen Prentice and her four children from the Westminster Union to the Norwich Incorporation as the place of her last legal settlement, was heard, in which the guardians of the poor of the Norwich Incorporation were the appellants, and the guardians of the poor of the Westminster Union were the respondents, when that court confirmed the said order, subject to the opinion of this court on the following case :

The said Ellen Prentice was the widow of John Prentice, and the four children mentioned in the order were their lawful children.

The settlement relied upon by the respondents was one by renting a tenement by the said John Prentice in the parish of St. Stephen, Norwich, in the incorporation mentioned, under 6 Geo. 4, c. 57, s. 2.

The tenement referred to was rented by the said John Prentice of Messrs Seaman and Grimmer under the following agreement :—

An agreement made the 25th Dec. 1879, between Samuel Grimmer and Frederic Grimmer of the city of Norwich, wine, spirit, and porter merchants, of the one part, and John Prentice of the other part.

The said Samuel Grimmer and Frederic Grimmer agreed that the said John Prentice shall enter into and take possession of all that public-house called the Mitre Tavern, Briggs-street, situate in the parish of St. Stephens, with the appurtenances thereto belonging, on the 25th March next, and the said John Prentice hereby agrees that he will on that day take possession of the same public-house, and premises, and hold the same for the term of three calendar months thenceforth next ensuing, at the rent or sum of 15l. per quarter, and will pay all rates and taxes (except the land tax), in respect of the said premises. And it is hereby also agreed between the said parties that the said John Prentice shall and may continue to occupy the said public-house and premises as tenant from quarter to quarter at the like rent or sum of 15l. until the receiving or giving notice to quit the same as hereinafter mentioned, that is to say, that the said John Prentice shall and will quit and deliver up the possession of the said public house and premises to the said Samuel Grimmer and Frederic Grimmer, or either of them, at any time hereafter, upon receiving three months' notice in writing from them, or either of them, to quit the same, ending at one of the usual quarter days in the year, without reference to the commencement of the tenancy of the said John Prentice, and the said John Prentice shall not quit the possession of the said public-house and premises without giving to the said Samuel Grimmer and Frederic Grimmer or one of them, the like notice in writing ending as aforesaid. That the said John Prentice shall keep the said house open as a public-house, and not suffer the same to be shut up, or the trade thereof to be injured, and in the event of his failing to perform any or either of these conditions, then he shall forfeit and pay to the said Samuel Grimmer and Frederic Grimmer, or either of them, the sum of 20l. by way of additional or increased rent, to be recoverable in the same manner as the said original rent of 15l., by distress and sale of the goods and chattels of the said John Prentice, or by action at law. That he shall also buy and take of the said Samuel Grimmer and Frederic Grimmer, or one of them, all the beer, ale, porter, and other malt liquors and all spirituous liquors and wines

to be sold, spent, and consumed by him in the said house, &c.

The said John Prentice occupied and resided in the said public-house under this agreement for a period of one year and nine months, and during the whole of that period he was licensed in respect thereof, and conducted the business thereof; he was also assessed to and paid the poor rates of the parish of St. Stephen in respect of the said public-house, and paid the rent quarterly during the whole period.

The only point raised by the appellants was that the written agreement did not constitute a yearly hiring or renting of the public-house for the term of one whole year within statute 6 Geo. 4, c. 57, s. 2. The respondents contended that the agreement showed that the parties contemplated originally that the holding would endure for a year or more, though it might be put an end to before the expiration of the year, and that as it was not put an end to during the year, but was occupied by the said John Prentice for a year and nine months under the agreement, he gained a settlement.

The justices at the said general quarter sessions decided that such agreement did constitute a yearly hiring as required by the said statute 6 Geo. 4, c. 57, s. 2.

The question for the opinion of this court is, Whether the written agreement constituted such yearly hiring or renting of the public-house for the term of one whole year as required by the statute.

If the court shall answer this question in the affirmative then the order of the sessions confirming the order of removal is to stand confirmed, otherwise the order of the sessions and the order of removal are to be quashed.

Poland, for the respondents, supported the orders of removal and of quarter sessions. The words of the section upon which this question turns are, "That no person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of settling upon, renting, or paying parochial rates for any tenement, not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling house or building, or of land, or of both, *bonâ fide* rented by such person, in such parish or township, at and for the sum of 10l. a year at the least, for the term of one whole year; nor unless such house or building or land shall be occupied under such yearly hiring, and the rent for the same to the amount of 10l., actually paid, for the term of one whole year at the least." In the *Hastings Union v. St. James, Clerkenwell* (L. Rep. 1 Q. B. 38), where the cases on this subject were discussed in a considered judgment of the court, the agreement was to hire a house quarterly, at a yearly rent of 25l., to be paid on the usual four quarter days, a quarter's notice to be given by either party; that was held to be within the statute, and to give the tenant a settlement. It was decided by *Reg. v. St. Giles's, Cripplegate* (4 B. & S. 509), that if the hiring is such as in its inception will last a year, unless determined by notice, and the tenancy does in fact continue for a year, that is sufficient, although the hiring was not for a whole year certain. As was remarked by Crompton, J., in *Reg. v. Thornton* (2 E. & E. 788, at p. 792), "A tenancy for any term must be considered to continue until legally determined."

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The hiring here was created by this agreement until put an end to by a quarter's notice, and it lasted beyond the required time; this, therefore, is within the principle contained in *Rex v. Herstmonceaux* (7 B. & C. 551) that such an agreement as this "is to be considered a lease for so many years as the party shall occupy, unless in the mean time it shall be defeated by notice on the one side or on the other."

Tindal Atkinson, contra, not heard.

COCKBURN, C.J.—I think no settlement was gained in the appellant's union. It is quite clear that to constitute such a settlement there must be an occupation for twelve months under a yearly tenancy. There is here to begin with, only a quarter's tenancy, and it is obvious that the parties contemplate that the premises may be quitted within the year, which is in contradiction of any yearly letting. In the other cases it has been held there was a yearly letting, some words have been used such as "at the yearly rent of" a sum stated. Here there is nothing to indicate any yearly rent, but only a quarterly rent. It is not enough that the tenancy does in fact continue for a whole year unless it so continued under a yearly letting. It would be a contradiction in terms to hold any such yearly letting here. I am not disposed to carry the principles laid down in *Rex v. Herstmonceaux* any further than their application in that case. The quarter sessions were wrong in their construction of this agreement.

BLACKBURN, J.—I am of the same opinion. The statute requires a yearly hiring, but the cases of *Rex v. Herstmonceaux*, and *Hastings Union v. St. James, Clerkenwell*, have decided that the tenancy being defeasible in less time than a year, does not prevent a settlement from being acquired. If the matter were *res integra*, I should say that by those decisions the statute has been defeated; but it is not here necessary to reconsider those cases, for they do not apply to the present agreement. Here not only is the tenancy defeasible within a year, but the premises were not rented for a year at all.

QUAIN and ARCHIBALD, JJ. concurred.

Judgment for appellants.

Attorneys for appellants, *Hudson, Matthews, and Co.*

Attorneys for respondents, *C. and J. Allen and Son.*

Wednesday, June 3, 1874.

CUTLER (app.) v. TURNER AND ANOTHER (resps.)

Master and servant—Servant absenting himself—Remedies—Second offence—Imprisonment—Master and Servant Act 1867 (30 & 31 Vict. c. 141), s. 9.

The appellant, a fireiron forger, in the employ of the respondents, was summoned under sect. 9 of The Master and Servant Act 1867 (30 & 31 Vict. c. 141), for absenting himself without lawful excuse, and ordered to pay a certain sum to the respondents as compensation, which sum was paid. The following month, not having returned to his work, he was again summoned under the same section, ordered to find security for the fulfilment of the contract, and in default sentenced to three months imprisonment, which term of imprisonment he suffered. After its expiration, appellant continuing to absent himself, was again summoned under the same section, and ordered to pay

a further sum to the respondents by way of compensation:

Held, that the contract of service had not been annulled by either or both of the previous orders, and that the magistrate had jurisdiction to make the last mentioned order, notwithstanding that the appellant had suffered three months' imprisonment for absenting himself from the same service.

CASE stated by the police magistrate for the borough of Sheffield, for the opinion of the Court of Queen's Bench.

1. A summons under the Master and Servant Act 1867, came on for hearing before me on the 31st Oct. 1873, and again by adjournment on the 18th Nov. The summons charged William Cutler, being the servant, as a fire-iron forger, of William Turner, with absenting himself from the service without just cause or lawful excuse, and claimed that he should be directed to fulfil his said contract, pursuant to the Master and Servant Act, 30 & 31 Vict. c. 141, s. 9.

2. On the 18th Nov. before mentioned, I made an order directing the defendant to pay the sum of 11l. 14s., as compensation to the complainants, being of opinion under the circumstances herein-after stated, that an order to fulfil the contract as prayed in the summons was not the most appropriate remedy, an adjournment having been previously granted on the application of the defendant's attorney to meet the question of compensation.

3. The defendant being dissatisfied with my determination, and having duly applied to me in writing, I state this case, setting forth the facts and grounds of such determination for the opinion of the Court of Queen's Bench.

4. On the 25th Feb. 1871, the parties made the following agreement in writing:—

An agreement made this 25th Feb. 1871, between Thomas Hague and William Turner, of Sheffield, in the county of York, fender and fire-iron manufacturers of the one part, and William Cutler, of Sheffield aforesaid, fire-iron forger, of the other part; whereby it is mutually agreed between the said parties as follows:

(1.) The said William Cutler agrees to work for the said Thomas Hague and William Turner as a fire-iron forger for the term of five years from the date hereof, during which said term he will complete and finish in a workmanlike manner for his said employers all such work as shall be assigned to him by them.

(2.) The said William Cutler will not during the said term work for any other employer than the said Thomas Hague and William Turner.

(3.) The said Thomas Hague and William Turner agree to employ and provide work by the piece for the said William Cutler during the whole of the said term of five years, paying him weekly for such work, as he shall complete and finish for them in manner aforesaid, the usual prices allowed by those in the same trade for similar work.

As witness the hands of the parties the day and year first above written.

(Signed by parties.)

5. The defendant entered into the service of the complainants under the agreement.

6. On the 8th Feb. 1873, a notice given on behalf of the defendant was received by the complainants.

"I hereby respectfully give you notice that on and after 8th March 1873 the prices of work done

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by me in your employment will be increased by 20 per cent. (the same as given in Birmingham), and in case of non-compliance with the same, shall feel compelled to suspend myself from your service from that date until the same is conceded.

"WILLIAM CUTLER."

7. On the 1st March 1873, the defendant ceased to work for and absented himself from the service of the complainants.

8. On the 1st April 1873, the complainants took out a summons against the defendant for absenting himself without cause, and claiming 15*l.* 12*s.* as compensation.

9. The case was heard by me on the 13th May 1873, when the parties appeared in person and by their attorneys, and being of opinion, after hearing them, that the defendant had wrongly absented himself, and also that the complainants had sustained damage by reason of such absence, between the said 1st March and the issuing of the summons, to the amount of 11*l.* 8*s.*, I ordered the defendant to pay that sum, together with the costs of the summons and order, at the same time expressing my opinion that the contract was still in force, and I assumed that the defendant, after hearing my decision would return to his employment and fulfil the contract for the remainder of the term. The damages were assessed on the following principle,—the defendant could make if at work 24 sets of fire-irons every week, and the net profit of the employers was 3*s.* 3*d.* per set, equal to 3*l.* 18*s.* per week.

The order not having been complied with, an order for imprisonment was drawn up, but the amount was paid on behalf of the defendant before his actual imprisonment.

10. The defendant did not return to his work, and on the 6th June 1873, the complainants issued a summons against the defendant for absenting himself, and claiming that he be directed to fulfil the contract.

11. This complaint was heard on the 7th July 1873, before two justices of the peace for the borough, the parties being present but not appearing by attorney, and the defendant was ordered to find security to fulfil the contract, and to pay 15*s.* 6*d.* for costs.

12. This order was not complied with, and the defendant subsequently underwent the three months' imprisonment in default, and on his liberation he continued to absent himself from his employment.

13. The summons of the 28th Oct., mentioned at the commencement of the present case, was thereupon taken out, and the order, the subject of this appeal, made, as already stated, as upon consideration (after objection taken and reference to the cases of *Unwin v. Clarke*, 35 *L. J.*, *N. S.*, 193, *M.C.* (decided under a previous Master and Servant Act) *Crane v. Powell*, 38 *L. J.*, *N. S.*, 43, *M.C.*; and *Barnesley v. Taylor*, 37 *L. J.*, *N. S.*, 39, *Q. B.*), I was of opinion that neither of the previous orders was a bar to the last summons and order.

14. The damages in the last-mentioned order were purposely limited by the complainant to those that accrued by the breach between the period of the defendant's liberation from prison and the issuing of the last summons, being three weeks' net profits on the defendant's labour at 3*l.* 18*s.* a week. I expressed my opinion, however, that as it appeared before me on the last case, and was avowed by the defendant's attorney, that the

defendant was acting wilfully in the sense of acting under the direction or by the advice of his trade union, and that he did not intend to perform the contract at all, that whatever damages were claimed and ordered to be paid under the last summons must be taken as in final satisfaction of the contract, as the complainants could not, under those circumstances, bring an unlimited number of complaints.

15. The question of law for the opinion of the court is, whether the orders of the 13th May, and of the 7th July 1873 (or either of them), were a bar to the subsequent complaint and summons of the 28th October 1873, and the order thereon. If not, the last-mentioned order is to be affirmed; otherwise, to be reversed.

J. E. DAVIS.

Hopwood, *Q.C.* (with him *Forbes*), for the appellant, contended that the three months' imprisonment which the appellant had suffered before the making of the last order exhausted and annulled the contract of service, and that the last order of the magistrate was therefore bad. Sect. 4 of 30 & 31 *Vict. c. 141*, provides that "whenever the employer or employed shall neglect or refuse to fulfil any contract of service, or the employed shall neglect or refuse to enter or to commence his service according to the contract, or shall absent himself from his service, or whenever any question, difference, or dispute shall arise as to the rights or liabilities of either of the parties, &c., the party aggrieved may lay an information or complaint in writing before a justice, magistrate, or sheriff, setting forth the grounds of complaint, and the amount of compensation, damage, or other remedy claimed for the breach or non-performance of such contract," and upon complaint made the justice is to issue a summons or citation. Then sect. 9 enacts that "upon the hearing of any information or complaint under the provisions of this Act, two justices, or a magistrate, or sheriff, after due examination and upon the proof and establishment of the matter of such information or complaint, by an order in writing under their respective hands, in their or his discretion, as the justice of the case requires, either shall make an abatement of the whole or any part of any wages then already due to the employed, or else shall direct the fulfilment of the contract of service, with a direction to the party complained against to find forthwith good and sufficient security, by recognisance or bond, with or without sureties, to the satisfaction of a justice, magistrate, or sheriff, for the fulfilment of such contract, or else shall annul the contract, discharging the parties from the same and apportioning the amount of wages due up to the completed period of such contract, or else where no amount of compensation or damage can be assessed, or where pecuniary compensation will not, in the opinion of the justices, &c., meet the circumstances of the case, shall impose a fine upon the party complained against, not exceeding in amount the sum of 20*l.*, or else shall assess and determine the amount of compensation or damage, together with the costs, &c.; and if the order shall direct the fulfilment of the contract and direct the party complained against to find good and sufficient security as aforesaid, and the party complained against neglect or refuse to comply with such order, a justice, magistrate, or sheriff may, if he think fit, by warrant under his hand, commit such party to

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the common gaol or house of correction within his jurisdiction, there to be confined and kept until he shall so find surety, but nevertheless so that the term of imprisonment, whether under one or several successive committals, shall not exceed in the whole the period of three months; provided always that the two justices, magistrate, or sheriff may, if they or he think fit, assess and determine the amount of compensation or damage to be paid to the party complaining, and direct the same to be paid, whether the contract is ordered by them or him to be annulled or not, or, in addition to the annulling of the contract of service and discharge of the parties from the same, may, if they or he think fit, impose the fine as hereinbefore authorised," &c. Sect. 11 provides that "Where, on the hearing of an information or complaint under this Act an order is made for the payment of money, and the same is not paid as directed, the same shall be recovered by distress or pawning of the goods and chattels of the party failing to pay, and in default thereof by imprisonment of such party, according and subject to the acts described in the second schedule to this Act; but no such imprisonment shall be for more than three months, or be with hard labour." Sect. 12 enacts that "from and after the expiration of the term of any such imprisonment as aforesaid, the amount of fine, compensation, or damages, together with the costs so assessed and directed to be paid by any such order as aforesaid, shall be deemed and considered as liquidated and discharged, and such order shall be annulled accordingly, and the said parties exonerated from their respective obligations under the same; provided always that no wages or any portion thereof which may be accruing due to the employed under any contract of service after the date of such order, shall be assessed to the amount of compensation or damages and costs directed to be paid by him under any such order or warrant of distress or pawning, to be seizable or arrestable under the same." It was the intention of the Legislature that for breach of the contract the maximum of imprisonment should be three months, and that had already been inflicted and suffered by the appellant in the present case before the last order was made by the magistrate. The chief difficulty which the appellant has to contend with, is the case of *Unwin v. Clarke* (L. Rep. 1 Q. B. 417), decided under the Act 4 Geo. 4, c. 34, s. 3, where a workman had entered into a contract with a master to serve him for the term of two years, and having absented himself during the continuance of the contract, was summoned before justices, convicted, and committed; after the imprisonment had expired, and while the term still continued, he refused to return to his master's service, and was again summoned before justices, when he stated that he considered his contract determined by the commitment. Though the justices found that he *bonâ fide* believed that he could not be compelled to return to his employment, and dismissed the summons, this court held that, although the servant had not returned to his employment, yet as the contract continued, he had been guilty of a fresh offence for which, notwithstanding his conviction and imprisonment he could be again convicted; and that his *bonâ fide* belief that he could not be compelled to return to his employment, did not constitute a lawful excuse for his absence. That was a decision of two judges only,

and Shee, J., though not formally dissenting from the judgment of Blackburn, J., expressed a strong opinion against the second conviction. After referring to the words of the enactment, Shee, J., said: "I think that on the proper construction of them, a servant who absents himself from his service, declaring at the time that he will not return, commits an offence of the same degree as that of declining altogether to enter into the service, and that it cannot have been the intention of the Legislature that he should be punishable only once for the latter offence, and *toties quoties*, by successive imprisonments for the former. The justices ought in such a case to take into their consideration that the person charged has declined absolutely to return to the service, and punish him once for all. It has been said that it is unreasonable that a second absenter from the service should not be punished as well as the first, but in my opinion the meaning of a man absentering himself is, that being in the service he departs from it. If he had returned to the service and then left it again, he might have been punished again, but having originally declared he would never come back, I think his non-return was not a fresh absence, and that he was not punishable a second time. The weight of authority is against this view, but I agree with Pollock, C.B., and Martin, B., in *Ex parte Baker* (2 H. & N. 219)." [LUSH, J.—A strong point against you is this, that sect. 9 of the Act gives the justices or magistrate power to "annul the contract" as well as to direct its fulfilment. This assumes that any order short of expressly annulling the contract is not to be construed as having that effect.] The same section provides that "the term of imprisonment, whether under one or several successive committals, should not exceed in the whole the period of three months;" and as that full period of imprisonment has been undergone by the appellant, it is submitted that all the powers intended to be given by the Act for the enforcement of the contract are exhausted, and that the contract is at an end. The Act of Geo. 4, on which *Unwin v. Clarke* (*ubi sup.*) was decided contained no similar provision as to the maximum of imprisonment. [LUSH, J.—Sect. 11 seems to contemplate the possibility of several successive imprisonments of three months' duration each where an order is made for the payment of money, and the amount cannot be recovered by distress.] But not, as here, where the order is not made for the payment of money, but for the return of the employed to service.

Dodd for the respondents was not called upon.

LUSH, J.—I am of opinion that the order of the magistrate was right. The question put to us is, whether the orders of the 13th May and 7th July 1873 were, or either of them, was a bar to the subsequent complaint and summons of the 28th Oct., and the order made thereon. The order of the 13th May was an order for the payment of a sum of money by the servant for having wrongfully absented himself. The order of the 7th July was an order to find security for the fulfilment of the contract, and to pay 15s. 6d. for costs, and that not being complied with, the appellant was sentenced to three months' imprisonment, which he underwent. The question for us now to determine is, whether these orders, either or both of them, put an end to the contract, so that the service can no longer be discharged. Looking at

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the language of the statute, I am of opinion that it was not contemplated by the Legislature that such orders as these should effect a determination of the contract of service. Sect. 4 gives a remedy by complaint before justices or a magistrate where either employer or employed neglects or refuses to fulfil any contract of service. Then sect. 9 states what is to be done on the hearing of any such complaint. The justices may, by order in writing under their hands, either make an abatement of the whole or part of any wages then already due to the employed, or shall direct a fulfilment of the contract of service, with a direction to the party complained against to find forthwith good and sufficient security, by recognizance or bond, with or without sureties, to the satisfaction of a justice, magistrate, or sheriff, for the fulfilment of such contract, or else shall annul the contract, discharging the parties from the same, and apportioning the amount of wages due up to the completed period of such contract, or else where no amount of compensation or damage can be assessed, or where pecuniary compensation will not, in the opinion of the justices, magistrate, or sheriff, meet the circumstances of the case, shall impose a fine upon the party complained against, not exceeding in amount the sum of 20*l.*, or else shall assess and determine the amount of compensation or damage, together with the costs, to be made to the party complaining, inclusive of the amount of any wages abated, and direct the same to be paid accordingly." Up to this the section does not state what is to be the consequence of disobedience. The magistrate has a very wide discretion. He may abate the whole or part of the wages due, or direct a fulfilment of the contract, or annul the contract, or inflict a fine. But the section then goes on to provide that, "if the order shall direct the fulfilment of the contract and direct the party complained against to find good and sufficient security as aforesaid, and the party complained against neglect or refuse to comply with such order, a justice, magistrate, or sheriff may, if he think fit, by warrant under his hand commit such party to the common gaol or house of correction within his jurisdiction, there to be confined and kept until he shall so find surety, but nevertheless so that the term of imprisonment, whether under one or several successive committals, shall not exceed in the whole the period of three months; provided always that the two justices, magistrates, or sheriff may, if they or he think fit, assess and determine the amount of compensation or damage to be paid to the party complaining, and direct the same to be paid, whether the contract is ordered by them or him to be annulled or not, or in addition to the annulling of the contract of service and discharge of the parties from the same may, if they or he think fit, impose the fine as hereinbefore authorized," &c. The language of this part of the Act of Parliament shows two things; First, that the Legislature did not intend that one order should exhaust the remedies or annul the contract; secondly, that the imprisonment to be suffered is for not finding security for the due fulfilment of the contract of service; and in that case the imprisonment is not to exceed in the whole the period of three months. So that if the servant has once been ordered to find security, and in default of doing so has been imprisoned for a month, he may be imprisoned again, but the whole term of im-

prisonment for this is not to exceed three months. But all this is for not finding securities for the fulfilment of the contract. But then comes the proviso which I have read, and in it the Legislature contemplates that nothing short of an order expressly annulling the contract will put an end to it. The language of the proviso is altogether inconsistent with the notion that imprisonment or payment of compensation should of itself operate to annul the contract, and if the contract is not annulled, the party breaking it may be proceeded against *toties quoties*. Where a magistrate has in the first place imprisoned a party for not finding security, he has exhausted his power in that way, but he may still make an order for the payment of compensation by the party for absenting himself from service. Then the remedy for the non-payment of compensation so ordered to be paid is given by the 11th section, which provides that "where on the hearing of an information or complaint under this Act an order is made for the payment of money, and the same is not paid as directed, the same shall be recovered by distress or pawning of the goods and chattels of the party failing to pay, and in default thereof by imprisonment of such party, according and subject to the Acts described in the 2nd schedule to this Act; but no such imprisonment shall be for more than three months, or be with hard labour." And the 12th section says, that "from and after the expiration of the term of any such imprisonment as aforesaid, the amount of fine, compensation, or damages, together with the costs so assessed and directed to be paid by any such order as aforesaid, shall be deemed and considered as liquidated and discharged, and such order shall be annulled accordingly, and the said parties exonerated from their respective obligations under the same," &c. I think this makes the whole statute consistent, in this sense, that we can see what the Legislature meant, though we may not understand all the reasons for the various enactments. I think that on the non-payment of the compensation ordered to be paid, the party is liable to be imprisoned again for a period not exceeding three months. The last order made here was for the payment of compensation, and I think that order was good.

ARCHIBALD, J.—I also am of opinion that the order made by the magistrate on the 28th Oct. should be affirmed, and that the remedy was not barred by any or both of the previous orders. The 9th section of the Act gives the magistrate power to annul the contract, or to direct that the contract should be continued, and to order the servant to find security for the performance of it, and to give power to enforce that order by imprisonment, not exceeding in the whole three months. It has been argued that the suffering of imprisonment for three months by implication annuls the contract; but that seems to me to be altogether at variance with the intention of the Legislature as here expressed. A severe remedy by imprisonment is given in order to enable the parties to enforce the contract; but because a party is not compelled by the application of this severe remedy to fulfil the contract, it does not at all follow that the contract is therefore at an end. I think that notwithstanding that the direct method by imprisonment of enforcing performance of the contract has been exercised, the magistrate may also exercise the power of awarding compensation. There is nothing to show that he is deprived of

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his power to award it, and if compensation is awarded, the remedy to enforce its payment is given by the 11th section. I think, therefore, that the contract of service was not put an end to by the three months' imprisonment of the appellant, and that the conviction was right.

Judgment for respondents.

Attorneys for appellant, *Doyle and Edwards.*

Attorneys for respondents, *Rickards and Walker.*

Wednesday, June 3, 1874.

WILLIAMS (app.) v. THE ASSESSMENT COMMITTEE OF BEDMINSTER UNION (resps.).

Poor rate—Appeal—Notice to assessment committee—Notice not stating all grounds of appeal—Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), s. 1.

The notice required by the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39, s. 1), to be given to the assessment committee, before an appeal to quarter sessions against a rate, must contain all the grounds of appeal, though on some of those grounds the assessment committee may be unable to give relief.

THIS was an appeal against a rate made for the relief of the poor by the churchwardens and overseers of the parish of Bedminster, on the 12th April 1872, in which the appellant was assessed as follows:

William Williams,—Occupier of toll-house and tolls for foot passengers on Princes-street Bridge,—Gross estimated rental 750*l.*,—Rateable value 650*l.*

2. The appeal came on to be heard at the Michaelmas Quarter Sessions 1872, for the city and county of Bristol, when the sessions made an order that the appellant's name be struck out of the rate, and that the overseers should repay him 56*l.* 17*s.* 6*d.*, and that the assessment committee of Bedminster union who appeared as respondents, should pay the appellant's costs, and the rate be amended subject to the following case:

The following case is stated in pursuance of the said order:

3. The said Princes-street Bridge was erected on the site of an ancient ferry, known as the Gib Ferry, under the authority of and in accordance with the provisions of 48 Geo. 3, c. xi (a copy of which accompanies and is to be taken as part of this case), by the Bristol Dock Company, who are now represented by the corporation of the city of Bristol, and the said corporation have now the exclusive property in the bridge and its approaches, which together form a public highway.

4. In accordance with the directions of sect. 21 of the said Act the said dock company erected at the Bedminster end of the bridge, in the parish of Bedminster, two toll-houses opposite each other, one for foot passengers and the other for carriages. A different collector occupies each toll-house, and between the toll-houses are two gates, a large for carriages and a smaller for foot passengers, such gates extending from one toll-house to the other.

5. Some time previous to the making of the said rate, and up to the present time, one of these toll-houses has been occupied by a man in the employ of the appellant, named Adolphus Dye, who collects at this toll-house, which is the toll-house mentioned in the said rate, the tolls of foot

passengers and trucks referred to in the 21st section of the said Act, 48 Geo. 3, c. xi, and hands them over to the appellant every fortnight; the other toll-house is occupied by the Corporation of Bristol, who place therein a servant who collects the tolls on horses, carts, and carriages referred to in the same section. Neither Dye nor the corporation collector interfere with any tolls but those which they are employed to collect, Dye attending exclusively to the tolls for foot passengers and trucks, and the corporation collector attending exclusively to the tolls for horses, carts, and carriages.

6. The toll is taken from all foot passengers who pass through the said gate, and it is not taken from any foot passenger, even though they pass up to the said gate, if they return back and do not pass through the said gate.

7. The amount of the tolls on foot passengers and trucks collected at the said toll-gate and received by the appellant, is upwards of 750*l.* a year.

8. The corporation of Bristol, as successors to the said dock company, are bound to repair and do repair the said bridge, with the exception of the said toll-house for foot passengers and trucks, which is repaired by the appellant, who is the lessee of the foot passenger and truck tolls.

9. The appellant resides at the Market Hotel in the city of Lincoln. He has no interest or property whatsoever in the bridge or its approaches, nor any interest in connection therewith other than the bare right to take the tolls for foot passengers and trucks, and to occupy one of the toll-houses.

10. The said poor-rate of the 12th April 1872, was made in conformity with the valuation list then existing, and which had been approved of by the respondents.

11. On the 4th June 1872 the appellant served on the churchwardens and overseers of the said parish of Bedminster, and also on the respondents, a notice of objection against the said valuation list, which was in the following terms:—

To the assessment committee of the Bedminster Union, and to the churchwardens and overseers of the poor of that part of the parish of Bedminster, which is in the city and county of Bristol, and in the said union.

I, William Williams, of the Market Hotel, Lincoln, being aggrieved by the valuation list for the said parish, hereby and according to the provisions of the Union Assessment Committee Act 1864, give to you the assessment committee, and to you the churchwardens and overseers of the poor of the said parish, notice in writing of the objection against the said list, for that the said list is bad as far as it relates to my property, because it is not made on a true estimate of the net annual value of such property, inasmuch as I am assessed in the said valuation list in respect of other property which is not in the said parish, and is not therefore liable to be rated therein.

Dated, &c.

12. Meetings were afterwards held by the respondents at which both the appellant and the parish of Bedminster appeared, and the only contention raised by the appellant when before the respondents was that as one half of the Princes-street bridge was in the parish of St. Stephens, the appellant ought not to be rated in the said parish of Bedminster in respect of more than one half of the said tolls.

13. The respondents decided against the contention raised by the appellant, and made no alteration in the valuation list.

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14. The appellant having failed to obtain such relief in the matter as he deemed just, on the 28th Sept. 1872, served on the churchwardens and overseers of the said parish of Bedminster, and also on the respondents, a notice and grounds of appeal in the following terms:—

To the assessment committee of the Bedminster Union, and to the churchwardens and overseers of the poor of that part of the parish of Bedminster, which is in the city and county of Bristol, and in the said union.

I, William Williams, of the Market Hotel, Lincoln, being aggrieved by a poor rate of the said parish, made on the 12th April 1872, and made or purporting to have been made in conformity with the valuation list then in force in that part of the said parish which is in the city and county of Bristol, and also by the said valuation list, and having failed to obtain such relief in the matter from you, the said assessment committee, as I deem just, hereby give you, and each and every of you notice that I do intend at the next general quarter sessions of the peace to be holden in and for the said city and county of Bristol, to appeal against the said rate, and that the grounds of appeal relied upon by me are as follows; that is to say,

First. That the said rate and assessment therein, so far as they relate to my property, are defective and bad, because they are not made on a true estimate of the net annual value of such property, inasmuch as I am assessed in the said rate in respect of other property which is not in the said parish, and is not therefore liable to be rated therein.

Second. That the said rate and the assessment therein, so far as they relate to my property, are defective and bad, because the alleged gross estimated rental of my lands and hereditaments, included in the said rate and assessment, is not the true and fair gross estimated rental, but very much exceeds it, inasmuch as I am not rateable to the poor for the tolls for foot passengers mentioned in the said rate or assessment.

Third. That the said rate and the assessment therein, so far as they relate to my property, are defective and bad, because the amount stated therein as the rateable value of my said lands and hereditaments is not the true and just rateable value of the same, but very much exceeds it, inasmuch as I am not rateable to the poor for the tolls of foot passengers mentioned in the said rate or assessment.

And I give to you, the said assessment committee, and to you the said churchwardens and overseers, notice that I intend, on the hearing of the said appeal, to avail myself of all or any of the said grounds of appeal.

And I, lastly, give you and every of you notice to produce at the hearing of the said appeal the said rate or assessment, and also the said valuation list.

Dated the 28th day of September, 1872.

FUSSELL, FRICHARD, AND SWAN,
Solicitors for and on behalf of the said
William Williams.

15. At the hearing of the said appeal the respondents objected to the said notice of appeal, on the ground that the appellant was not entitled to go into the second or third grounds of appeal, inasmuch as he had given no notice to the respondents of objection to the valuation list on these grounds, under the proviso to the first section of 27 & 28 Vict. c. 39, but the court of quarter sessions overruled this objection on the ground that the assessment committee had no power to determine or give relief on the question of rateability raised by the second and third grounds of appeal, and that those grounds of appeal could not have been made into before an assessment committee the appellant was not bound under the proviso to the first section of 27 & 28 Vict. c. 39, to give notice to the respondents of objection to the valuation list on those grounds, but reserved the point for the decision of this court, subject to an objection raised on behalf of the appellant that the decision of the court of quarter sessions on this point was final by virtue of the 12 & 13 Vict. c. 45, s. 9, and that the

court had no power to reserve the point in the form of a case for the opinion of this court.

16. The court of quarter sessions further decided that the appellant was not liable to be rated in respect of the amount to be received by him from the said tolls under the circumstance set forth in this case, and that as the appellant was rated in a conjoint assessment in respect of a toll-house and tolls, in respect of the latter of which he was not, in the opinion of the said court, liable to be rated, the whole assessment on the appellant was bad, and made an order that the rate should be amended by striking out the name of the appellant, which order is the order set forth in the second paragraph of this case.

17. The questions for the opinion of the court are: First, whether the appellant was entitled at the hearing of the appeal to rely on the second and third grounds of objection stated in his notice of appeal; secondly, whether the court of quarter sessions had power to reserve the last preceding question for the opinion of this court in the form of a case; thirdly, whether the appellant was liable to be rated in respect of the amount received by him from the said tolls; fourthly, whether the court of quarter sessions had power to amend the rate by striking out the name of the appellant.

18. If the court shall be of opinion on the first question in the affirmative, or on the second question in the negative, and on the third question in the negative, and on the fourth question in the affirmative, then the order of sessions to be confirmed.

19. If the court shall be of opinion on the first question in the negative and on the second question in the affirmative, or if the court shall be of opinion on the third question in the affirmative, then the order of session is to be quashed.

20. If the court shall be of opinion on the first question in the affirmative, or on the second question in the negative, and on the third question in the negative, and on the fourth question in the negative, then the order of session is to be remitted back to the court of quarter sessions to be awarded in accordance with the opinion of this court.

Murch (with him *Sir J. B. Karlake*) for the appellant, contended that the notice given by him was sufficient, as it contained the only ground of objection to the rate on which the assessment committee could give relief. Sect. 1 of the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39) enacts that, "before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862, applies, the appellant shall give twenty-one days' notice, in writing, previous to the special or quarter sessions to which such appeal is to be made, of the intention to appeal, and the grounds thereof, to the assessment committee of such union, provided that after the 1st Aug. next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the

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committee shall hear, with full power to call for and amend such list, although the same has been approved of," &c. The appellant has satisfied all the requisites of that enactment; he gave notice, and he mentioned the only ground on which the assessment committee could give him relief, the assessment committee having no power to deal with the question of rateability. 25 & 26 Vict. c. 103, s. 18, enacts that "any person who may feel himself aggrieved by any valuation list, on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may at any time after the deposit as aforesaid of such list, and before the expiration of twenty-eight days after the notice of the deposit as aforesaid, give to the committee and to the overseers a notice in writing of his objection, specifying the ground thereof," that is any of the three grounds previously mentioned, viz, (1) unfairness, (2) incorrectness in the valuation, (3) omission of any rateable hereditament; but the question of rateability or non-rateability is not for the assessment committee to decide, and it is such a question that is raised by the second and third grounds of appeal given in the present case. [LUSH, J.—If a person is rated in respect of a non-rateable matter, can he not make objection to the assessment committee?] It is submitted that he cannot. [LUSH, J.—No appeal to the assessment committee on this ground is given by the former Act, but there is no prohibition of appeal. Previous objection to the assessment committee is now made a condition precedent to the right to appeal.] 6 & 7 Will. 4, c. 96, which gives the right of appeal against a rate to special sessions (s. 1), and enacts that, "at such special or adjourned sessions the justices there present shall hear and determine all objections to any such rate on the ground of inequality, unfairness, or incorrectness in the valuation of any hereditaments included therein," expressly provides "that the said justices in special session shall not be authorised to inquire into the liability of any hereditaments to be rated, but only into the true value thereof, and into the fairness of the amount at which the same shall have been rated." It would be strange then if the assessment committee had a power which is here expressly denied to the special sessions to which the appeal is to be made. In the very recent case of *The Overseers of Salford Union v. The Justices of the Hundred of Salford* (30 L. T. Rep. N.S. 403), according to the head note, in the event of omitting to give notice of objection and appeal to the assessment committee, this court will quash the order of quarter sessions, even in cases where the assessment committee has no power to grant relief; and Blackburn, J., said, that "the applicant ought to have given notice, although the assessment committee could give no relief, as that is a condition precedent to an appeal to quarter sessions." But in that case no notice was given at all; here notice was given, but all the grounds of appeal were not mentioned. [LUSH, J.—The grounds of appeal should also have been given.] (2). The recorder had no power to reserve the question for the opinion of the court. Sect. 9 of 12 & 13 Vict. c. 45, enacts that "the decision of the court of general or quarter sessions of the peace, upon the hearing of any appeal as to the sufficiency of the statement of any ground or grounds of appeal, and as to the amending or refusing to

amend any order or judgment of a justice or justices appealed against, or the statement of any ground or grounds of appeal, &c., shall be final, and shall not be liable to be reviewed in any court by means of a writ of *certiorari* or *mandamus* or otherwise." [LUSH, J.—That does not touch the point. The question is whether the appellant was at liberty to go into these grounds of appeal, no notice having previously been given to the assessment committee.] If the court is against me on these two points, there is no use in urging any others.

Field, Q.C. (with him *Bompas*), for the respondents, was not called upon.

LUSH, J.—Neither myself nor my brother Archibald has any doubt that the court of quarter sessions were wrong. The particular objections raised on appeal to the quarter sessions must previously be brought before the assessment committee. That was not done here, and the order of quarter sessions must therefore be quashed.

ARCHIBALD, J.—I am of the same opinion.

Judgment for the respondents.

Wednesday, June 3, 1874.

BATESON (app.) v. ODDY (resp.)

Hackney carriage—Plying for hire—Carriage exposed for hire in private yard.

A hackney carriage is one which is offered for public hire to anyone who chooses to engage it, though it stands for that purpose, in a private yard. It is not necessary that it should be exposed for hire in the public streets.

CASE stated by justices pursuant to 20 & 21 Vict. c. 43.

1. The information charged that Thomas Oddy the elder (the respondent), on the 25th Sept. 1873, in the township of Bilton-with-Harrogate, and within the limits of the High and Low Harrogate Improvement Acts (4 Vict. c. 16), did stand or ply for hire and use a coach or hackney carriage without a licence from the commissioners acting under and by the said Improvement Act or by the bye-laws made in pursuance thereof.

2. At the hearing of the said information, on the 15th Oct. 1873, it was proved that the appellant is clerk to the said Harrogate Improvement Commissioners, which body is the Local Board of Health acting in and for the Improvement District of Harrogate as comprised in the said Improvement Act.

3. It was further proved that the North-Eastern Railway Company had a station at Harrogate within the limits of the said Improvement District, and that the yard in front of the station is inclosed, and is the property of the said company.

4. That the respondent is the proprietor of a hackney carriage which had theretofore been licensed by the said commissioners, but that such licence had been revoked by the said commissioners under and by virtue of sect. 144 of the said Act.

5. That the respondent had, along with certain other hackney carriage proprietors, arranged with the North-Eastern Railway to supply (upon certain terms set out in a certain written agreement) hackney carriages to stand in the said inclosed yard of the said North-Eastern Railway Company to await the arrival of the passengers by the trains, any of such hackney carriage proprietors being at

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liberty to invite passengers, and having rules of their own as to priority of taking fares within the said yard.

6. It was further proved that the respondent after his licence had been revoked, was standing with his hackney carriage within the said railway station yard, where he took up passengers for hire and drove them along different streets (within the said Improvement District), according to the directions of such passengers.

7. It was contended by the appellant that a hackney carriage so used, without a licence from the said commissioners, was a plying within sect. 145 of the said Act 4 Vict. c. 16, which is as follows: "And be it enacted that if the driver or attendant of any hackney carriage, coach, or beast shall be found standing or plying for hire, or using any such coach, carriage, or animal within the limits of this Act without a licence from the commissioners, the owner, driver, or attendant of such coach, carriage, or animal, so offending, shall, for, every such offence, forfeit and pay any sum not exceeding forty shillings." And there being no definition of a hackney carriage in the said Act other than as set out in sect. 140, which enacts "That it shall be lawful for the commissioners from time to time to license such number of hackney coaches or carriages of any kind or description, whether drawn by horses, mules, or asses, or such number of saddle horses, mules, or asses to ply for hire within the limits of this Act as they shall think fit," the appellant cited and relied upon the case of *Clarke v. Stanford* (L. Rep. 6 Q. B. 356).

8. It was contended on the part of the respondent that inasmuch as the fares were taken up in the private yard of the said railway company, and as he, the respondent, was one of several cab proprietors mentioned in paragraph No. 5, it was not a plying for hire or using such carriage within the meaning of the above recited sections of the said Improvement Act, as the respondent could so ply for hire, and use such carriage without any licence from the said commissioners, under an ordinary Inland Revenue licence which the respondent held and produced.

9. Our opinion was that the said railway station yard being private property and inclosed, and the respondents, with others, having a particular contract with the said railway company to supply hackney carriages at the station for the use of their passengers, that the plying for hire or using a hackney carriage from such station yard as aforesaid was not such as required a licence from the said commissioners. We therefore dismissed the said information.

10. The question of law upon which this case is stated for the opinion of this court is whether the respondent's carriage was a hackney carriage plying for hire within the meaning of the said recited sections, requiring a licence from the said Improvement Commissioners, and therefore liable to the penalty imposed by the 145th section of the said Improvement Act. If the court should be of opinion that it was then, the case was to be remitted, but if the court should be of opinion otherwise, then the dismissal of the said information was to stand confirmed or such other order was to be made as to the court might seem fit.

Waddy, Q.C. (Tenant with him) for the appellant, contended that the carriage of the respondent was a hackney carriage. In *Clarke v. Stanford* (L. Rep. 6 Q. B. 356) it was held that a

carriage whilst on the premises of a railway company, under a contract with them to await the arrival of their trains for the conveyance of any passengers by railway who chooses to hire it, is plying for hire within the meaning of the Metropolitan Public Carriage Act 1869 (32 & 33 Vict. c. 115, s. 4, and is therefore a hackney carriage requiring a licence. In that Act hackney carriage is defined (sect. 4) to mean "any carriage for the conveyance of passengers, which plies for hire within the limits of this Act and is not a stage carriage." Lush, J. in the case cited said: "It is no longer necessary that a hackney carriage to be plying for hire should be in a public street. The recent statute (32 & 33 Vict. c. 115) has dropped these words. This carriage was awaiting the arrival of a train in order to be hired by any person who might come by the train. That is a plying for hire within the meaning of this statute." The decision in that case was followed by the Court of Common Pleas in *Allen v. Tunbridge* (L. Rep. 6 C. P. 481) where it was held that a brougham, the owner of which by agreement with a railway company attends at their station to await the arrival of trains for the conveyance of any passenger by the railway who chooses to hire it, and whose driver solicits its passengers, is a "hackney carriage plying for hire" within the meaning of the Metropolitan Public Carriage Act. Willes, J. said: "*Clarke v. Stanford* is precisely in point; and indeed there are some circumstances in this case which give even greater reason for holding that there was a plying for hire here than there. It was assumed in that case that the words 'in any public street, road, or place' were omitted from sect. 4 of 32 & 33 Vict. c. 115, by reason of the decision in *Case v. Storey* (L. Rep. 4 Ex. 319) that those words did not include a railway station. A cab does not become any other than a hackney carriage though plying for hire in a railway station." The same thing applies where the carriage stands for similar purposes in a private yard. These two cases would completely cover the present case if there were in this local Act a definition of hackney carriage similar to that above quoted from the Metropolitan Public Carriage Act. The local Act, however, contains no definition, and so recourse must be had to the meaning of the term hackney carriage at common law, and that, it is submitted, is any carriage which is kept or exposed for public hire by any member of the public who chooses to engage it—whether it is kept or exposed for that purpose in the public streets or in a private yard. The justices should therefore have convicted, and the appellant is entitled to judgment.

Maule, Q.C. (with him Cave) for the respondent. —If this carriage was a hackney carriage within the meaning of the Act, then it is acknowledged that it was plying for hire in accordance with the cases already cited; but it is submitted that it was not a hackney carriage. The Public Health Act 1858 (21 & 22 Vict. c. 98) which incorporates (sect. 44) the Towns Police Clauses Act 1847 (10 & 11 Vict. c. 89) has been applied to the town of Harrogate, and in sect. 28 of the Towns Police Clauses Act hackney carriage is thus described—"Every wheeled carriage standing or plying for hire in any street within the prescribed distance, and every carriage standing in any street, having thereon a numbered plate as required by this or any special Act." [BLACKBURN, J.—The Act which we are dealing with was passed in 1841. A definition in

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an Act of 1847 cannot show what was meant by hackney carriage in the Act of 1841. We must come to the question, what is a hackney carriage at common law.]

Waddy, Q.C. referred to sect. 4 of 9 Ann. c. 23, the first statute referring to hackney carriages, which provided "that from and after the 24th June 1715, &c., no person or persons shall presume to drive, or let to hire, by the hour or day or otherwise any hackney coach, or coach horses, within the cities of London or Westminster, or suburbs of the same, or within the parishes or places comprised within the bills of mortality, without such leave or license first obtained from the said commissioners, &c." [BLACKBURN, J.—That seems to show to show that common hire is the test of a hackney carriage.]

BLACKBURN, J.—The Act does not define a hackney carriage, but it does say that all carriages found standing or plying for hire within the limits of the Act must be driven by a licensed driver. The carriage here was used in the streets for the purpose of carrying people, and was, in this sense, plying for hire; but it stood in a private yard. It stood there however for the purpose of taking up persons who hired it, and then carrying them through the streets. The matter comes to this then—we must determine what is a hackney carriage within the meaning of the Act of 1841. Is it enough that the carriage is for common hire by anyone who chooses to use it, or is it further necessary that it should stand exposed in a public place for that purpose? I think this latter point is not necessarily involved in the notion of a hackney carriage, and that it is immaterial whether the carriage stands in the public street or in a private yard. The case of *Clarke v. Stanford (ubi sup.)* decides that a carriage may be plying for hire within the meaning of the Metropolitan Public Carriage Act, though it stands in a private yard, and that it must be driven by a licensed driver. I think that the carriage in the present case was a hackney carriage and that our judgment must be for the appellant.

LUSH, J.—I am of the same opinion. I think a hackney carriage is a carriage exposed for hire to the public whether kept in the public streets for that purpose, or, as may be seen in some towns, in a passage or gateway opening into the streets. It is sufficient that it is kept or exposed for hire.

Judgment for the appellant.

Attorneys for the appellant, *Sharpe and Ullithorne*.

Attorneys for the respondent, *Pitman and Lane*.

April 25 and July 6, 1874.

MARWICK v. CODLIN.

Victualler's or publican's licences after licence for sale of beer or wine—New licence—Confirmation—Licensing Act 1872 (35 & 36 Vict. c. 94).

The respondent, who had held licences granted by the Commissioners of Excise for the sale only of wine and beer for consumption on his premises, in the county of Middlesex, under the authority of the justices' certificates required by the Wine and Beerhouse Act 1869, applied for and obtained at the general annual licensing meeting in March 1873, a victualler's or publican's licence in respect of the same premises, under 9 Geo. 4, c. 61, and the Licensing Act 1872. The confirming authority

of the said county determined that the respondent had not obtained a new licence within the definition contained in sect. 74 of the Licensing Act 1872, and therefore did not require a confirmation under that Act. Following that determination, a magistrate dismissed a summons against the respondent for selling spirits without being duly licensed; but

Held, upon a case stated, that, notwithstanding the interpretation clause, this was a new licence under the Licensing Act 1872, and required confirmation under sect. 37.

THIS was a case stated under 20 & 21 Vict. c. 43.

The respondent Charles Codlin, was charged before one of the magistrates of the police courts of the metropolis, sitting at the Great Marlborough Street police court, within the metropolitan police district, with having on the 17th May 1873, unlawfully sold and exposed for sale certain intoxicating liquors, to wit, spirits, without being duly licensed to sell the same, contrary to the 3rd section of the Licensing Act 1872 (35 & 36 Vict. c. 94.)

The said Charles Codlin was the occupier of the house numbered 4 and 5, Crown-court, Pall Mall, in the county of Middlesex, and up to the general annual licensing meeting, held for the St. James's division in the said county in March 1873, he held licences granted by the Commissioners of Excise for the sale only of wine and beer, for consumption on the said premises.

Such licences were granted to him under the authority of the justices' certificate, which had been granted to him annually since the passing of the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27) and at the said general annual licensing meeting such certificate was renewed.

At the said last-mentioned general annual licensing meeting, the said Charles Codlin for the first time applied for a victualler's or publican's licence under 9 Geo. 4, c. 61, and the Licensing Act 1872, and he gave the notices required to be given by persons applying for a new licence under sect. 40 of the said Act, and in accordance with the rules of the licensing justices, he presented a petition in favour of such application.

William Marwick, who was a licensed victualler, and has carried on that business for very many years at a house in Crown Court, Pall Mall, within half a dozen yards of the said Charles Codlin's house, presented a petition against the grant of such licence to the said Charles Codlin under 9 Geo. 4, c. 61, and the Licensing Act 1872.

The form of this licence was settled by the Secretary of State under sect. 48 of the Licensing Act 1872, and it contains on the back of it a form to be filled up by the confirming authority for the county of Middlesex.

The confirming authority for the said county, consisting of the assistant judge and eleven other magistrates of the county, held a meeting on the 21st April 1873, for the purpose of confirming the new licences granted by the justices of the county at the various general annual licensing meetings under the Licensing Act 1872.

At that meeting the said William Marwick claimed under sect. 43, to be heard to show cause why such licence should not be confirmed, and it was contended by the said Charles Codlin that such licence did not require confirmation, on the ground that the same was not a new licence within the meaning of the said Act.

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The confirming authority determined that the licence granted to the said Charles Codlin was not a new licence within the meaning of the Licensing Act 1872, but suggested that if either party felt aggrieved, application might be made for a *mandamus* to compel them to hear the case on the merits, so that the point of law might be determined by this honourable court.

The said Charles Codlin did not adopt this course, but at once obtained from the Commissioners of Excise a licence authorising him to retail spirits.

The said William Marwick thereupon gave the said Charles Codlin notice that the victualler's or publican's licence, so granted to him as aforesaid, was null and void, because it had not been confirmed, and that the excise licences granted under it were also null and void.

Such notice was disregarded, and the said Charles Codlin did in fact sell by retail, and expose for sale, the spirits in his said house on the day mentioned in the summons, and the said Wm. Marwick then obtained a summons from the magistrate against Charles Codlin, to answer the charge before mentioned.

On the hearing of the summons the facts herein stated were duly proved before the magistrate, and the certificates and licences mentioned were put in evidence.

It was contended on behalf of the said William Marwick that the victualler's or publican's licence granted for the first time at the said general annual licensing meeting, holden in March 1873, was null and void, because it had not been confirmed as required by sect. 37 of the Licensing Act 1872, and that the excise licence for the sale of spirits, granted in pursuance thereof, was also null and void by reason of 9 Geo. 4, c. 61, s. 17, and that in truth, and in fact, the said victualler's or publican's licence was a new licence, as the respondent had no such licence before that time; and he further contended that such grant could not be considered as a grant "by way of renewal."

On behalf of the said Charles Codlin it was contended that although he had no victualler's or publican's licence, or a licence authorising him to sell spirits before such last-mentioned meeting, yet as he had a magistrates' certificate and excise licences, authorising him to sell wine and beer, such victualler's or publican's licence was not a new licence as defined by sect. 74 of the Licensing Act 1872.

The magistrate was of opinion that the victualler's or publican's licence was not a new licence within the meaning of the section referred to, because it was not "a licence granted at the general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors," as there had been both a wine and beer licence granted in respect of those premises for the sale of some intoxicating liquors, namely, beer and wine, and that therefore the victualler's or publican's licence, authorising the said Charles Codlin to obtain a spirit licence, was not a new licence within the meaning of that Act; he therefore held that the licences held by him were valid licences, and dismissed the summons.

The said Wm. Marwick being dissatisfied with the magistrate's determination as being erroneous in point of law, duly required him to state a case in writing for the opinion of this honourable

court, which he did. The question for the opinion of the court was:

Whether the magistrate was wrong in point of law in holding that the victualler's or publican's licence referred to was valid, although it had not been confirmed by the confirming authority.

If such licence was valid, his judgment was to be affirmed; if otherwise this case was to be remitted to him in order that he might convict the said Charles Codlin, and inflict a nominal penalty for the offence which was proved to have been committed if such licence was not valid.

Poland for the appellant, contended that if this were not held to be a new licence, the provisions of the Act of 1872 would be in a great measure rendered nugatory; as anyone holding a wine and beer licence, or even a grocer's licence, under sect. 69 of the Act, might afterwards turn this into a licensed victualler's licence without any ratification by the confirming authority.

Warner Sleight, for the respondent, relied on the interpretation clause of the Act, which enacts that "a new licence" means a licence granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors.

Poland in reply.

Cur. adv. vult.

July 6.—COCKBURN, C.J., delivered the judgment of the Court (Cockburn, C. J., and Quain, J.).—This was an appeal against the decision of one of the metropolitan police magistrates, dismissing a complaint against the respondent for selling spirits without a licence, contrary to the 3rd section of the Licensing Act 1872. The point raised for our decision is whether the licence granted to the respondent under the 9 Geo. 4, c. 61, and the Licensing Act 1872, for the sale of spirits, &c., for the first time at the licensing meeting in March 1873, was a new licence, requiring the confirmation of the licensing committee under sect. 37 of the Licensing Act 1872. It was contended for the respondent that it was not a new licence, because he held at that time a certificate and licence under the Wine and Beerhouse Acts 1869 and 1870, for the sale of wine and beer to be consumed on the same premises. In support of this contention reliance was chiefly placed on the definition of a new licence in sect. 74 of the Licensing Act 1872. That section enacts that "In this Act, if not inconsistent with the context, the following expressions have the meanings hereinafter respectively assigned to them;" and amongst others "a new licence means a licence granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors;" and by the same section, "intoxicating liquors" include beer and wine as well as spirits. Before the passing of the Wine and Beerhouse Act 1869, a broad distinction existed between beerhouses and public houses, commonly so called. The latter were licensed by the justices under 9 Geo. 4, c. 61; the former were licensed by the Commissioners of Excise, without the intervention of the justices. Wine licences, to sell wine by retail, to be consumed on the premises, were also granted by the excise authorities, under 23 Vict. c. 27, to refreshment-house keepers and others; but the justices might object to the granting or renewal of such licences. The Wine and Beerhouse Act 1869 was the first Act which brought the granting of beer and wine licences directly under the control of the justices. By the 4th section of that Act it

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is enacted that "no licence or renewal of a licence for the sale by retail of beer, cider, or wine, or any of such articles under the provisions of any of the said recited Acts shall (save as is in this Act otherwise provided) be granted except upon the production and in pursuance of the authority of a certificate granted under this Act." These certificates are to be granted by the justices at the annual licensing meetings, held under 9 Geo. 4, c. 61, and on the same terms and in the same manner as licences under that Act, subject to certain exceptions in favour of licences existing on the 1st May 1869, and some other exceptions contained in the Act. But notwithstanding this Act, and the amending Act of 1870, the licences to sell beer and wine only are kept quite distinct from a licence to sell excisable liquors under 9 Geo. 4, c. 61, nor are there any privileges granted to the holders of the former licences on applying for a licence under the latter Act. The Licensing Act 1872 introduces a distinction between applications for a new licence, and applications to renew an old one; a distinction which seems also made, or intended to be made, in the Wine and Beerhouse Act 1869. New licences must be confirmed by the licensing committee appointed under sect. 37 of the Licensing Act 1872, and sect. 40 prescribes the form of notice to be given in the case of a new licence, and sect. 43 contains certain provisions applicable to a person applying for a renewal of his licence and apparently facilitates the renewal of licences as distinguished from the granting of new licences. It is also provided by sect. 43, sub-sect. 2, that "a renewal of a licence may be made by an endorsement on the licence, or by the issue of a copy of the old licence." In the present case an attempt has been made to transform a beerhouse into a public-house, without the sanction of the licensing committee appointed under sect. 37 of the Licensing Act 1872. We think that this cannot be done. The licence granted to the respondent was a licence under 9 Geo. 4, c. 61, and the Licensing Act 1872, for the sale of intoxicating liquors generally, as defined in sect. 74, including spirits, as well as beer and wine. This is either a new licence, or a renewal of an old one. It is plainly not the latter. A renewal of a licence is a repetition of an old one, and cannot include anything not contained in the old one. The old licence held by the respondent was for the sale of beer and wine only. The new one, in pursuance of a certificate granted by the justices under the Wine and Beerhouse Act 1869, is direct from the justices, and includes spirits and other intoxicating liquors. The form of renewal, as prescribed by sect. 48, already cited, seems quite conclusive on this point. We are of opinion, therefore, that the licence granted to the respondent is a new licence, and is not valid, unless it has been confirmed by the licensing committee appointed under sect. 37. With regard to the definition of a new licence contained in sect. 74, we think it must either be read as if the words were "a licence granted in respect of premises not theretofore licensed for the sale of intoxicating liquors of the same kind to which the new licence extends," or the meaning assigned to the words "new licence," in sect. 74, must be considered as not applicable to the present case, as being "inconsistent with the context" of the Act, and with the whole legislation on the subject.

Judgment for appellant.

Attorneys for appellant, *Pownall, Cross, and Knott.*

Attorneys for respondent, *Pauls and Fearon.*

COURT OF COMMON PLEAS.

Reported by *ETHELRINGTON SMITH* and *J. M. LELY, Esqrs.*,
Barristers-at-Law.

Thursday, June 25, 1874.

BOLINGBROKE (Viscount) v. SWINDON NEW TOWN LOCAL BOARD.

Principal and agent—Scope of authority—Local Board—Manager of "sewage farm"—Trespass to land.

A farm manager, however extensive his powers may be, has no implied authority to trespass upon a neighbouring farm for the benefit of his employer.

The defendants owned a "sewage farm," and entrusted the entire management thereof to B. Between the sewage farm and certain land occupied by a tenant of the plaintiff, there flowed a stream, for the purpose of scouring which B. trespassed upon the bank occupied by the plaintiff's tenant, and cut down brushwood growing thereon. The time occupied by the scouring of the brook was eleven days, during which none of the defendants was or could be aware of the trespass; but B.'s disbursements for wages on account of the scouring were repaid by the defendants in the same manner as his ordinary disbursements. The motive of B. in scouring the brook thus was to improve the property of the defendants and the neighbourhood generally.

Held (by Keating and Grove, JJ.), that there was no evidence that the trespass of B. was within the scope of his authority, and a rule to set aside a verdict directed by Quain, J., to be entered for the defendants discharged.

Poulton v. London and South-Western Railway Company (17 L. T. Rep. N.S. 11), distinguished from Bayley v. Manchester, Sheffield and Lincolnshire Railway Company (28 L. T. Rep. N.S. 866).

DECLARATION that a certain close forming part of the bed and banks of a stream flowing between certain land of the plaintiff, on the one side, and certain lands in the occupation of the defendants, on the other side, was in the possession of one Wm. Plummer, as tenant thereof to the plaintiff, the reversion thereof then belonging to the plaintiff, and the defendants injured the plaintiff's said reversion in the said close, by wrongfully and improperly cutting away the banks of the said stream, and lowering and deepening the bed thereof, and also by wrongfully and improperly cutting down and destroying divers bushes and underwood of great value then growing in the bed and upon the banks of the said stream, and also by wrongfully and improperly digging and carrying away large quantities of earth and stone from the bed and banks of the said stream, and converting the same to their own use, by means of which said several premises the plaintiff was greatly injured in his reversionary interest in the said close.

*Pleas: First, not guilty; second, that the reversion of the close did not belong to the plaintiff; third (by statute 11 & 12 Vict. c. 63—the Public Health Act 1848, s. 139), payment of 5*l.* into court.*

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Issue thereon.

The cause was tried at the Wilts Spring Assizes 1874, before Quain, J., and a special jury, when the following facts appeared in evidence :

The defendants, as the Local Board of Swindon New Town, had recently purchased about 100 acres of land, which they had converted into a "sewage farm," for the purpose of disposing of the sewage of their district. This farm they had placed under the management of one Buchan, and the only question was whether or not the defendants had authorised him to commit the trespass complained of, which was admitted. The nature of the complaint and defence set up appears from the following correspondence :

Letter of the plaintiff's solicitors to the clerk of the local board, dated Oct. 14, 1872 :

We are instructed by Lord Bolingbroke to request that you will bring under the notice of the Swindon New Town Local Board that during the past month the local board has caused him and his tenant, Mr. Plummer, considerable injury and damage by the cutting down of a large quantity of wood and underwood, which was growing on the side of the bank inclosing his land occupied by Mr. Plummer, and by the cutting away of the bank on the same side of his land. Lord Bolingbroke considers it very extraordinary that his property should be interfered with in the way referred to, and this, too, without any communication with, or notice to, his tenant or himself. Perhaps the trespass and injury complained of were done without the knowledge of the local board, but they appear to be responsible for the same. If the local board claim to have done what we are instructed by our client to complain of, under any power conferred on the board by any Act of Parliament, or otherwise, we shall be glad to be informed as to the authority under which they have acted; but if, as we are at present advised in the case, the board have acted illegally in this matter, we shall be glad to hear what the local board proposes to do for the satisfaction of Lord Bolingbroke and his tenant.

Answer thereto, dated 8th Nov. 1872.

I have laid your letter to me of the 14th ult. before this local board, at their meeting held on the 7th inst., and I am instructed to assure his Lordship through you that neither this local board or any member thereof have at any time, directly or indirectly, authorised any interference whatever with his Lordship's land or property, and that they beg to express their great regret that any damage or injury should have been done to his property by cutting any wood or underwood thereon, or by cutting the bank on side of stream, and to state that such acts were a wilful trespass on the part of the farm manager, Mr. Buchan, and wholly unauthorised by this local board, and that they have therefore requested Mr. Buchan on his own account to apologise for and make all the reparation in his power for the damage done by him to his Lordship and his tenant.

Buchan was paid weekly, but his engagement, which was not a written one, was determinable at three months' notice only. He was accustomed to take general directions from the board, and to attend board meetings for that purpose. He employed two or three men, whose wages he paid weekly, sending in slips of paper to the board on which the amounts due for wages were entered (day-work being distinguished from piece-work), and receiving a cheque for the amount. The work which gave rise to the action was piece-work, and was completed in eleven days from its commencement. No member of the board had seen the work going on. Buchan had reported that the brook overflowed, but had received no express directions to scour it. He had the work complained of done, he said, in answer to the learned judge, without the knowledge of the board, and on his own responsibility, and his motive was to improve the

property of the local board, the property of the plaintiff, and the neighbourhood generally. Upon these facts, the learned judge directed a verdict for the defendants, reserving leave to move to enter it for the plaintiff for such sum as might be assessed by a practical person, to be named by counsel for the parties, and in case of difference by himself. A rule was afterwards granted by Brett and Denman, JJ., to set aside this verdict, and enter a verdict for the plaintiff on the ground that there was evidence that the acts complained of done by the manager, Buchan, were within the scope of his authority.

Lopes, Q.C., and *Mackey* showed cause.—The defendants had no statutory authority to take this farm and appoint Buchan manager of it. The case, therefore, is on all fours with *Poulton v. London and South-Western Railway Company* (L. Rep. 2 Q. B. 534; 36 L. J. 294, Q. B.; 17 L. T. Rep. N. S. 11). In that case the plaintiff, refusing to pay the carriage of a horse, was arrested by order of the station-master of the defendants, and it was held that as the defendants themselves would have had no power to detain the plaintiff on the assumption that he had wrongfully taken the horse by the train without paying, there could be no authority from them to the station-master to detain the plaintiff, and that they, therefore, were not liable for the act of the station-master. The authority of a master to his servant is limited to such acts as the master could do himself. They also cited—

Seymour v. Greenwood 30 L. J. 189, 287, Ex.; 4 L. T. Rep. N. S., 633; 7 H. & N. 355.

Cole, Q.C. and *Pinder* supported the rule.—Although no express authority was given by the board to commit the trespass, Buchan had an implied authority to act as he did. It appears that the straightening of the brook was discussed at the board, and it was evidently in contemplation of the board that something should be done with regard to it. They paid Buchan for what he had had done by the labourers, and are not to be held irresponsible because they chose, as it were, to shut their eyes to the exact character of the work as it proceeded. "It is agreed upon by all," says *Blackburn, J.*, in *Limpus v. London General Omnibus Company* (32 L. J. 41, Ex.; 7 L. T. Rep. N. S. 641), "that a master is responsible for the improper act of his servant, even if it be wilful, reckless, or improper, provided the act is the act of the servant in the scope of his employment, and he is executing the matter for which he was engaged at the time." And it has been held by the Exchequer Chamber and more recently by the Judicial Committee of the Privy Council that a banking company is liable for the fraud of their agent.

Barwick v. English Joint Stock Bank, 36 L. J. 174 Ex.; L. Rep. 2 Ex. 259; 16 L. T. Rep. N. S. 461; *Mackay v. Commercial Bank of New Brunswick*, 30 L. T. Rep. N. S. 180.

[*KEATING, J.*—In commercial matters the doctrine of the principal's liability has been carried very far, no doubt, but, if I mistake not, the extreme cases are all cases where the act done was done in the transaction of the current business entrusted to the agent—generally a bank manager.] The reason of holding the agent liable was that the principal was necessarily absent—a reason equally strong in the present case. On this point they cited

Bayley v. Manchester, Sheffield, and Lincoln Railway Company, L. Rep. 7 C. P. 315 (affirmed on appeal L. Rep. 8 C. P. 148; 42 L. J. 119, C. P.; 28 L. T. Rep. N. S. 366).

KEATING, J.—We have had the benefit of an able argument on both sides—a circumstance which always assists the court in arriving at a speedy as well as a right conclusion. All the cases which have been cited are pertinent, and on considering them I come without difficulty to the conclusion, that this rule must be discharged. There is no doubt, and indeed it was admitted, that the land of the plaintiff was cut into and his trees cut down by a wrongful act, and we are agreed that it is beyond question that Buchan was entrusted with the most extensive powers in the management of this farm that the board could confer. It appears that Buchan hired and paid the labourers, his communications with the board being held for the purpose of receiving a cheque for the purpose of satisfying his disbursements on account of wages. Now it struck Buchan that it was necessary to deepen the bed of a certain stream flowing between the property of the local board and the property of the plaintiff, and for this purpose to cut away the banks, and also the brushwood, and it is said trees which impeded the flow of the stream. All these were acts of trespass to the reversion of the plaintiff, and the only question is, what evidence was there to fix the local board with having given authority to commit them. My brother Quain was of opinion that there was no such evidence. Having put certain searching questions to Buchan, with the view of bringing the case within the category of the authorities, he directed a verdict for the defendants, and I am of opinion that he was right in so doing. It was well argued by Mr. Pinder that recent cases have carried the liability of principals very far. *Barwick v. English Joint Stock Bank* (*ubi sup.*) and other analogous cases tend, undoubtedly, to show that where a principal employs an agent, with such wide powers that the agent may be considered as standing in the place of the principal himself, there the principal is liable for whatever the agent does. Thus, in *Barwick v. English Joint Stock Bank* (*ubi sup.*), a banking company has been held liable for a false representation made by their manager, knowing it to be false. These cases tend to show that the liability of an agent is of a most extensive character. Still there is a distinction between the cases which I have mentioned, and those other cases in which the principal has not been held liable; and that distinction is well illustrated by the two cases of *Poulton v. London and South-Western Railway Company* (*ubi sup.*), and *Bayley v. Manchester, Sheffield and Lincoln Railway Company* (*ubi sup.*). In *Poulton's* case the defendants were held not liable for the tortious act of their servant, on the ground that they themselves could not have committed it, and consequently could not have given their servant any implied authority to commit it. In *Bayley's* case, on the other hand, the defendants were held liable because they had trusted their servant to determine whether an act which they themselves had power to do, was or was not to be done, according to circumstances. Applying that distinction here, I am of opinion that the authority to Buchan was limited to the area of the farm and the management of that area,

and could not extend to a trespass upon land lying beyond that area; and it appears to me that there is no evidence to fix the board with the acts of Buchan done beyond that area. Mr. Pinder laid great stress on the fact that the board derived benefit from these wrongful acts of Buchan; but I think that however important such a fact may be in some cases, it has no importance in this, where the local board was obliged to take the work of Buchan as it stood, and were unable to forego the benefit of it, such as it was. On the whole, then, admitting that the cases run very close together, I am of opinion that this case stands on that side of the dividing line on which my brother Quain had placed it, and consequently, that this rule ought to be discharged.

GROVE, J.—I am of the same opinion. It is difficult, or rather it is impossible, to lay down an exact and absolute line of demarcation in these cases. Nevertheless, there are lines of deviation which may reasonably be expected when it is attempted to draw a practical distinction between an act done within the scope of an agent's authority, and an act done upon his mere individual responsibility. Taking a reasonable and practical view of the facts of this case then, I think that there is a sufficient hiatus between the scope of Buchan's authority and the course of action which he in fact pursued, to absolve the board from liability. It is admitted that he did not think these acts to be within the scope of his authority, but that he did them because he thought that they would enure to the benefit of the neighbourhood. He had no authority to benefit the neighbourhood—still less had he authority to break and enter the land of persons other than his employers. He perfectly well knew he was a trespasser, and that he was not acting within the scope of his authority. He has admitted, in fact, that he went upon land which he knew to be not the land of his principals. Mr. Pinder did all he could, but he produced no case going so far as this:—that when you employ a man to work upon your own land, you give him authority to go upon the land of another man. I admit that *Mackay v. Commercial Bank of New Brunswick* (*ubi sup.*) is a very strong case; but I think it to be distinguishable.

Attorneys for the plaintiff, *Clarke, Woodcock, and Ryland*, agents for *Kinneir and Tombs*, Swindon.

Attorney for the defendants, *W. Moon*, for *Townsend and Ormond*, Swindon.

V.C. MALINS' COURT.

Reported by F. GOULD and JAMES E. HORNE, Esqrs.,
Barristers-at-Law.

Friday, May 1, 1874.

Re SPURSTOWE'S CHARITY.

Practice—*Lands Clauses Act 1845, ss. 69 & 78*—*Trustees of a charity*—*Persons absolutely entitled.*

A railway company took lands belonging to the trustees of the S. charity, and paid the purchase-money into court, under the *Lands Clauses Act 1845*:

Held, that the trustees were entitled to have the corpus of the fund paid out to them as persons absolutely entitled, under sects. 69 & 78 of the Act.

THIS was a petition by the trustees of a charity

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called Spurstowe's Charity, praying the payment out of court to them of a sum of Consols, which represented the purchase-money paid into court by the Great Eastern Railway Company, for certain freehold lands of the charity which had been taken by the company.

Chute, for the petitioners.—The only question is, whether the petitioners, being trustees of the charity, are persons absolutely entitled under sects. 69 and 78 of the Lands Clauses Consolidation Act 1845, and as such entitled to have the *corpus* of the fund paid out to them. This was done in *Ex parte the Trustees of Tid St. Giles's Charity* (17 W. R. 758).

Jason Smith, for the company, referred to *Re Reaston's Estate* (26 L. T. Rep. N. S. 148; L. Rep. 13 Eq. 564), where it was decided that trustees for sale, whose *cestuis que trust* were under disability, were not persons absolutely entitled within the meaning of the Act.

The VICE-CHANCELLOR made the order for the payment out to the trustees, as persons absolutely entitled.

Solicitors for the petitioners, *C. B. Randall and Son*.

Solicitor for the company, *R. S. Shaw*.

COURT OF COMMON PLEAS.

Reported by ETHELINGTON SMITH and J. M. LELY, Esqrs.,
Barristers-at-Law.

April 22 and 23, 1874.

LOCKWOOD v. WILSON AND ANOTHER.

Landlord and tenant—Lease—Covenant to pay rent without any deduction except landlord's property tax—Covenant to pay all taxes, rates, assessments, or charges whatsoever—Tithe rentcharge—6 & 7 Will. 4, c. 71, s. 80.

A lease contained a covenant that the lessee would pay the rent reserved without any deductions in respect of any taxes, rates, assessments, or charges whatsoever, the landlord's property tax only excepted.

Held, that he was not entitled to deduct the amount of a tithe rentcharge paid by him from the rent payable to the lessor, for that word "charges" is wide enough to include it, and is not confined to matters ejusdem generis with taxes, rates, and assessments.

THIS was an action for an illegal distress, and was tried before Keating, J., at the sittings at Westminster during Easter Term, 1874, when a verdict was given for the defendants, leave being reserved to the plaintiff to move to enter the verdict for him for 11s. 5d.

G. B. Kennedy moved accordingly.—The plaintiff was tenant to the defendants under a lease dated 20th July 1872, and having paid a tithe rentcharge assessed upon the premises, she deducted the amount from the rent which she paid to the defendants, whereupon the defendants distrained for the amount so deducted. The lease contained a covenant that the plaintiff would pay to the defendants the rent reserved "without any deductions in respect of any taxes, rates, assessments, or charges whatsoever, the landlord's property tax alone excepted;" and there was a further covenant that he would pay "as well the land tax (if any) as also the sewers rate, and all rates, taxes, and assessments, Parlia-

mentary, parochial, or otherwise, now charged, or hereafter to be charged upon the said premises, or any part thereof, landlord's property tax only excepted." The Act 6 & 7 Will. 4, c. 71, s. 80, entitles the plaintiff here, in the absence of any express stipulation, to deduct the tithe rentcharge from the rent payable to the defendants. The section enacts that "every tenant or occupier who shall occupy any lands by any lease or agreement made subsequently to such commutation, and who shall pay any such rentcharge, shall be entitled to deduct the amount thereof from the rent payable by him to his landlord, and shall be allowed the same in account with the said landlord." Here there is no express stipulation, for the word "charges" is not such. Charges, in this covenant, must clearly be *ejusdem generis* with taxes, and assessments, and the cases show that tithe rentcharge is not included under these terms. In *Jeffery v. Neale* (24 L. T. Rep. N. S. 362; L. Rep. 6 C. P. 240) there was a covenant to pay "all taxes and assessments whatsoever," and the rent was to be paid "without any deduction or abatement, on any account whatsoever, except in respect of the level tax, property tax, and land tax," and it was there held that the tithe rentcharge was not payable by the tenant. So, also, in *Tidswell v. Whitworth* (15 L. T. Rep. N. S. 574; 36 L. J. 103, C. P.) the words "all taxes, rates, assessments, and impositions," were held not to include tithe rentcharge; and here the words are similar with the variation of "charge" for "imposition," which cannot be a wider term. [BRETT, J. — Can you suggest anything that "charge" would include if this is not within it?] In *Parish v. Sleeman* (1 L. T. Rep. N. S. 24; 29 L. J. 96, Ch.) it is true that Campbell, L. C., held that tithe rentcharge was included under the word "outgoings," but that is the only case, apparently, where, without the express words being used, the tenant's right to deduct it from his rent under the statute has been questioned.

LORD COLERIDGE, C.J.—The court will consult Keating, J. who tried the case, and consider their judgment.

Cur. adv. vult.

April 23.—LORD COLERIDGE, C.J.—This was a question upon a lease as to who was to pay the tithe rentcharge assessed upon the premises demised. The expression of the documents is clear: "Without any deductions in respect of any taxes, rates, assessments, or charges whatsoever, the landlord's property tax only excepted." Now it was pressed on us that this covenant did not include tithe rentcharge, and it was very ingeniously argued that the tenant might deduct from her rent the amount paid by her in respect of it, in accordance with sect. 80 of 6 & 7 Will. 4, c. 71. I think, however, upon consideration, that there is no ground for granting this rule. The words are very strong, "will pay all taxes, rates, assessments, or charges whatsoever." The parties clearly contemplated that even property tax would be payable by the tenant, unless excepted; but besides saying that property tax is to be the only deduction made from the rent, there is the covenant to pay all charges. Now it has been contended that "charges" here must be *ejusdem generis* with taxes, rates, and assessments, and authorities to show that if so tithe rentcharge will not be included under those words which have been cited.

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But it is enough to say that the additional word "charges" is here inserted, and it will not do to maintain that tithe rentcharge is a well-known and obviously excluded charge, it not being specifically mentioned. But how could the word "charges" in the covenant be satisfied without allowing tithe rentcharge to be within it? I am of opinion that the words are quite sufficient to include it, and that the use of them shows the intention to do so.

BRETT, J.—I am of the same opinion. The plaintiff, in reply to the demand for rent said no rent was due, by saying, "I have a right to deduct the tithe rentcharge." She claimed the right to pay the rent subject to the deduction. But if we refer to the covenant we find that it is absolute to pay rent without any deductions, landlord's property tax only excepted. I admire Mr. Kennedy's talent in arguing the contrary, but the construction of the contract is against him; if tithe rentcharge be a charge, then the plaintiff has covenanted to pay it. The minuteness of the expression shows that what he wants is not in the exception, and if not, it is in the principal clause, and the tenant must pay this charge.

DENMAN, J.—I am of the same opinion. Looking at the agreement, it is clear that tithe rentcharge is not to be deducted from the rent, for the mention of the express exception excludes any other; tithe rentcharge is not excepted, therefore it is excluded from that portion of the agreement. But more than that, it is included in the other portion under the word "charges."

Rule refused.

Attorneys for plaintiff, Webb, Stock, and Burt.

Friday, May 22, 1874.

APPLEBEE v. PERCY.

Ferocious dog—Evidence of scienter—Knowledge of servant.

If the owner of a dog permit it to run about his business premises and into the street near his shop during his absence, and his servants, ordinarily serving in his shop, are informed of the dog's ferocity, the fact of their knowledge is evidence sufficient to be left to the jury of the master's knowledge. Per Lord Coleridge, C.J. and Keating, J.; Brett, J. dissentiente.

THIS was an action tried before Honyman, J., and the declaration stated that the defendant kept a ferocious dog, which was in the habit of biting people, as the defendant well knew, and that the plaintiff was bitten by it. The defendant pleaded not guilty; and the learned judge, at the close of the evidence given in support of the plaintiff's case, directed a nonsuit on the ground that there was no sufficient evidence of the *scienter* to be left to the jury.

The defendant was a publican, and the evidence showed that about three weeks before the injury to the plaintiff, a man called King was passing by the defendant's premises when a large black and white dog flew at him and bit him. He at once went into the public house to the bar, and said to one of two men who were behind the counter serving: "Is that your dog?" He replied, "Why?" King said, "Because he flew at me." The man then went through a door, and a woman came out and said, "The master is not at home; will you call again to-morrow." Then, on Friday, 11th April, a man called Hunter was passing,

when the same dog, without any provocation, ran at him and seized him by the trousers. He made no complaint then, but the following morning went into the bar, where were two men serving behind the counter, and while he was drinking the dog flew at him again, and he kicked it off, and said to the men: "I wonder you allow such a ferocious animal to run about, for yesterday he attempted to bite me." Then the dog ran, or was called, through into the back yard, and was heard to howl when the man "growled" at it.

In the evening of the same day the plaintiff was passing by when the dog flew at him and bit him in the arm.

A rule *nisi* was obtained for a new trial, against which

Murphy, Q.C., showed cause.—The nonsuit was right, because there was no evidence that the defendant knew anything about the dog being fierce. The evidence showed that the defendant was not constantly at his house, though frequently there, and it was sought to fix him with knowledge, because the day before Hunter had been attacked, and had gone into the bar and complained. This complaint, however, was only made on the morning of the day on which the plaintiff was bitten, and was made not to the defendant, but to two men in the bar, as to whose position there was no definite evidence. Then the other man King made his complaint three weeks previously to men in the bar confessedly not the defendant. That is the whole of the evidence as to the *scienter*. It clearly does not affect the defendant himself, and as clearly it is submitted does not affect any agent of his or person who had the management of the dog. The cases with reference to the matter are, first, *Stiles v. The Cardiff Steam Navigation Company* (10 L. T. Rep. N. S. 844; 33 L. J. 310, Q. B.), where the dog, which bit the plaintiff, had previously within the knowledge of some of the defendants' servants, bitten another person; but it was held that as those servants had no control over the affairs of the corporation or over the dog, there was no evidence of the *scienter*, and that the action was not maintainable. The judgments show that to affect the defendants with knowledge, the servant must have been in the position of manager, or at any rate must have had control of the yard. Then in *Gladman v. Johnson* (15 L. T. Rep. N. S. 476; 36 L. J. 153, C. P.), it was held that there was evidence of the husband's knowledge of the dog's propensity to bite, because a former complaint had been made to his wife, for the purpose of its being communicated to him; and that she occasionally attended to his business, which was that of a milkman. The ground of the judgment is that the wife had a duty to communicate the knowledge, as being also manager of the business, and that it was a fair inference that she did so. [Lord COLERIDGE, C.J.—That seems against you, as the same presumption may arise that the message was communicated.] This case is very different, for even supposing the men in the public house were barmen, they could not be called managers of the defendant's business, nor had they any duty cast upon them to communicate the knowledge to the defendant. Then there is no evidence as to what these men were; yet, by means of interrogatories, the plaintiff may always find out in what relation the person who was told about the dog was to the defendant, and as he had not done so,

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it must not be presumed against the defendant that knowledge in these men was his knowledge. In *Thomas v. Morgan* (2 C. M. & R. 496) it was clearly laid down that the fact of the dog having bitten other persons' cattle was not evidence by itself which could be left to the jury of the defendant being aware of such fact. [KEATING, J., referred to *Hudson v. Roberts* (6 Ex. 697), where the fact of the defendant knowing that a bull would run at anything red was held to be evidence of his knowledge that his bull was a dangerous animal.] The latest case is *Baldwin v. Casella* (26 L. T. Rep. N. S. 707; L. Rep. 7 Ex. 325), where a servant was especially entrusted with the control of the dog; and it was held that the knowledge of such servant was the knowledge of the master. The *ratio decidendi* there was the fact that the servant had been appointed by the master to keep the dog. *Gallagher v. Piper* (10 L. T. Rep. N. S. 718; 16 C. B., N. S., 665) is in point to show what constitutes knowledge in the master. There the knowledge of a complaint about an unsafe scaffold reached the general manager; yet the defendants were held not liable for his negligence.

Willoughby and Poulter in support of the rule.—The evidence was that the men were assisting behind the bar when complaint was made to them. It is conceded that it is not necessary to give notice to the master; and on the authority of *Gladman v. Johnson* (*ubi sup.*), it is enough to give it to a person who seems to have authority, or, as Willes, J., puts it, in that case to the wife, because she assisted her husband in the business. Honyman, J., seemed to think that the person informed must be some one specially deputed to take charge of the dog; but it is submitted that this is not so. Here, however, the men actually witnessed one attack, and they acted so as to order the dog away, and he obeyed them. It was their duty to tell their master, because the acts of the dog were clearly detrimental to the business over which the master had placed them, and the law presumes that they did their duty. But in addition to this, on the occasion of King complaining, the men summoned some one from an inner room, who evidently had been informed of the complaint, because she asked King to call to-morrow, when the master would be in. She, at any rate, was in control of the premises and business sufficiently to bring her within the case of *Gladman v. Johnson* (*ubi sup.*). The fact of the dog being about the premises of the defendant, and that it was sent into the back yard, is quite enough to fix him with liability as harbouring it: (*M'Kone v. Wood*, 5 C. & P. 1.)

The court being divided in opinion, the following judgments were delivered:

BRETT, J.—I am of opinion that this rule should be discharged. The question is, Was there any evidence of the liability of the defendant? The action was against him for knowingly keeping a dog of ferocious habits, and it was proved that the dog bit the plaintiff. Under peculiar circumstances the knowledge of the defendant himself is not necessary to be proved, and the knowledge of a person who has the sole control of the defendant's business, or of the dog, is sufficient. It is argued here that there was evidence of the habitual ferocity of the dog, and I think there was; and that evidence of attacks on other people was properly admitted to show that the dog was not ferocious only upon this occasion.

There has always been a distinction drawn between animals that are by nature and habit fierce, and those that are not generally or necessarily so; and if a man keep one of the former class, then although no particular knowledge be brought home to him of previous manifestations of ferocity in that particular animal, he is liable for any injury which may be caused by its savage disposition; but if he have an animal of the latter class, then it is otherwise, and he must either actually or constructively have notice that ferocity has been displayed, to make him liable for any injury caused by it. Now, here it has been argued that the dog was under the control of persons who were managers on behalf of the master. The evidence is that on two former occasions the dog had bitten people. This had been done once certainly in the presence of two persons who served at the public house of the defendant and were behind the bar, and the other attacks had been reported to either the same persons or others, as to whose appearance and position the evidence was similar. That is the whole of the evidence in respect to them, and they may have been barmen or potboys. But what evidence is that of their knowledge of a publican's business? A barman has no other duty than to draw beer for his master's customers, and deliver it to them, and receive a price for it which has been fixed by the master, and over which he exercises no discretion or control. This is no more management of a business than is the action of a linendraper's apprentice who is ministerially employed in measuring goods for the customers who come into the shop. A publican's business requires a knowledge of buying as well as selling, an acquaintance with the qualities and values of liquors, demands the exercise of judgment and discretion as to when the articles are fit for consumption, what cask is to be tapped, and so forth; but none of these matters, which are the essentials of the business, does the barman decide, and he cannot therefore be called, with any propriety, the manager. Managers of a principal's business, who have been held to be so, in such sense that their knowledge would be that of the master, are those who have a real control over it in his absence or by his having deputed them. In *Stiles v. The Cardiff Steam Navigation Company* (*ubi sup.*), the Chief Justice expressly says that knowledge of the dog's vicious qualities brought home to the porters and persons of that sort, servants employed by the defendants about the place, would not do; but that if brought home to the manager of the yard, who had the deputed authority of the master, who could give orders, and say whether the dog was to be chained up or not, it would do. Taking that as our rule, these men here had no control over the dog, and no deputed authority of the defendant in respect of the business generally or of the dog in particular so far as appears. Then in the case of *Baldwin v. Casella* (*ubi sup.*), the court went a step further in fixing the liability of the master. But it is to be noticed that there the dog lived not in the house, but in a mews, and the defendant did not personally often see it at all. The judges there held the defendant liable, but all of them went upon the ground that the dog was left in the special control of the coachman, so that his knowledge as the deputed caretaker was sufficient. There, again, it is stated in terms that knowledge of an ordinary servant will not do, and that is perfectly intelligible viewed in

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connection with the case, for the master had put his authority in another person's hands. But if we are to act here according to our ordinary knowledge of business relations, we cannot say that these barmen had control over the business or over the dog, so as to bring them within these cases; and I know of no authority that the knowledge of any one else not occupying such positions would be sufficient. Then, it is said, that assuming that knowledge must be brought home to the master, here there was evidence that it reached him, because the fact having been told to the men spoken of, it was their duty to tell, and it must be assumed that they did tell. But I know of no duty either in law or fact upon a barman to tell his master, when anybody may chance to say to him that a dog over which for this purpose it must be assumed that he has no control, is ferocious. But it is argued that *Gladman v. Johnson* (*ubi sup.*) is an authority that if anyone leaves a message with a person acting in the master's business, it is to be assumed that the message is given to the master. If that case decided that every servant has such a duty, and that the presumption is always that he fulfils it, then it governs us here; but if that be the decision, if the case does do that, how far does it go? A consideration of what this rule would include may help us to see whether such a proposition has really ever been established. Take a merchant's office—a message may be left with any clerk, porter, or person employed to sweep out the rooms, and is it to be assumed against the merchant that the message necessarily reaches him, and is he to be affected with knowledge in such a manner? It would be wholly destructive of all recognised principles of carrying on a mercantile business, were it so; but the truth is, that no such rule as has been contended for ever has been laid down before, and it cannot be the rule to be derived from *Gladman v. Johnson* (*ubi sup.*). If that be the rule, then, upon the facts, I cannot distinguish this case from *Gallagher v. Piper* (*ubi sup.*), for if it is to be assumed that because a fact was known to the foreman, and it was his duty to tell, he did tell, then that case was wrongly decided, for the master was affected with knowledge; and, that being so, there is no opportunity for the doctrine in respect of fellow-servants' negligence to be applied, because if this alleged rule be right, the master himself knew of the unsafe condition of the scaffold. *Gladman v. Johnson* (*ubi sup.*), does hold that if a person be managing or carrying on the business of the defendant, and so have authority to receive a message of this kind as being in the course of the business, then the defendant is affected with knowledge in case of a message being so given to such a person. It is true that if solitary expressions here and there be picked out, it might almost be colourably contended that it went further in the direction of facilitating proof of the *scienter* than this: but if the case be examined the judges base their decisions carefully on the ground that the person to whom complaint was made, was not only the wife, but was the manager of that part of the defendant's business which was transacted where the dog was kept, and so the case carries the rule of law no further than *Stiles v. The Cardiff Steam Navigation Company* (*ubi sup.*). As I have said, if the rule be otherwise, it uproots everything and every dealing in connection with business transactions, and it prac-

tically strikes out the *scienter* altogether in actions of this kind, by saying that the knowledge of the servant, irrespective of his position or duties, is the knowledge of the master. For these reasons, therefore, I have a strong opinion that there was here no evidence of the *scienter* to be left to the jury, that the nonsuit was right, and that this rule ought to be discharged.

KEATING, J.—I think that this rule should be made absolute. The question is, whether there was any evidence of the *scienter* to go to the jury, which it is undoubtedly necessary there must be to sustain an action of this nature, which being against the defendant for keeping a ferocious dog, requires proof of knowledge in him of the animal's previous display of vicious propensities. The ferocity of the dog cannot be disputed upon the facts: the attack on the plaintiff showed the utmost ferocity, and not long before, it being kept apparently near the defendant's shop, attacked a passer by who went into the shop to complain, and found there not the defendant but persons who were at the time managing his business. I agree with my brother Brett, that if notice must be given to him personally or to a person who in the mercantile sense was his manager, then notice was not here given to the defendant nor to his manager in such a sense. But it was given to persons who were left in charge of the business to sell beer, which was the defendant's trade. On two other occasions the dog flew at a man without provocation, once outside, and once actually inside the shop, and information of its having done so was given in respect of both occasions to persons similarly placed. Was this evidence to go to the jury that the conduct of the dog was within the knowledge of the defendant? I think it was; and it was evidence stronger than that in *Gladman v. Johnson* (*ubi sup.*), which the court held to be enough. What were the facts there? The defendant was a corndealer and milkman, and his wife occasionally assisted him in his business. Four years before on one single occasion a boy had been bitten by the dog, and his relative had told the wife of it; that was the whole of the evidence, and it was held by the court to be enough to go to the jury in support of the *scienter*. First let us see, was the wife there manager in the sense given by my brother Brett to that term? I think she was no more so than these barmen; she did not buy cows or sell them, or so far as we know charge any different price for milk than her husband had fixed, upon her own responsibility; and so she was no more manager than the barmen. It was asked by Mr. Murphy in what capacity could these notices be taken to affect the defendant. In answering that I would rather take the words of Willes, J., than substitute any of my own; all the judges agree that the wife was not manager in the commercial sense, and he says: "At the trial I probably might have taken the same course which my brother Montague Smith adopted, for four years had elapsed since the dog had attacked Mrs. Gibson's nephew, and the evidence of the *scienter* was certainly slight; but in doing so, I should have been forming a judgment upon the facts, and not on the law with which we have now to deal. There was evidence that a boy's aunt had called at the house, and had seen there the defendant's wife, who attended to the business occasionally, and to whom, in the absence of the husband, the aunt communicated

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what had occurred; and she did so in a form which showed that it was not meant for the wife personally, but as a message to be given to her husband. Under these circumstances it was the duty of the wife to communicate such message to her husband." Why was it her duty? Not, as my brother Brett would say, because she was manager as in a great commercial transaction; not a word to that effect. "I think she had authority to receive it." The only ground could be that she was left with the business and the dog was there on or about the premises. "It is not too much for us to conclude, as a matter of fact, that she probably did communicate it to her husband." If it was not too much there, it seems to me, *a fortiori*, that it is not too much here to assume that the fact was so communicated to the defendant by the persons who not only were told of it, but actually saw it. The Lord Chief Justice (Bovill) also dismisses the idea of the wife being a general agent, for he says, "Here it appears that the wife attended to the milk business, which was carried on upon the premises where the dog was kept, and that a formal complaint was made to the wife when on the premises, and for the purpose of being communicated to her husband." It appears to me, therefore, that without overruling that case we could not do otherwise here than make this rule absolute; and I am not disposed to overrule it, for it is in my opinion decided in accordance with good law and good sense.

Lord COLERIDGE, C.J. — Several things were necessary to be proved to support this action. The injury to the plaintiff; then that it was not the first injury that the dog had inflicted; then that knowledge of the former injuries had been brought home to the defendant. It is not a question here as to the weight of evidence, but we have only to consider if there was any evidence which ought to have been left to the jury on all of these points. Now it cannot be disputed that the animal was ferocious, for there were three attacks proved by it upon other persons prior in date to that upon the plaintiff. The question really remaining for consideration is whether there was evidence that the facts of the earlier attacks were made known in the sense that the law requires, to the defendant. The way in which the defendant is sought to be affected is through persons in his employ. It is not pretended that personal information was given to him. Now it is admitted on all hands that mere notice to a person in the position of a servant won't do. It was stated strongly by my brother Brett that such is the law, and it was not dissented from by my brother Keating, nor is it by myself. Here the evidence was that one witness had been attacked by the dog a day or two before as he was passing the defendant's premises; that he succeeded in beating it off, suffered no damage, and said nothing at the time. Then on the same day as the plaintiff was injured the same witness was again attacked in the presence of two of the defendant's servants, men in the position described by my brother Keating. I don't like to say they were managing, but they were conducting or administering that part of the business of the defendant which was carried on there and consisted of selling liquors over the counter. They were the only persons there, so far as appears, representing the publican, and the only persons connected with the dog. To these men the witness said "I wonder you allow such a ferocious animal to run about, for yesterday

he attempted to bite me." That, therefore, was one communication. Another fact was that three weeks before a witness, King, had been attacked, and he went into the bar and said to the same two men, or others just like them, "Is that your dog?" One of them said "Why?" King replied, "Because he flew at me." The man addressed then went to an inner door for a barmaid, who came out and said to King, "The master is not at home, will you call again when he is?" Now it is said that those communications so made to persons in the position in which those were, were sufficient to fix the defendant with knowledge, or at any rate were evidence to be submitted to a jury that he had legal knowledge of the complaints about the dog. I think they are. The matter may be put in either of two ways. First, there was evidence that these persons were in the position of managers for the defendant in the sense in which the court thought the wife stood in respect of authority to receive a message, and duty to communicate it in *Gladman v. Johnson* (*ubi sup.*), they were persons intrusted with the administration of part of the business. In the course of that business a notice was given to them of the vicious nature of the dog which was about the premises, and notice to persons in that relation is upon principle and authority evidence for the jury as to the master's knowledge. It may also be put on the ground which would bring it within the cases of *Stiles v. The Cardiff Steam Navigation Company* and *Baldwin v. Casella* (*ubi sup.*), both which cases proceeded on the principle that where a portion of a business is deputed to others, anything happening in connection with that part is notice to them and to the master through them. Crompton, J. said: "I had some doubt whether the knowledge must not be brought home to some person who kept and had care of the dog, and had power to put an end to the keeping of it; but perhaps it would be enough if he had the care of the dog." And Blackburn, J. said: "The real difficulty still remains whether they were persons who had control of the yard, or of the dog, or of the business, so as to be proper persons to receive notice for the company." So in *Baldwin v. Casella* (*ubi sup.*) the master was held responsible, because he deputed the coachman to take care of the dog. So on that view, the one taken in those two cases, it may be said that here there was evidence for the jury. But if *Gladman v. Johnson* (*ubi sup.*) has been rightly decided, it seems impossible, for the reasons given by my brother Keating, without overruling it, not to make this rule absolute. I do not think that that case means to upset all the previous course of decisions, but the judgments affirm that in each case there is a question of degree and circumstances, as Willes and M. Smith, JJ. say. The latter expressly says at the conclusion of his judgment, "It may be supposed that the wife did communicate the message to her husband, from the fact that they were not only living together in the same house, but that she was assisting him in the management of the business." Now if that was the conclusion arrived at in that case, and on those facts, it was here a matter which the jury ought to have been asked, if the persons to whom complaint was made were in the position of persons assisting in the management of the business, and whether they would tell the defendant. All the ingredients are here present necessary to make them so; they were in

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the bar for the purposes of the business, and the dog's habitat was the bar. This would render it their duty to tell, and so there was evidence upon which to ask the jury if their knowledge had been communicated to the defendant. For these reasons I think the rule must be made absolute.

Attorney for plaintiff, *John Long*.

Attorney for defendant, *Fitch*.

Thursday, May 28, 1874.

POPE (app.) v. TEARLE (resp.).

Adulteration of Food Act (35 & 36 Vict. c. 74, s. 3)—
"Declare such admixture"—Duty of seller under
sect. 3.

A grocer sold mustard, saying, "I do not sell this as pure mustard," and the label on the packet, to which he also drew attention, said, "Not sold as pure mustard." On an information preferred against him for not complying with sect. 3 of 35 & 36 Vict. c. 24, it was held that he had declared such admixture to the purchaser thereof before delivering the same within the intent and meaning of that section, and that the justices rightly dismissed the summons. The requirement to "declare such admixture" is satisfied by a declaration of the fact, and does not necessitate a statement by the seller of the nature or proportion of the ingredients.

THIS was a case stated by justices under 20 & 21 Vict. c. 43, s. 2, for the opinion of the court. An information was preferred before them against the respondent for selling mustard which he knew to be adulterated, contrary to the provisions of sect. 3 of 35 & 36 Vict. c. 74. That section is as follows: "Any person who shall sell any article of food or drink, or any drug, knowing the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser thereof before delivering the same, and no other, shall be deemed to have sold an adulterated article of food or drink or drug, as the case may be, under this Act." The appellant was an inspector of weights and measures, and he went to the respondent's shop and asked for some mustard. The respondent, a grocer, produced a packet of Colman's mustard, and said, "I do not sell this as pure mustard," and at the same time he pointed to the label on the packet, which was "warranted free from injurious admixture, but not sold as pure mustard." The mustard when analysed was found to consist of a mixture of wheat flour, turmeric and mustard, but none of these ingredients were injurious to health. The respondent at the time of the sale, in reply to the appellant's question, said that he did not know what the ingredients were. The question for the court was whether it was necessary for the respondent to do more than declare the fact of the mustard not being pure, or whether he ought also to have declared the nature of the admixture, the quantity and quality of the ingredients.

The justices dismissed the summons, thinking that the respondent had done all that was required by the Act.

Merevether for the appellant.—What is the meaning of the expression "declare such admixture"? It is in itself ambiguous, and if standing alone might mean either the fact of admixture some kind, or a description of the materials admixed; but

the words following "and no other" show the meaning to be that the seller must tell truthfully what the admixture is. If this be not so, how does sect. 3 create a separate offence from sect. 2? A person who sells and does not declare the admixture in this sense sells an adulterated article as unadulterated, and so comes within sect. 2. If all that is required of him is not to conceal the fact of adulteration, he is already provided for in sect. 2, and he may be convicted in the penalties. And sect. 2 is even wider, for the question of knowledge does not enter, and the seller is liable whether he knows the fact or not. Sect. 3, therefore, which presupposes knowledge of the fact, requires a more accurate knowledge and statement of the materials. The judgment of Blackburn, J., in *Fitz Patrick v. Kelly* (28 L. T. Rep. 558; L. Rep. 8 Q. B. 337) shows that sect. 3 is an extension and not a restriction of sect. 2. He says: "Sect. 3 is very difficult to understand, but it is perfectly clear that it does not mean to relax the law as enacted in sect. 2 in favour of the seller, but to add another offence to be treated as adulteration, viz., the addition of some foreign body so as to increase the bulk or weight without actually adulterating. . . . It was intended to increase or extend not diminish the seller's liability." The preamble to the Act points to the necessity of more stringent and effectual laws being enforced, and so the Act as I read it, is more strict than the former one; but if no meaning be given to sect. 3 it is not so, while the words "and no other," in sect. 3 itself are wholly unintelligible, unless "declare such admixture" be interpreted in the manner I suggest.

Wills, Q.C. and *F. M. White* for the respondent.—The 3rd section it is to be noticed does not create an offence, but only one of the ingredients of an offence. It has been assumed on the other side that the meaning of the 3rd section is, that if a man has done the things described in the section, he has committed an offence; but that is not so. The 2nd section creates the offence, and that is selling as adulterated any article of food or drink which is adulterated; but sect. 3 goes on to show what may come within the meaning of selling an adulterated article of food or drink; and that is the selling of a fraudulent but not poisonous admixture without declaring it. I might, therefore, admit here that the respondent was within the 3rd section, still he would not have committed an offence against the Act, because the case finds that he did not sell the adulterated article as unadulterated, which, to complete the offence under sect. 2, he must have done before he could be convicted in the penalty.

Lord COLERIDGE, C.J.—I think that the respondent is here entitled to our judgment. There are two sections of the Act (35 & 36 Vict. c. 74), which bear upon this case, and it appears to me that the facts bring him within neither of them. The 3rd section enacts (his Lordship read the section). Now it seems to me that the true and reasonable construction of the Act interprets it thus: Whereas the phrase in the former section contemplated the case of the adulteration being by means of some noxious ingredient, the 3rd section went on to say, if an article of food or drink be mixed with a substance not noxious, but fraudulently added for the purpose of increasing the weight or bulk, and it be sold by a person knowing this who does not declare it, then such person shall be guilty

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under sect. 2. The respondent here is not within it, for though he sold an article so mixed, yet by language and by the label, he affected the purchaser with knowledge, and so did declare the admixture. He is not, therefore, within sect. 3. But supposing that he had not declared the admixture, and had sold, then he would have been brought within sect. 2; as it is, however, he is not within the latter section, for the simple reason that he has not here sold as unadulterated any article of food which was adulterated.

BRETT, J.—I am of the same opinion.

GROVE, J.—I read the Act in this way. Sects. 1 and 2 contemplated the mixing of noxious ingredients in articles of food or drink. The 3rd section, in order to avoid any doubt as to what adulteration is, says, that the admixture of foreign substances, whether noxious or innocuous, is all the same adulteration. Is there anything in the section to make it necessary for the seller to declare what is the substance and quantity of the materials mixed? I think not. The words "and no other" may well mean no noxious substance, nothing, that is to say, except for the purpose of increasing the weight.

Attorneys for the appellant, *Lewis, Munns, and Longden*.

Attorneys for the respondent, *Ashurst, Morris, and Co.*

Thursday, May 28, 1874.

YATES AND OTHERS (apps.) v. LEECH AND ANOTHER (resps.)

Municipal election petition—35 & 36 Vict. c. 60, ss. 13, 18, 21—Who may be respondent—Candidate in a minority assuming to be elected.

At a municipal election the candidate declared to be elected was found to be disqualified and never took his seat; the candidate second on the poll thereupon assumed to have been elected, and took the oath of office and acted. Both were made respondents to a petition. On a motion to strike out the name of the latter as having been improperly made a respondent,

Held, that having assumed to have been elected, he came within the 13th section of 35 & 36 Vict. c. 60, which says that "respondent shall include any one or more persons against whose election a petition is presented."

After the presentation of the petition both respondents gave the prescribed notice that they did not intend to oppose the petition:

Held, that their having done so did not make them cease to be respondents, and that sub-sect. 2 of sect. 15 of the Act did not entitle either of them to have his name struck out.

Where the court is of opinion that a person has been wrongly made a respondent, it has power under sub-sect. 5 of sect. 21 to strike the name out of the petition.

When a petition has been duly presented, and the preliminaries required by sect. 13 fulfilled, it must, unless withdrawn, be tried in the manner prescribed by the Act, notwithstanding that the respondent has given notice that he will not oppose it, and there is an agreement that the election was void. No tribunal except that appointed by the Corrupt Practices (Municipal Elections) Act 1870 can decide whether an election is void.

This was an application in connection with the

municipal election in the borough of Oldham. A petition was presented, in which Thomas Milnes and James Leech were respondents, and a rule nisi was obtained calling on the petitioners to show cause why the name of James Leech should not be struck out of the petition on the ground that he was improperly made a respondent.

It appeared that the election was held in November, and that Milnes obtained a majority of votes, and was declared elected. Leech was in a minority as regards Milnes. Immediately after the election it was discovered that Milnes was disqualified, and he never took the oath or acted on the council. Leech, however, upon the admission of Milnes' disqualification, made the declaration, and took his seat as councillor. On the 26th Nov. the petition was filed, and on the 28th Nov. Milnes said he should not oppose it, and on the 6th Dec. Leech said the same thing.

On the 10th March a summons was taken out by the petitioners calling on the respondents to show cause why the 500l. deposit should not be repaid, and why the election should not be declared void, and why the costs of the petition should not be paid by Milnes and Leech, or either of them. The summons was heard before Lord Chief Justice Cockburn, who said that he had no jurisdiction to declare the election void, and that the petition would have to be tried in the manner provided by the Act.

Nothing further was done till this rule was obtained for Gorst on the first day of Trinity Term.

J. O. Griffiths now showed cause.—It is said, first, that Leech was not properly made a respondent because by sect. 13 respondent is defined; and it is argued that, as Leech was not elected, he does not come within the definition; but the answer to this objection is that the expression in the Act says respondent shall "include," not "mean," any one or more persons against whose election a petition is presented; so that it is not limited, as has been suggested. Then I say here that Leech claimed to be elected, and acted accordingly, and, having thus assumed to have been elected, he can be properly made a respondent; for in what other way can he be prevented from continuing to act, unless recourse be had to a *quo warranto*? Then it is said that, having given notice that he should not oppose the petition, Leech is brought within sect. 18, sub-sect. 2, and that he cannot, therefore, remain a party against the petition in any way, and may have his name struck out as of right. But that sub-section carefully abstains from saying that he shall cease to be a respondent—indeed, the words contemplate his still being a respondent, but say that he shall not be allowed to appear or act as a party against the petition in any proceedings thereon. On the contrary, Leech, by giving the notice, acted on the petition as a respondent, and he cannot at the last moment withdraw by asking the court to strike his name out so as to avoid the costs. His own act has put him into the position, for he assumed to be elected. [BRETT, J.—Milnes admitted his disqualification from the first. Must a barrister go down to try the petition against him when there is no opposition?] Yes; the summons at chambers was to declare the election void, and have a new election, but the Lord Chief Justice said that a court constituted under the Act must be held for the purpose.

Douglas Walker in support of the rule.—The

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dates of the various proceedings show that Leech has not done anything to embarrass the petitioners or justify them in throwing the costs upon him. He gave notice on the 6th Dec. that he did not intend to oppose the petition, and nothing was done until the 10th March when the summons was taken out. At the hearing then the respondents offered to pay the costs between them, and as the Lord Chief Justice said he could not declare the election void, Leech now asks the court to strike his name out. Has the court power to do this? I contend that under sect. 21, sub-sect. 5 it has. Then the ground on which it is asked to exercise its power is this, that it is clear by the construction of sect. 13, that Leech was improperly made a respondent. The words are plain, "against whose election any petition is presented." Therefore, to be a respondent the person must have been elected or purport to be elected. The section to be intelligible must mean a person declared to be elected. The election is only known by the declaration of the returning officer, and Leech was never returned as elected or declared to be elected. That this is the true construction of the words is borne out by sub-sect. 6 of sect. 13, which makes a special provision for some one not previously defined to be a respondent; and this is a strong argument to show that, unless any person other than one whose actual election is to be questioned is specified as being capable of being made a respondent, no one who does not fall within par. 3 of sub-sect. 1, of sect. 13, or within sub-sect. 6 of the same section, can properly be made a respondent. Again, sub-sect. 10 of sect. 15 points to the same thing, as it speaks of the respondent holding "the office his election to which is questioned." The petitioners argue that Leech has acted as councillor and so must be taken to have assumed to have been elected; but although it is true that the election of Milnes cannot be declared void except by a court sent down to try the petition, yet the 2nd paragraph of the 12th section which, as they say, precludes any other proceeding, does not apply to Leech, for he not having been elected, and having, as they allege, sat without any right, could be removed by a writ of *quo warranto* if necessary. But then this is unnecessary, because he long since ceased to act and gave a notice that he would not oppose the petition, so there is no obstacle so far as he is concerned, when once Milnes' election is declared void, to proceeding to hold a new election. He has practically retired, and he cannot resign only, because he has never been elected to an office and resignation would imply that he had. Notwithstanding what has been said, I also submit that Leech comes within sub-sect. 2 of sect. 13, and having given the prescribed notice that he did not intend to oppose the petition is entitled to have his name struck out as being no longer "a party against such petition in any proceedings thereon."

Lord COLERIDGE, C. J.—I am of opinion that this rule ought to be discharged. It was an application to us to strike out the name of James Leech from a petition which has been presented to set aside his election to the office of town councillor in the borough of Oldham. The facts in relation to the case were that two persons, Milnes and Leech, were candidates against other persons for election to the vacant post. Milnes at the election got a majority of votes and was declared elected, and Leech got a minority as against Milnes, but

was second on the poll. Milnes, however, proved to be disqualified as having a contract with the corporation, and as it was evident he could not resist the objection, he did not take the oath or act. Whereupon Leech asserted his right to the office, and as he persisted in it, was allowed to take the declaration, and voted and acted as councillor on the ground as far as we can tell that as Milnes was disqualified he was elected by a majority of lawful votes, all those that had been given to Milnes having been thrown away; that being so, a petition was presented against both Milnes and Leech, against the one because he had been declared elected, and against the other because he had taken the oath and sat and acted as if elected. On the 6th Dec. Leech gave notice within sect. 18 of 35 & 36 Vict. c. 60, that he did not intend to oppose the petition; nothing, however, took place until March, and then the petitioners went to the Lord Chief Justice at chambers, and endeavoured to get a declaration from him that the election was void, to save the expense of a trial. He said, and I agree in the view which he expressed, that he had no power to make such a declaration, that all questions as to the validity of elections being regulated by the provisions of the the Corrupt Practices (Municipal Elections) Act 1872, he was not the tribunal appointed thereby to decide. On this state of things Leech, who has claimed to have been elected, and has sat, and who will not resign, as we are told, applies to the court to strike his name out as respondent from the petition, the petition being nevertheless the only mode, except by an information in the nature of a *quo warranto*, of getting rid of the two incumbents of the seat. Now if Leech is fixed with any costs, or is in any trouble or difficulty in the matter at all, he has brought it on himself; and he is now seeking to embarrass his opponents and to get out of paying the costs, when his own confessedly wrongful act had placed him in the position of respondent to the petition. It is said that he is not by the Act a respondent, and we were referred to the statute for the definition of the term: the section says "respondent shall include any one or more persons against whose election a petition is presented," and it was argued that as he was never elected, and as this is an election petition, he was not a respondent within the meaning of the Act. But I think there is no ground for this contention; the word is "include," not "mean," and all who are in the habit of construing Acts of Parliament will recognise the very great difference which is involved in the use of the one and the other of these expressions. But I also think that the definition "a person against whose election a petition is presented" includes a person who claims to be elected and who acts as an elected person. The construction of the section therefore is, as I hold, that Leech is properly a respondent, having done this. Then it is said, although this point be decided against him, yet the 18th section will help him, which refers to a respondent giving notice that he will not oppose the petition; for the 2nd subsection says that "a respondent who has given the prescribed notice shall not be allowed to appear or act as a party against such petition in any proceedings thereon." But this section assumes that the petition is going on, and assumes that he continues to be a respondent, and in this case Leech has, in my opinion,

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by availing himself of the provisions of the section, thereby acknowledged that he was a respondent. I think, therefore, that there is no ground for this application. No doubt under sub-sect. 5 of section 21 of the Act, the court would have power, as in other cases so here, to strike Leech's name out if he had been put in improperly; but for the reasons I have given I think he was properly made a respondent. There is one other matter: it is said that the course adopted is very inconvenient, and that the working of the Act so interpreted will be very inconvenient, as necessitating the formality and expense of a trial when no defence is proposed to be set up; but I may say that, compared with the old process, this is as light against darkness, and the expense is not so very great as to lead us to conclude that the Legislature did not intend that when a petition was once presented it was to be disposed of in the way which the Act, with considerable minuteness, prescribes.

BARR, J.—The question with which we have to deal is whether the rule is to be made absolute which calls on the petitioners to show cause why Leech's name should not be struck out on the ground that he has been improperly made a respondent, and whether he has been improperly made a respondent, because, by the Act of Parliament, the only person who can be made a respondent is one who has been elected. As to whether the court could have struck the name out if satisfied that Leech was wrongly made a respondent, I am of opinion that we could have done so; but as I think he was properly made a respondent to this petition, we ought not to grant this application. The definition in the 13th section means, as I read it, that a petition can be presented against a person who has been elected, or who assumes to have been elected; and the ground of the petition against such a person is that he has not been duly elected. Mr. Leech's advisers must have told him, upon the disqualification of Milnes becoming evident, that he was duly elected, and he assumed to be so, and acted accordingly. The petitioners, therefore, upon this say, "No, you were not duly elected;" and, as this afforded a proper ground for the petition, Leech was properly made a respondent. Then it was said, that as his name would remain, if not struck out, although he intended to offer no opposition, an idle and expensive ceremony was to be performed, that a barrister would have to go down to the borough and hold a solemn court to declare the election to be void, which everybody agrees is void. The court granted the rule nisi rather upon a consideration of that necessity than from any hesitation as to the position of Leech, to see if there were any other way of disposing of the petition, and enabling a new election to be held; but it seems that that is the only way of settling the matter in accordance with the Act, and so it must be done whether we think it inconvenient or not. As to the question of costs that does not arise yet; when the barrister has given his decision, it will be known on whom they fall; at present we have nothing to do with the consideration of them directly or indirectly.

GROVE, J.—I am of the same opinion. I think that Leech was rightly made a respondent for the reasons given by my lord. Sect. 13 means not only a person who has been declared elected by the returning officer, but one who has assumed to act as if elected. Then sect. 13 does not make the

person giving notice cease to be a respondent, and so Leech, having been properly made a respondent, has remained so.

Rule discharged.

Attorneys for petitioners, Gregory, Rowcliffe, and Co.

Attorneys for the respondent, Chester, Urquhart, and Co.

Thursday, May 28, 1874.

LOVESY (app.) v. STALLARD (resp.)

Jurisdiction of justices—Shooting game by tenant where lease contained a questionable reservation—Bona fide claim of right—Finding of justices on fact not conclusive.

The appellant tenant of a farm under a lease which reserved the game to the lessor, but did not expressly say that it did so exclusively, shot three hares in the presence of the keeper to assert his right. He set up this claim of right on the hearing of an information against him before the justices, and alleged that it ousted their jurisdiction. They found that the claim was not bona fide, because he had a copy of the lease, and convicted him.

Held, that this finding as to the appellant's bona fides was not conclusive, because there was no evidence that his claim was made mala fide; and that as he asserted his claim of right the magistrates had no jurisdiction to hear the information.

THIS was a case stated by justices under 20 & 21 Vict. c. 43, s. 2, for the opinion of the Court of Commons Pleas upon the following facts:

At the petty sessions held at Northleach, in the county of Gloucester, an information was preferred by Charles Stallard against David Lovesy, under sect. 12 of 1 & 2 Will. 4, c. 32, for that he on the 1st Sept. 1873, killed a hare upon certain land, without the authority, consent, or licence, of the lessor, landlord, or owner. And a second information was for killing two hares on the 2nd Sept. 1873, under similar circumstances.

The case was heard at Northleach on 10th Sept., and it appeared that Lovesy was tenant of a farm under a lease from the Hon. and Rev. G. C. Talbot, and that on the occasion in question he was in a field forming part of the farm, and in his own occupation, and had a gun in his hand, and a dog with him. Seeing Stallard, Mr. Talbot's gamekeeper, he called to him and said he was going to kill a hare if he could find any; soon after he shot a hare in the presence of the keeper. On the next day Lovesy was riding on the farm, and had his gun and dog with him. Stallard heard a shot, and on coming up to Lovesy, asked him if he had shot anything. Lovesy thereupon showed him a hare newly killed; and while Stallard was still with him, shot at another, which was eventually pulled down by his dog.

Mr. Talbot had not given Lovesy leave to shoot upon the farm, but the lease, a copy of which was annexed to the case, contained the following clause: "And with liberty to him the said lessor at all times to hunt, course, shoot, and fish over the demised premises; the said David Lovesy to be at liberty to kill and destroy rabbits by means of wires, traps, and ferrets, and other means, but not to shoot rabbits." The lease was proved by an attested copy before the justices, and Lovesy was defended by an attorney who took various

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objections, the chief of which were, first, that Lovesey had shot the hares under an assertion of right, and that consequently the jurisdiction of the magistrates was ousted; secondly, that the alleged reservation of the exclusive right to shoot game upon the farm in the lease was not good, but that Lovesey had a concurrent right with the lessors upon the true construction of the clause; thirdly, that there was also an arbitration clause in the lease which took a question of this sort out of the jurisdiction of the justices.

The magistrates adjourned the hearing and took counsel's opinion as to the points raised, and then gave their decision that the lease was a valid lease, that the reservation of the exclusive right to the game in it was good, and that their jurisdiction was not ousted by the arbitration clause, that the claim of right on the part of the defendant was not *bonâ fide* as having a copy of the lease in his possession, and that the cases cited on his behalf were inapplicable. They therefore convicted the defendant in the penalties of 1*l.*, and 2*l.* on the respective informations, but stated this case at his request for the opinion of the court.

Sawyer for the appellant.—I have no intention of saying that the lease is not valid; but the first and real point which I shall contend for is that the jurisdiction of the magistrates was ousted by the claim of right set up by the appellant. In *Faley on Summary Convictions*, p. 137, it is laid down thus: "It has always been held as a maxim that where the title to property is in question, the exercise of a summary jurisdiction by justices of the peace is ousted." Now here the appellant did what he did in the presence of the keeper expressly to assert his right. [BRETT, J.—Can we discuss the *bonâ fides* when the justices have found as a fact against it?] Yes; in *R. v. Stimpson* (8 L. T. Rep. N. S. 536; 4 B. & S. 301), the Court of Queen's Bench held that they were not bound by the finding of the justices as to the *bonâ fides* of a claim of right; and here I submit that there was no reasonable evidence on which the justices could properly find as they did. The cases with reference to church rates, when disputes were of frequent occurrence and questions of *bonâ fides* arose, are also in point, such as *Pease v. Chayton* (5 L. T. Rep. N. S. 280; 8 L. T. Rep. N. S. 613; 3 B. & S. 620). The only reason given by the justices here why the claim was not *bonâ fide* was because the appellant had a copy of the lease. [Lord COLERIDGE, C. J., referred to *R. v. Bolton* (1 Q. B. 66), and read at length from the judgment. You must show that the justices had no jurisdiction to enter upon the inquiry—not that something arose in the course of it which would seem incidentally to deprive them of it.] In *Reg. v. Kayly* (10 L. T. Rep. N. S. 339), the claim of right set up was sustained as *bonâ fide*, though the lease contained an alleged reservation as here; and Blackburn, J. said when in such a case a *bonâ fide* and probable right of property is set up, the justices ought to hold their hands. In *R. v. The Justices of Derbyshire* (11 W. R. 780) the magistrates held that because the defendant had practised as an attorney, therefore his claim to shoot over certain lands as lord of the manor was not *bonâ fide*; but the court said that the justices were not conclusively the judges of *bonâ fides*, and quashed the conviction. Then the next point is that on the terms of the lease the appellant had here a concurrent right with the lessor to shoot

game on the land. The reservation clause says nothing about an exclusive right to be in the lessor, and unless expressly reserved the game goes with the land. [Lord COLERIDGE, C. J.—How do you explain the later clause, "And also will and shall protect and preserve all game excepting as hereinbefore is mentioned with respect to rabbits, and will ward off all persons and give notice to the lessor of all persons shooting," &c P.] This might well be for the joint benefit of lessor and lessee, and the stipulation about the rabbits would be to prevent the disturbance of the game by firing guns on the farm in the close season. [Lord COLERIDGE, C. J.—We should like to hear from the other side why there was no evidence of *bonâ fides*.]

Lawrence for the respondents.—Though it is stated as a reason by the magistrates that the appellant had a copy of the lease, yet the court will not say that that was the only reason. They had all the parties before them and could judge; the fact has been found by them, and cannot be reconsidered by the court. The question of fact is not left for the consideration of the court. [BRETT, J.—Whether there is any evidence or not is a question of law; the weight of evidence is a question of fact.] The mode in which the claim was made is against the man; he came forward not as the assignee but as one of the original contracting parties. When leases are granted they are the subjects of discussion, and he must have known what were the terms meant to be embodied in the lease. [GROVE, J.—The parties are bound by the written document only; and can you say that the expression there is so clear that it is impossible that the appellant could make a *bonâ fide* claim upon it?] The mode in which the claim was made is against the man; he came forward not as the assignee but as one of the original contracting parties. When leases are granted they are the subjects of discussion, and he must have known what were the terms meant to be embodied in the lease. [GROVE, J.—The parties are bound by the written document only; and can you say that the expression there is so clear that it is impossible that the appellant could make a *bonâ fide* claim upon it?]

Lord COLERIDGE, C. J.—In this case a finding of magistrates upon an information is brought before us on appeal by the defendant, who was convicted in a penalty. The parties were the clergyman of the parish who leased the glebe, reserving, as he believed, the exclusive right to shoot the game to himself. The defendant was his tenant, and becoming tenant at Michaelmas 1872, he in Sept. 1873 shot three hares in the presence of the lessor's keeper, and did so under a claim of right, calling on the keeper to see. Many points were taken before the justices which it is not necessary now to go into, but among others was this, viz., that the shooting of the hares by the defendant was done under a *bonâ fide* claim of right, and so it became a matter of civil, not criminal import, and might be tried and determined in a civil court if the lessor should think it worth while to sue the defendant, and that consequently the jurisdiction of the magistrates was ousted, and they could not hear the information. This and many other points were all found by the magistrates against the defendant, and he was fined; and we are to say whether, the case having been stated to us on appeal, our judgment is to be for the defendant, the appellant, or for the respondent. I do not intend to consider any point but one. Was there a *bonâ fide* claim of right by the appellant? If there was, the magistrates acted wrongfully; and if they had admitted that claim and yet had gone on and decided wrongly, the court ought to reverse their decision. I have said wrongly, but I do not mean that this court is a court of appeal from the magistrates upon the facts stated by them; for if they had stated the evidence on both sides, and had said

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that on the evidence they had arrived at a certain conclusion, I should not have thought myself at liberty to disturb their decision, even if I thought it to be grossly wrong. But the question of jurisdiction here depends on the finding of fact, and the finding of fact depends on the evidence; and, although the consideration of the weight of evidence is a question for the justices, yet that of the existence of evidence is for the court; and if the magistrates have given themselves jurisdiction without right, the court will examine the decision and reverse it if necessary. Now here the magistrates have set out their finding at length, stating that they found that the cases cited on behalf of the appellant were inapplicable, that the lease was valid, that the reservation of the game was well reserved, and that the defendant's claim of right was not *bonâ fide*, because he had a copy of the lease. We are then asked our opinion as to the whole decision, the appellant being dissatisfied with it. Any one point wrongly decided would upset the whole decision. I think they have, therefore, submitted the question of *bonâ fides* to us, and we can only look at the evidence they set before us; but it is all one way. The hares were shot in the presence of the keeper, and the claim was then made that it was done as of right, and the magistrates base their decision against the appellant simply on the statement that he had a copy of the lease in his possession. Now we have the lease before us, and it does not appear that possession of that lease was any evidence that the claim of right was necessarily *malâ fide*. That being so, the jurisdiction of the magistrates was ousted, and our judgment must be for the appellant. I have already explained from the case of *Reg. v. Bolton (ubi sup.)*, the two principles by which the court must be guided in respect of the question of the jurisdiction of magistrates being dependent on the facts found by them. They are there admirably stated, and there can be no question that those principles are indisputable. It is also indisputable that under certain circumstances the court may inquire into facts with reference to jurisdiction, and I will not discuss the cases on the subject. It was necessary here to show that the claim of right was made *malâ fide*, and I am quite clear that there was no evidence of its being so.

BRETT, J.—The question reserved for us, is whether the various decisions of the magistrates on the points set out were correct in point of law. It is admitted that they had jurisdiction to enter upon the case at first; it is admitted also, that, if the defendant did what he did under a *bonâ fide* claim of right, the magistrates ought to have stopped, as their jurisdiction was ousted. It is admitted also that the defendant did in fact claim the right to shoot over the land, and the dispute is whether he did so claim *bonâ fide*. If the magistrates found that he did, they were bound to stop, but they found that he did not. Whether this claim was *bonâ fide* or not was a question of fact to be properly determined by them if there was evidence on both sides. But whether there was any evidence is a question of law, and is for us to decide. The consideration is, was there before the justices any evidence of *malâ fides*? If there were any, then, however wrong the court may upon that evidence have come to the conclusion that the decision of the justices was, yet it could not interfere. But I think that here there was

absolutely no evidence of *malâ fides* on the part of the defendant. It has been said that there may have been some; but this will not suffice, for it must be taken that they have set out all the facts for us to consider, in order that we may decide if there was any evidence or not. If they have, therefore, set out all the facts, I see no evidence of *malâ fides*. The only fact which the justices set out, or adduce as a reason for their decision, is that the defendant had possession of the lease, and this satisfied them that his claim was not *bonâ fide*. I think that this was no evidence of *malâ fides*, and therefore on this ground alone I am of opinion that our judgment must be for the appellant.

GROVE, J.—I am of the same opinion. The magistrates must, if they leave us anything to decide, leave it to us on the materials alone found in the case; otherwise it might be that, forming an opinion on the facts before us in favour of the appellant, there might nevertheless be some other circumstances behind which would have influenced us in favour of the respondent, had they been known, and the result would be utterly unsatisfactory and extraordinary. The case has been set out for the express purpose of informing the court what were the material facts, and, on consideration of them, we must say if there was any evidence that the defendant was guilty of *malâ fides* in making the claim of right. If we could look beyond what is before us, the case would have been set out without object. The evidence shows that the tenant of a farm, openly and before the keeper, under a claim of a right to do so, shot a hare, and that before the justices he set up the same claim. Was it *bonâ fide*? If yes, the jurisdiction of the justices was thereby ousted; if no, if it were fictitious, the justices might go on and decide the matter. Now, the justices have not merely said the claim of the defendant was not *bonâ fide*, but they have also given the grounds of their decision. They took time to consider, in order to lay the matter before counsel, and this could only be to assist them in the construction of the lease; and I assume that counsel thought the right to the game was reserved to the landlord by the lease. But the justices had not that question to decide—they had only to say whether the claim was *bonâ fide*. Their consideration of the lease does, however, show that it was not so very plain what were the rights of the tenant. Now, supposing it was beyond all dispute clear that no claim could be set up by the tenant under the lease, I will not say that even then there might not have been some evidence of *bonâ fides* on his part; but, as it was, though I give no opinion as to the true construction of the clause, the lease does not give in terms a certain exclusive right to the game to the landlord so conclusively that the tenant must have known its effect. The judgments in *Reg. v. Stimpson (ubi sup.)* show what will deprive justices of jurisdiction. Wightman, J. says, "When the party charged asserts title in himself, though the title be only colourable, yet if the assertion be made *bonâ fide*, the jurisdiction of the justices falls to the ground." This goes even further than is necessary here. Can it be said that this claim had no degree of reason in it at all? Then Crompton, J. says, "I think there was no reasonable evidence on which the justices could say that there was not a *bonâ fide* claim or

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dispute; on the contrary, the circumstances stated in the affidavits show that there was such a claim." I can say here that to my mind there was no evidence that this was not a *bona fide* claim; and Blackburn, J. says, "The question for us is, whether there was reasonable evidence on which the justices could find that a claim of title was not *bona fide* set up by the defendant;" he therefore puts it on the same ground, and so, on the authority of that case, all we should be required to decide would be that there was no reasonable evidence on which the justices could find against the *bona fides*. But I can say here that there appeared to be no evidence. The lease was so ambiguous as not necessarily to take away the defendant's *bona fides*, and the other circumstances were strongly in favour of it and of his intention to initiate a civil dispute, for the evidence was all one way as to it. I think, therefore, our judgment ought to be for the appellant.

Attorney for the appellant, *Selby*, for *Stroud*, Cheltenham.

Attorneys for the respondent, *Wilkins*, *Blyth*, and *Marsland*, for *Stiles*, of Northleach.

June 9, 10, 11, and 23, 1874.

PETERSFIELD ELECTION PETITION.

STOWE (pet.) v. JOLLIFFE (resp.).

Election petition—Scrutiny—Conclusiveness of register—Ballot Act 1872, s. 7—Prohibited from voting—Whether vote of paupers, almsmen, or non-residents may be struck off on scrutiny.

The register of voters is conclusive after as well as at an election, except as to those persons who from some inherent or for the time irremovable quality in themselves had not the status of electors when they voted.

By the Ballot Act 1872, s. 7, "every person whose name is on the register of voters for the time being in force shall be entitled to demand and receive a ballot paper and to vote; provided that nothing in the section shall entitle any person to vote who is prohibited from voting by any statute or by the common law of Parliament."

A scrutiny having been taken in the Petersfield Election Petition, it was found that certain registered voters had, between the day of election (30th Jan. 1874) and the 31st of the preceding July, received such parochial relief as would, if it had been received within twelve months previous to such 31st July, have disentitled them to be registered, by virtue of the Reform Act 1832; that others had, within the same period, received benefits under a charitable trust; that others had within twelve months previous to such 31st July received such parochial relief as had disentitled them to be registered; and that others had either not possessed during the twelve months previous to the 31st July and the day of election certain residential or rating qualifications prescribed, as to some cases by the Reform Act 1832, and as to others by the Representation of the People Act 1867:

Held (per Lord Coleridge, C. J., and Keating and Grove, JJ.), upon a review of the various enactments in pari materia in and subsequent to the Reform Act 1832, that none of such registered voters were persons ascertained by the proviso of the 7th section of the Ballot Act 1872, that the title

of such persons to vote could not be inquired into when their names had been once placed upon the register, and that their votes could not be struck off upon a scrutiny.

Persons ascertained by the proviso of sect. 7 of the Ballot Act are peers, women, felons, minors, officials disqualified ex officio, and the like.

CASE stated by Mellor, J., Election Judge.

This was a petition under the Parliamentary Elections Act 1868, against the return of the respondent as a member of Parliament for the Borough of Petersfield, which came on to be tried before me at the said borough on the 21st, 22nd, 23rd, 24th, and 25th April 1874. The petition prayed that it might be determined that the respondent was not duly elected or returned by a majority of legal votes, and that William Nicholson the other candidate at the said election had a majority of legal votes, and ought to have been returned instead of the respondent. On the trial the following facts were admitted or proved, and I have thought it right to reserve for the opinion of the Court of Common Pleas certain questions which arise therefrom.

1. At the last election for the said borough the respondent and the said William Nicholson were respectively candidates.

2. The nomination took place on the 30th Jan. 1874, and the poll was taken on the 3rd Feb. 1874, and the returning officer returned the respondent as being duly elected.

3. The number of votes recorded for the said candidate were as follows:—for the respondent, 372; and for the said William Nicholson, 361; making a majority for the respondent of 11 votes.

4. Twenty voters who voted for the respondent at the last election, and ten voters who voted for Mr. Nicholson were proved to have received parochial relief within the meaning of the 36th section of the 2 Will. 4. c. 45, (a) between the 31st July 1873, and the day of the election.

5. There is a charity which is under the management of the trustees of the will of the late John Goodger, dated on or about the 22nd April 1664, and the funds are applied in conformity with the directions of his will for the benefit of the poor inhabitants and the poor children of the said Tithing of Weston. The following is a copy of the said will. [The case then set out the whole will, the material part thereof being as follows.]

Item. I give to the poor people of the Tithing of Weston aforesaid, twenty shillings, to be distributed within a month after my decease, at the discretion of my executors hereafter named. I give and devise unto my honoured friend, Leonard Bilson, Esq., and my nephew, Edmund Yalden, in the county of Surrey, Clerk, and to his heirs and assigns for ever, all my messuage, dwelling house, together with all the barns, stables, outhouses, and buildings, and all the gardens and orchards thereunto belonging, situate in Weston aforesaid, called Halfpenny Land, now in the possession of Thomas Jacques, together with free liberty to water and overflow the said lands, as it is now, and heretofore hath been, used for the best improvement thereof, to the intent and purpose

(a) By the Reform Act 1832 (2 Will. 4. c. 45), s. 36, "no person shall be entitled to be registered in any year as a voter in the election of a member or members to serve in any future Parliament for any city or borough, who shall within twelve calendar months next previous to the last day of July in such year have received parochial relief or other alms which by the law of Parliament now disqualify from voting in the election of members to serve in Parliament."

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that they, the said Leonard Bilson and Edmund Yalden, and the survivor of them, their heirs and assigns, shall grant and convey all the said messuage, land, and premises, with the appurtenances, unto six able, honest, and sufficient persons, their heirs and assigns, as they or the survivor of them shall think fit, upon trust and confidence and to the intent and purpose that all the yearly rents, issues, and profits of the said messuage, lands, and premises, shall be employed and disposed of for ever hereafter for the putting forth and placing abroad of all such poor children of the Tithing of Weston aforesaid, and the overplus thereof shall be distributed unto the poorest inhabitants of the said Tithing of Weston aforesaid, as my said trustees and their assigns shall think fit. And if any or either of my said trustees shall die, then the survivors of them shall convey the premises aforesaid unto the use, intents, and purposes, and upon the trusts aforesaid.

Fourteen voters who voted for the respondent, and one who was also objected to by the petitioner, but who voted for Mr. Nicholson, received clothing or goods since July 31st, 1873. The son of another voter for the respondent was before the said date and now is apprenticed by the charity; and the son of another such voter was before and since the said date educated by the charity.

6. Fifteen other voters who voted for the respondent at the last election were proved to have received parochial relief also within the meaning of the said 36th section of 2 Will. 4, c. 45, within twelve months previously to the 31st July, 1873.

7. One other voter who voted for the respondent at the last election was proved not to have resided within the borough, or within seven statute miles thereof or of any part thereof, in the year preceding the 31st day of July, 1873, or between that time and the day of the election. (a)

8. One other voter who voted for the respondent at the last election was proved not to have resided within the borough or within seven statute miles thereof, or of any part thereof, at the time between the middle of July, 1873, and the beginning of November 1873.

9. Thirteen other voters, the nature of whose qualifications appeared upon the register to be the occupation of premises in the borough, and who save as aforesaid, had no other qualification, voted for the respondent, were proved to have occupied the premises, but not to have occupied them as owners or tenants at any time between the 31st July 1872, and the day of the election. (b)

10. Twelve of the voters alluded to already under some previous head other than that mentioned in the last paragraph, and being voters who voted for the respondent, were proved to have had no sufficient qualification entitling them to be upon the register on the ground of non-occupation, non-rating, or change of occupation.

11. The register of voters and the petition may be referred to if necessary as part of this case.

12. The question is whether any of the above votes ought to be struck out and disallowed, and if so, which of them, and such as ought to be struck out and disallowed must be taken off the number polled and the majority determined accordingly.

13. The parties have agreed to my stating this case as a way of reserving the questions. But if necessary I must further report to the court as the court may require.

(a) See 2 Will. 4, c. 45, s. 33.

(b) See Representation of the People Act 1867 (30 & 31 Vict. c. 102) s. 3.

14. I have reserved my determination whether the respondent was duly returned, or whether he was not, and the said William Nicholson was duly elected, and ought to have been returned until the court has determined the above questions; and I shall certify to the Speaker of the House of Commons according to the decision of the court.

Giffard, Q.C. (with him *C. Bowen* and *C. J. Darling*) for the petitioners.—The 7th section of the Ballot Act refers to procedure only, and to procedure "at" the election itself; it merely deals with the right to demand a ballot paper. [Lord COLERIDGE, C.J.—Such a contention as that would seem to take away all force from the proviso.] The section is to be viewed as the complement of the legislation since 1832. Before 1832 there was no register of voters at all; if a poll was had, the returning officer determined, there and then, any disputed right to vote, and could make any inquiries he pleased of a would-be voter. Then by the Reform Act of 1832 (2 Will. 4, c. 45), ss. 34, 54, a register was established; and by sect. 58 no questions could be asked of the voter except (1) as to his identity, (2) as to the continuance of his qualification, and (3) whether he had before voted. There next followed 6 Vict. c. 18, by sect. 79 of which the register is to be deemed conclusive evidence that the persons therein named "continue" to have the qualifications annexed to their name. This section also applies only to procedure at the election itself, as may be seen by reference to sect. 82, which shows that the Legislature had before it the distinction between procedure at and procedure after an election. But the material enactment to consider is no doubt the 7th section of the Ballot Act, and the use of the words "at an election" limits the operation of that section to procedure before the presiding officer; otherwise the effect of the section will be to exclude all appeal whatever from the register. [Lord COLERIDGE, C.J.—According to your argument, the effect of the section would be to make the register more open than ever. GROVE, J.—You seem to use the word "entitled" in two different senses.] That is so; but the difference of the sense arises from the difference of the subject matter. As to the receipt of relief, poor and indigent persons are disqualified from voting by the common law of Parliament—

Smith v. Hall, 33 L. J. 59, C.P.

[KEATING, J.—The votes were held good there, and the case is not unlike the present. Lord COLERIDGE, C.J.—I find Williams, J. citing with approval the following from Heywood on County Elections, p. 278: A distinction may be made between charities which are of such a nature as to imply that the partaker of them is in a state of indigence and abject dependence, and those which afford no such inference, or from which a contrary one may be drawn."] Nevertheless, the point was one which could be taken before the revising barrister; and it is submitted that at least on such points the register is still open.

Thesiger Q.C. (with him *W. G. Harrison* and *Couch*) for the respondent.—The strong authority for the respondent is, that sect. 98 of 6 Vict. c. 18, the only enactment which allowed an election petitioner to go behind the register, is repealed by the Ballot Act 1872, and no enactment has been substituted for it. The contention on the other side goes to this, that the register is final to no intent

C. P.]

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whatever, thus frustrating that secrecy which is the main object of the Ballot Act. Both upon the words and the spirit of the 7th section of that Act, its only meaning can be that the register is absolutely final, except as specified in the proviso. It is however material to trace the history of the legislation upon the subject, and that history is divisible into five periods—(1) Before 1832; (2) between 1832 and 1843; (3) between 1843 and 1867; (4) between 1867 and 1872; and (5) after 1872. 1. The law before 1832 is to be found laid down in Rogers on Elections, p. 48: "The rights of voting for cities and boroughs," it is said "were not, as in counties, regulated by any statute or fixed rule. . . . They were established by special Acts of Parliament, by charters, by local usage, or by the last determination of the House of Commons to the particular place." And at pp. 179, 183, the law as to the receipt of alms is laid down thus: "The receipt of alms was only considered as evidence of inability, which evidence may be rebutted by circumstances; and the franchise was considered as suspended, not annihilated." And thus: "In those of the old boroughs where the usage is not clear, and in all the new boroughs, it seems to be a general principle with regard to charitable foundations that those only disqualify whose funds form a part of the general parish resources for the relief of the poor;" for which latter proposition *Smith v. Hall* (*ubi sup.*) is cited. And it must be borne in mind that it was said in that case that the presumption is in favour of the franchise. They also referred on this point to

Orme on Elections (A.D. 1812), pp. 114, 119;
Elliott on Qualifications (A.D. 1843), p. 250;
Taunton case, 1 Dougl. 369;
Cricklade case, 2 Lud. 365.

Secondly, from 1832 to 1843 the right to vote in boroughs was governed by sect. 27 of the Reform Act, which after giving the franchise to 10l. householders, "if duly registered," enacted that no occupier should vote unless rated, and that no person should be registered unless he possessed a certain residential qualification. Under this section, whether a voter change his qualification or lose it wholly or in part, it has been held that he will still be entitled to vote, provided he has resided within the prescribed limits during the year that the register is in force, and up to the time of the election:

Rogers on Elections, p. 544;
Rochester case, K. & O. 83;
Rochester, Hermitage's case, K. & O. 83; Gate's case, 112;
Worcester, Cook's case, *ib.* 240;
Horsham, Aldridge's case, *ib.* 271.

The position of a voter, therefore, before 1843, was that where there had been an express decision of the revising barrister the Election Committee was a court of appeal from that decision. See Rogers on Election Committees, p. 174. Thirdly, from 1843 to 1867 the law was governed by 6 Vict. c. 18, sect. 79 of which provided that the register should be conclusive evidence of the voter's retaining the same qualification. That this section does not refer to procedure only may be seen from the wording of sect. 98, which provides that election committees may inquire into the right to vote. This section made the register final, unless there had been an express decision of the revising barrister. And the revising barrister was bound by decisions to distinguish between common law incapacity, such as that of an alien, and statutory

incapacity such as that of a custom house officer, under 22 Geo. 3, c. 41 s. 1:

Pownall v. Hood, 11 C. B. 1;
Cooper v. Harris, 7 M. & G. 97.

Upon this point they also referred to

Monmouth, Hall's case, K. & O. 415;
Rochester, Collins's case, *ib.* 121.

Fourthly, the material sections in the Representation of the People Act 1867 (30 & 31 Vict. c. 102), are sects. 3 & 4, by which every man possessing the qualifications therein mentioned "shall be entitled to be registered as a voter, and, when registered, to vote." In the *Coventry case* (1 O'M. & H. 107), Willes, J., said that under 6 Vict. c. 18, s. 98, if no objection had been taken before the revising barrister, the election judge could not, even on a scrutiny, go into a question of qualification; but that if an objection could not have been taken before the revising barrister, then in respect of such an objection, arising afterwards, it came within the expression "legal incapacity at the time of voting," which might be inquired into by an election judge. They also cited

The Oldham Case, 1 O'M. & H. 157;
The second Bewdley Case, *ib.* 175.

Fifthly, coming finally to the Ballot Act 1872, we find sect. 98, of 6 Vict. c. 18 repealed, and for what other purpose could it have been repealed, except to make the register final? Then, the words of sect. 7, which has been preceded by the significant heading "Amendment of Law" are absolutely conclusive against the respondent. Besides that, the section is by sect. 15, to be construed as one with the Acts of 1843 and 1867, while by rule 41 especial care is directed to be taken that the mode in which any particular voter has voted shall not be discovered until it has been proved that he has voted. The proviso therefore of sect. 7 will not apply to the recipients of alms, who are neither prohibited by common law or statute from voting; if they were, there would be a wholesale disfranchisement of voters in many small boroughs. It may be asked to whom then does the proviso apply? It is not incumbent upon the respondent to give an answer, but it may be answered that it applies to cases where there is a prohibition by statute properly so called *e.g.* to revenue officers or to such common law disqualifications as those of minors, aliens, felons, and women. All these answer the definition. In fact the only arguable point for the petitioner lies in the use of the word "at" in sect. 7, but it has been shown that that argument fails.

Giffard, Q.C., in reply cited
The Rochester case, K. & O. 83;
The Bedford Town case, F. & K. 112;
The Oldham case, 1 O'M. & H. 159;

and contended that the argument on the other side limited the scrutiny which was assumed by rule 41 of the Ballot Act 1872. He also relied on the Preamble of the Reform Act, and the title of the Ballot Act, and argued that prohibited in sect. 7 must mean something which ought not to be done.

Lord COLERIDGE, C.J.—The court is unanimous, and entertains no doubt upon the question raised; but as the seat is claimed, and the questions are of great importance, we think it desirable to put our opinion into writing.

June 23.—The following written judgment was delivered by Lord COLERIDGE, C.J.:—This is a case stated for the opinion of this court by my brother

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Mellor, who tried the Petersfield Election Petition. The petitioner was to be entitled to the seat if (1) the register is not conclusive as to the right to vote on the part of all or some of the voters who voted for the sitting member, or (2) if some of those voters came within the proviso of the 7th section of 35 & 36 Vict. c. 33. The case was argued before us with remarkable learning and clearness by Mr. Giffard and Mr. Thesiger; and I may, I hope, be permitted to thank them for the great help they have afforded the court in arriving at a conclusion. A very natural result of an argument so complete and exhaustive was to narrow materially the disputable ground, and to reduce the matters for decision to very few. We come at last to the true construction of the 7th section of the Ballot Act, and to the question whether upon the right to vote of all, or, if not upon the right of all, upon the right of which of the voters whose votes are impugned by this petition, the register of electors is or is not conclusive. The history of legislation on the subject of the register seems to me, when accurately stated, to be practically decisive of this case. There was no register before the first Reform Act, in 1832 (2 Will. 4, c. 45), and after the various provisions for revising and completing the register, both in counties and boroughs, that Act enacts in terms sufficient to imply its conclusiveness, in sect. 54, that "it shall be deemed the register of electors to vote for members of either counties or boroughs." By the 58th section of that Act three questions, and three only, were allowed to be put at the time of polling as to the right of any person to vote—First, as to the identity of the voter; secondly, as to having already voted; thirdly, as to his still retaining the qualification for which his name stood in the register. The 60th section provides for the election committees retaining some part of their control over questions as to the qualification of voters, and allowed the correctness of the register to be impeached in any case in which the revising barrister had, in the opinion of the committee, improperly decided. There were, indeed, no direct and affirmative words making the register conclusive, but the practical effect of the provisions of the Reform Act was, with slight exceptions, to make it so. But the Registration Act, the 6 & 7 Vict. c. 18, went much further; it enacted in sect. 79 that, "at every future election for a member or members to serve in Parliament for any county, city, or borough, the register of voters so made as aforesaid, shall be deemed and taken to be conclusive evidence that the persons therein named continue to have the qualifications which are annexed to their names respectively in the register in force at such election: Provided always, that it shall not be lawful for any person to vote at any election for a member or members for any county where the qualification annexed to the name of such person shall have appeared annexed to his name in the preceding register; and such person, on the last day of July, in the year in which such register so in force was formed, shall have ceased to have such qualification, or shall not have retained so much thereof as would have entitled him to have had his name inserted in such register: Provided also, that no person shall be entitled to vote at any future election for a member or members to serve in Parliament for any city or borough, unless he shall, ever since the 31st July, in the year in which his name was inserted

in the register of voters then in force, have resided, and at the time of voting shall continue to reside within the city or borough, or place sharing in the election for the city or borough in the election for which he shall claim to be entitled to vote, or within the distance thereof required by the said recited Act (2 Will. 4, c. 45, s. 33), to entitle such person to be registered in any year." And the 81st section enacts that "in all elections whatever of a member or members to serve in Parliament for any county, &c., or for any city or borough in England or Wales, or the town of Berwick-upon-Tweed, no enquiry shall be permitted at the time of polling as to the right of any person to vote, except only as follows, that is to say, that the returning officer or his respective deputy shall, if required, on behalf of any candidate, put to any voter at the time of his tendering his vote, and not afterwards, the following questions, or either of them:—1. Are you the same person whose name appears as A. B. on the register of voters now in force for the county, &c.? 2. Have you already voted, either here or elsewhere, at this election for the county, &c.?" It enacted in the 98th section as follows, amending the 60th section of the Reform Act, which I have already read:—"It shall and may be lawful for any such committee" (the select committee appointed for the trial of a petition complaining of an undue election or return) "to inquire into and decide upon the right to vote of any person who, being upon the register of voters in force at the time of such election, shall have voted in such election, or, not being upon such register, shall have tendered his vote at such election, in case the name of such person shall have been specially retained upon such register, or inserted therein, or expunged or omitted therefrom, by the express decision of the revising barrister, who shall have revised the lists of voters from which such register shall have been formed; and also that it shall and may be lawful for such committee to inquire into and decide upon the right to vote of any person who, being upon such register, shall have voted in such election, so far as the same may be disputed on the ground of legal incapacity at the time of his voting under and by virtue of any statute now or hereafter to be in force, or on the ground of any other legal incapacity at the time of his voting, which may have arisen subsequently to the expiration of the time allowed for making out the list of voters, from which the register of voters in force at the time of such election shall have been formed; but that except in such cases, and on such grounds as aforesaid, the register of voters in force at the time of such election shall, so far as regards the proceedings before such committee, be final and conclusive to all intents and purposes as to the right to vote in such elections of every person who shall be upon such register." So stood the law at the time of the passing of the Representation of the People Act (30 & 31 Vict. c. 102), and the argument addressed to us by Mr. Giffard was in substance this: Before the Reform Act, the returning officer, from the very necessity of the case, was allowed, and indeed obliged, to hold a scrutiny of the voters at the time of the poll. The creation of a register put an end to this necessity. The returning officer's power of asking questions was accordingly limited, as the Reform Act, and subsequently the Registration Act, limited it. But the conclusiveness of the register enacted by

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these Acts had reference only to the returning officer and to the time of the actual election, and at all events, except so far as these enactments made it so, it was not conclusive. Then came the Representation of the People Act, 1867, and by the 3rd, 4th, 5th, and 6th sections of that Act, new franchises were created. In all these sections the words are the same. The persons possessing the respective qualifications are enacted to be respectively "entitled to be registered as voters, and when registered to vote." This Act, it is said, pursues the same line of legislation; it makes the register conclusive on the returning officer at the time of voting, but it goes no further. This was followed by the Ballot Act (35 & 36 Vict. c. 33), which repeals the 58th and 66th sections of the Reform Act, the 98th section of the Registration Act, and the proviso to the 79th section of the same Act, and enacts affirmatively in the 7th section as follows: "At any election for a county or borough a person shall not be entitled to vote unless his name is on the register of voters for the time being in force for such county or borough, and every person whose name is on such register shall be entitled to demand and receive a ballot paper and to vote: Provided, that nothing in this section shall entitle any person to vote who is prohibited from voting by any statute, or by the common law of Parliament, or relieve such person from any penalties to which he may be liable for voting." It contemplates a possible scrutiny, it is said, by the expression "on a scrutiny," in the 25th section, and clearly the opening of the register, by the expressions of the 41st rule. The effect of the Ballot Act, it was contended, was, by repealing the 98th section of the Registration Act, and the 60th section of the Reform Act, to remove from the Statute Book the provisions which made the register conclusive; and as the 79th section applied only, when it was first enacted, to the procedure at elections, and affected only the returning officer, so such was its only effect now; and the 7th section of the Ballot Act is to be read in the same manner, as applying only to procedure at elections, and, by its proviso, practically leaving open the inquiry into any voter's vote which, although it may be on the register, is capable of being impeached on any legal ground. The argument is ingenious, but, I think, untenable. From the Reform Act to the Ballot Act, the tendency of legislation has been to make, with certain exceptions, the register conclusive. There is nothing in the words "at" or "in" any election (for both prepositions are used) to limit the enactments to the time of polling only; and although it is true that the 58th and 60th sections of the Reform Act, and the 98th section of the Registration Act have been repealed, the enacting part of the 79th section of the Registration Act has been carefully kept in force, which is the more remarkable because the provisos to that section, which insist on the retention of certain incidents of the qualification up to the time of voting, are expressly repealed. No answer has been given to the question, and probably no answer could be given to it, what effect is to be ascribed to the 79th section of the Registration Act, beyond and other than the 7th section of the Ballot Act, if both these sections have to do with procedure only? The retention of the earlier section would be useless if the 7th section of the Ballot Act makes the register

certainly conclusive on the returning officer. I think the true construction of these sections, which alone remain, is to make the register conclusive not only on the returning officer, but also on any tribunal which has to inquire into elections, except in the case of persons ascertained by the proviso. These are "persons prohibited from voting by any statute or by the common law of Parliament." I do not think that these words are pointed at any of the cases which my brother Mellor has referred to us. The receipt of alms—supposing the alms in this case to be such as to disqualify; the receipt of parochial relief; non-residence within the proper distance of the borough; non-occupation; insufficient qualification—none of these things appear to satisfy the words of this proviso. It does not mean persons who from failure in the incidents or elements of the franchise, could be successfully objected to on the revision of the register; it means persons who from some inherent or for the time irremovable quality in themselves have not, either by prohibition of statutes, or at common law, the status of Parliamentary electors. Such, for example, are peers, whether of the United Kingdom or of Scotland or Ireland, women, persons holding certain offices or employments, the subjects of statutory prohibition, and persons convicted of crimes which disqualify them from voting. I do not say that this list is exhaustive. It is enough to give examples of the cases in which I think the register would be still open. In all the cases referred to us by my brother Mellor, I think it is not open; and I answer the questions put by him in the 12th paragraph of the case by saying that I think none of the votes there referred to ought to be struck out and disallowed.

KEATING, J., said:—Having had an opportunity of reading and considering the judgment just pronounced by my Lord, it remains for me only to say that I entirely concur in it.

GROVE, J., said:—I also have read and considered my Lord's judgment, and I agree in the conclusion he has arrived at, and the reasons which he has given.

Judgment for the respondent.

Agent for petitioner, *Soames*.

Agents for respondent, *Rogerson and Ford*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Thursday, June 25, 1874.

(Present the Right Hons: Sir JAMES COLVILLE, Sir B. PEACOCK, Sir MONTAGUE SMITH, and Sir R. COLLIER.)

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ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Ecclesiastical procedure—Monition in civil suit—Allegation of interest.

A monition calling upon the churchwardens of a parish to remove certain alleged unlawful ornaments in the church, or to appear and show cause against such removal, must disclose on its face such an interest in the person at whose instance it issued as would have entitled him to institute and carry on a civil suit commenced in the ordinary way by citation.

THIS was an appeal from a sentence or decree of the Arches Court of Canterbury.

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The proceedings were originated in the Diocesan or Commissary Court of Canterbury.

On the 24th March 1873, a monition and citation under seal of that court was issued by order of the judge of the petition of John Benjamin Lee (the appellant), after the affidavit of the Rev. John Puckle, Rural Dean of the Rural Deanery in which the Church of St. Peter, Folkestone, is situated, had been filed in the court, and after it had been made to appear to the judge that the representations of figures in the affidavit mentioned, had been placed in the Church of St. Peter, Folkestone, without any faculty having been granted for that purpose.

This monition and citation monished and cited the Reverend Charles Joseph Ridsdale, Clerk, Incumbent of the parish or district and church of St. Peter, Folkestone, in the county of Kent, and diocese and jurisdiction of Canterbury, and John Fagg and Edward Mummery, the churchwardens of the said parish or district (the said churchwardens being the respondents in this appeal), to remove, or cause to be removed, certain representations of figures in coloured relief, of plastic material, representing scenes of our Lord's Passion, attached to the walls of the said church of St. Peter, Folkestone, and commonly called Stations of the Cross and Passion, or to appear and show cause why the same should not be removed, on the ground that the said stations had been placed in the said church without any faculty having been granted for placing the same there.

The monition was served on the incumbent and churchwardens on the 25th March 1873, and on the 31st March an appearance was entered by proctors on their behalf.

On the 26th May 1873, counsel appeared in court on behalf of the churchwardens only, and prayed the judge to dismiss them from the suit with costs, on the ground that John Benjamin Lee did not show on the face of the monition any interest in the matter complained of, either of a public or a private character.

On the 9th June 1873, the judge (Dr. Tristram), by interlocutory decree, rejected the prayer of the churchwardens. From this decree an appeal was made to the Arches Court of Canterbury on behalf of the churchwardens.

On the 14th Nov. 1873, the Official Principal of the Arches Court of Canterbury, reversed the decree of the court below, and pronounced for the appeal, and dismissed the churchwardens from the suit with costs (L. Rep. 4 A. & E. 135).

The present appeal was from this decree.

Dr. Deane, Q.C. and H. Cowie appeared for the appellant, and argued that the suit was not such as to require the party at whose instance it was commenced to have any special or private interest in the subject matter thereof, or any interest other than that of maintaining public order, and of enforcing obedience to ecclesiastical law; and that it was not necessary that he should have sustained any civil injury in respect of the subject matter of the suit, or that he should have the status of a parishioner of St. Peter's, Folkestone.

A. J. Stephens, Q.C. and W. G. F. Phillimore, contra.

In addition to the cases referred to in the judgment the following authorities were cited

Turner v. Meyers, 1 Hagg. Const. 414;

Reg. v. Bishop of Chichester, 2 E. & E. 209; 29 L. J. 23, Q. B.

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Their Lordships' judgment was delivered by Sir R. COLLIER.—In this case an application was made to the Commissary General of the Diocese of Canterbury for a monition to be issued to the Rev. Charles Joseph Ridsdale, the incumbent of St. Peter's, Folkestone, and the churchwardens, ordering them to remove certain ornaments called Stations from their church, unless they could show cause why such ornaments should not be removed. The application for this monition appears to have been made by a gentleman described as Mr. John Benjamin Lee, of No. 2, Broad Sanctuary, in the city of Westminster, and their Lordships cannot take cognizance of any other description of that gentleman. Mr. Lee does not state that he has any interest in the suit. The rector did not appear, but the churchwardens, upon the day appointed by the Commissary General for holding a court to make an order in the matter, insisted that the suit should be dismissed, on the ground that the monition did not show that Mr. Lee, the promovent of the suit, had any such interest as would entitle him to maintain it. The learned Commissary General overruled this objection, whereupon an appeal was preferred to the Court of Arches. The Judge of the Court of Arches reversed the judgment of the Commissary General, and directed that the suit should be dismissed as against the churchwardens, with costs. The first question which arises in the case is—whether it is in point of law necessary that the promovent of a suit of this description should have an interest in the subject of it? On this question the learned Judge of the Court of Arches observes: "In the ecclesiastical court there are two kinds of suits, civil and criminal. The criminal suit, which is the promotion of the office of the judge, that is, of the ordinary, is open to any person whom the ordinary may think fit to allow to promote his office by the institution of a criminal suit; such a suit is '*ad publicam vindictam*,' and in some sense concerns every member of the church. The civil suit is not open to everyone, even with the consent of the ordinary, but only to those who have a personal interest in it;" and the learned judge proceeds to rule that this suit comes within the latter description. Their Lordships are of opinion that the learned judge was right. It has been contended, indeed, at the bar that there is in the ecclesiastical courts a certain third class of suits, not very accurately defined, but designated generally as a *tertium genus*, partaking partly of the character of civil suits and partly of the character of criminal suits, and that this suit is one of that *tertium genus*, but no sufficient authority and no sufficient argument founded upon principle has been adduced to induce their Lordships to affirm the existence of this class of suits, or, if it exists, that the present suit belongs to it. Their Lordships find the law on this subject laid down by Lord Stowell in a case which has been quoted, the *Duke of Portland v. Bingham* (1 Hagg. Cons. 157), in which he lays down the distinction between criminal and civil ecclesiastical suits, without alluding to any supposed third class of suits, in these terms:—"There are other interests in which every man partakes, such as that of maintaining public order, &c. These are clear, direct, and universal, and will entitle anyone to institute proceedings to preserve that order. But such proceedings must be *ad publicam vindictam* and by criminal articles exhibited in due form,

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which is the usual way of trying such matters as the present, and the most convenient. In that case the question would be reduced to one point only—the right of the party who is the object of such proceedings, whereas in civil suits a previous question may arise of equal difficulty on the right and title of the person instituting the suit. This, then, is an important distinction.” Their Lordships, therefore, have come to the conclusion that it is necessary in point of law to enable Mr. Lee to maintain this suit that he should have some interest in it. This being so, the questions which remain are purely questions of pleading and practice in the ecclesiastical courts. The first pleading question which arises is whether it is necessary that the monition should show the interest of Mr. Lee upon the face of it; and, secondly, whether, if the defendants are entitled to object to his want of interest, they have objected to it at the proper time and in the proper manner? It has been said that citations in suits of this kind have usually not set out the interest of the promovent of the suit. Some cases have been cited upon the subject, and reference has been made to Conset’s Book of Practice, in which, although (as far as their Lordships understand) no precedent is actually set out of a form of citation or a form of monition, still the requisites of a citation are described. Those requisites are first, the name of the judge, his commission, and style; secondly, the name of the party cited; thirdly, the day and place where he must appear; fourthly, the cause for which the suit is commenced; fifthly, the name and address of the party at whose instance the citation is obtained; and sixthly, the residence of the defendant; and it is argued that this enumeration excludes the notion that the interest of the promovent of the suit should appear in the citation. It appears however to their Lordships that that part of the citation which shows “the cause for which the suit is commenced,” would probably be defective unless it showed the interest which the promovent had in it. Some cases were then referred to in which it has been contended that no interest was set out in the citation, but those cases do not appear to their Lordships to bear out that contention. In the *Duke of Portland v. Bingham*, it is said, “This is a case arising upon a decree taken out by the Duke of Portland, as lay rector, impropiator, and parson of the rectory and parish of St. Marylebone, against Dr. Bingham, citing him to appear and bring in a licence granted by the Bishop of London authorising him to perform the office of joint Sunday preacher in a chapel in Quebec Street in the said parish.” It seems from his citation that the Duke of Portland did allege an interest, and the question subsequently raised by an act on petition, was whether the interest he had set out was or was not sufficient. Then again in *Line v. Harris* (1 Lee, 146), it would appear, from the short report of the citation that it did show some interest on the part of the promovent. “Mr. Harris, the vicar of St. Stephen’s, took out a citation to call Line to answer in a cause of invading and encroaching on Harris’s office by officiating in this chapel without his leave.” Possibly if the citation had been set out in full, the nature of his interest would have more clearly appeared. Again, in the case of *Hopper v. Davis* (1 Lee, 640), some interest was stated on behalf of the churchwardens. Be this as it may, it is to be observed that a citation

only calls upon the defendant to appear, and then the proceedings take the ordinary course of libel and allegation, and so on. This suit is commenced not merely by citation but by monition also. The defendant is not only called upon to appear, but to do a certain act, or to show cause why it should not be done. A monition is by no means a process of the court to be issued like a citation as a matter of course, but is granted on application in the exercise of judicial discretion, and in the absence of cause shown becomes an imperative order. If therefore it were clear that a mere citation need not show an interest, it would by no means follow that a monition need not. As far as their Lordships are able to collect, this mode of proceeding, although it may not be altogether novel, has been more frequently adopted recently, than in former times. According to the statement of the Dean of the Arches, which undoubtedly is correct, no precedent is to be found of any monition not showing an interest in a civil suit of this kind. One precedent only has been brought before their Lordships of such a monition, but that is of a very important character. It is the well-known case of *Beal v. Liddell* (Moore’s Special Report 1857), in which the suit was commenced in precisely the same manner as this, and in which the interest of the promovent of the suit is set out most carefully in the monition. It may be at least inferred that their Lordships, who heard that case (the committee comprising very eminent names), were of opinion that this was proper and necessary, for Mr. Beal appeared before the Privy Council desiring the execution of the monition, whereupon counsel for the defendant made an objection which was afterwards withdrawn, that Mr. Beal had no interest to continue the suit, although he had lawfully begun it, whereupon (according to the report of Mr. Moore) the committee observe:—“The counsel for the respondents took an objection, which they did not press, to Beal being heard, as he had ceased to be a parishioner or inhabitant within the district of St. Barnabas, and therefore had no *locus standi* in an ecclesiastical court. Their Lordships intimated their opinion that the objection in general law and practice was correct, and that it was only in the particular circumstances of the case, and having regard to the waiver of the objection by the incumbent and churchwardens, that Beal would be allowed to proceed, but that the permission granted him was not to be considered a precedent.” Their Lordships seem to have entertained some doubt as to whether Beal’s interest must not have been a continuing interest to enable him to enforce execution in the suit, but none that it was proper and necessary that his interest in the first instance should have been stated in the proceeding by which the suit was commenced. That being so, their Lordships are clearly of opinion that it was necessary that Mr. Lee’s interest should appear upon the monition. Then comes the question, if the defendants had a right to object to his interest not appearing when and how they should have objected? It is stated, indeed, by the learned Judge of the Commissary Court that in his opinion the only convenient and correct mode of raising an objection to Mr. Lee’s interest is, either appearing under protest and calling upon him to propound his interest, or by raising it on the admission of the libel or by the subsequent pleadings. The learned Judge of the Court of Arches speaks of three

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courses which were open to the defendants. He says, "The party so cited might have taken one of three courses, he might have appeared and demanded a more formal proceeding by way of libel, or by the less formal way of act on petition, but he might also have made his defence by appearing in obedience to the monition and showing cause against it to the court." The learned Commissary gave notice that he would hold a court for the purpose of cause being shown against the monition, and he states that he held this court with a view of making an order in the matter. Under these circumstances, the defendants being called upon, as they properly would be, to show cause, in their Lordships' opinion it was competent for them to show as cause that which was fatal to the suit, namely, that the plaintiff had no interest in instituting it. Their Lordships are therefore of opinion that the judgment of the Court of Arches was right, and they will humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal, with costs.

Proctors for the appellant, *Moore and Currey.*

Proctors for the respondents, *Brooks, Tanner, and Jenkins.*

V.C. MALINS' COURT.

Reported by F. GOULD and JAMES E. HORNE, Esqrs.,
Barristers-at-Law.

Friday, June 19, 1874.

Re CLERGY ORPHAN CORPORATION.

Charity—Investment of funds—Change of investments—Cash under control of court—23 & 24 Vict. c. 38, sect. 11—Metropolitan Consolidated Stock—34 & 35 Vict. c. 47, sect. 13.

The treasurer of a charity was bound by the Act incorporating the charity to invest all the moneys, given to the charity in the public funds and he accordingly invested the money in the Three per Cents. and New Three per Cents.

Held that he might sell out these stocks for the purpose of re-investing in any of the securities in which cash under the control of the court might be invested or (under 34 & 35 Vict. c. 47, sect. 13) in Metropolitan Consolidated Stock.

PETITION. This was a petition by the above-named charitable corporation praying the advice of the court as to their power of investment of the funds applicable to the purposes of the charity.

The Clergy Orphan Corporation was established by 49 Geo. 3, c. xviii, the objects of the society being the clothing maintaining and educating poor orphans of clergymen of the established church in England until of age to be put apprentice and the corporation was thereby empowered to hold all sums of money given and bequeathed to it for the purposes in the Act mentioned, and might purchase and hold lands.

By the fourth section of the Act it was enacted that it should be lawful for the treasurer for the time being of the corporation, and he was thereby required with the consent of the committee to lay out and invest all sums of money which had been or should be given or bequeathed for the purposes of the charity (other than such as should be required for immediate expenditure) in any of the public funds. And by the fifth section it was enacted that the dividends, and interest which should from time to time arise from funds and securities belonging to the corporation should from

time to time be applied for the purposes in the Act mentioned. The moneys which had from time to time been given, devised, or bequeathed for the charitable uses in the Act mentioned, and which were not required for immediate expenditure were from time to time invested in the Three per Cents. and New Three per Cents., and at the time of presenting this petition amounted to upwards of 125,000*l.* The corporation were desirous of selling out the sums of stock and of re-investing the proceeds in some or one of the stocks, funds, or securities in which by the general order of the 1st Feb. 1861, cash under the control of the court might be invested or (under the provisions of the Act of 34 & 35 Vict. c. 47, sect. 13) in Metropolitan Consolidated Stock (a)

The petition therefore prayed the advice of the court: Whether your petitioners may sell out the several sums of bank annuities now standing in their names or such parts thereof as they may think expedient, and may re-invest the proceeds of such sales with the consent and approbation of the committee, in or upon the stocks, funds, or securities, in or upon which by the general order of this honourable court of the 1st Feb. 1861, cash under the control of this honourable court may be invested or in Metropolitan Consolidated Stock.

Cozens-Hardy, for the petitioners. We come within sect. 11 of the Act of 23 & 24 Vict. c. 38. The treasurer is bound to invest the money received by him, and is not merely empowered. *Re Warde* (2 Joh. & Hem. 191) does not apply.

THE VICE-CHANCELLOR.—I cannot understand the decision in *Re Warde*. I think that the treasurer being a trustee his powers are extended by 23 & 24 Vict. c. 38, sect. 11, and I answer the question in the affirmative.

Solicitors, *Chapple and Welch.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Wednesday, April 29, 1874.

REG. v. GUARDIANS OF STEPNEY UNION.

Criminal lunatic—Maintenance—Power of justices to adjudge settlement of lunatic—Order made by justices—"Debt, claim, or demand"—9 Geo. 4, c. 40, s. 54; 3 & 4 Vict. c. 54, s. 7; 22 & 23 Vict. c. 49, s. 1.

Where a person charged with felony has been acquitted on the ground of insanity, and is detained during pleasure, two justices of the county where the lunatic is detained may inquire into and adjudge the settlement of the lunatic, and may make an order upon the overseers or guardians of the parish where the lunatic is adjudged to be legally settled to pay such weekly sum for the maintenance of the lunatic as two justices shall from time to time direct.

The service of such an order upon the guardians need not be accompanied by a statement of the grounds of chargeability and particulars of settlement.

(a) Section 13 is as follows. "A trustee, executor, or other person empowered to invest money in public stocks, or funds, or other government securities may, unless expressly forbidden by the will or other instrument under which he acts, whether prior to this date or not, invest the same in consolidated stock."

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Proceedings to enforce the payment of each such weekly sum must be commenced within the time limited, by sect. 1 of 22 & 23 Vict. c. 49.

THIS was a writ of *mandamus* to the guardians of Stepney Union to pay for the maintenance of Adelaide Freedman, a criminal lunatic in Broadmoor Asylum, the said Freedman having a settlement in the Stepney Union.

The writ of *mandamus* recited that Adelaide Freedman was on 24th Nov. 1869, at the Old Bailey, found insane by a jury, and the court ordered her to be confined during Her Majesty's pleasure; that two justices of the City of London inquired into her settlement and pecuniary circumstances, and on 21st Dec. 1869, adjudged her to be settled in the parish of St. Paul, Shadwell, within the Stepney Union, and the pauper having been sent to Broadmoor Asylum, they ordered the Stepney Union to pay to the superintendent of that asylum the sum of 14s. weekly, the same being a reasonable charge; that the lunatic was removed to the asylum on 7th Jan. 1870; that the union had not paid the said sum, and there was due 44l. 18s. This sum the writ ordered the union to pay.

The return alleged, first, that A. Freedman was not found insane as alleged; secondly, that neither of the said justices had any jurisdiction to make such order; thirdly, that before making the order the union received no notice, and were not aware of the said inquiry. The return proceeded as follows:—

4. And we the guardians of the poor aforesaid, do further humbly certify and return to our said sovereign lady the Queen that the said supposed order of justices, mentioned and referred to in the said writ, was and is made by the said two justices, mentioned and referred to in the said writ, to the effect and in the words following, that is to say, "To the guardians of the poor of the Stepney Union, in the county of Middlesex, in which the parish of St. Paul, Shadwell, is comprised, and to the overseers of the poor of the said parish, and to each of them. London, to wit,—Whereas one Adelaide Freedman was on the 22nd Nov., in the year of our Lord 1869, at the general session of oyer and terminer of our Lady the Queen held for the jurisdiction of the Central Criminal Court, at Justice Hall, in the Old Bailey, in the suburbs of the City of London, indicted for murder, and at the same session of oyer and terminer held at aforesaid on the 24th day of the said month of November, the said Adelaide Freedman was found to be insane by a jury lawfully empanelled, whereupon the court ordered the said Adelaide Freedman to be confined during her Majesty's pleasure. Now we, Samuel Wilson, Esq., and Sir William Anderson Rose, Knight, being two of her Majesty's justices of the peace in and for the City of London and the liberties thereof, in which the said Adelaide Freedman was so tried and found insane as aforesaid (no one of her Majesty's principal Secretaries of State having otherwise directed), having now received evidence on oath touching the said several premises, do adjudge the same to be true. And we the said Samuel Wilson, Esq., and Sir William Anderson Rose, Knight, such justices as aforesaid of, in, and for the said City of London and the liberties thereof, do now inquire into and ascertain by the best evidence and information which can be obtained under the circumstances of the personal legal disability of the said Adelaide Freedman, into the place

of the last legal settlement and the pecuniary circumstances of the said Adelaide Freedman, and it now appearing to us the said justices that the said Adelaide Freedman is not possessed of sufficient property which can be applied to her maintenance, and having now received evidence on oath touching the place of the last legal settlement of the said Adelaide Freedman, do by this our order, under our hands and seals, adjudge that the said Adelaide Freedman is lawfully settled in the parish of St. Paul, Shadwell, in the county of Middlesex; and whereas the said Adelaide Freedman is now confined in her Majesty's gaol of Newgate; and whereas, upon the making of this order, a warrant will be issued by one of her Majesty's principal Secretaries of State for the removal of the said Adelaide Freedman from the said gaol of Newgate to the criminal lunatic asylum at Broadmoor in the county of Berks: Now we do hereby order you, the guardians of the poor of the Stepney Union, in which the said parish of St. Paul, Shadwell, is comprised, from and immediately after the removal of the said Adelaide Freedman from the said gaol of Newgate to the Broadmoor Criminal Lunatic Asylum aforesaid, to pay on behalf of the said parish to the superintendent for the time being of the said criminal lunatic asylum, weekly and every week, the sum of 14s., the same having been proved before us to be a reasonable charge in that behalf for the maintenance of the said Adelaide Freedman in the said lunatic asylum during her confinement therein, under and by virtue of the warrant so to be issued by one of her Majesty's principal Secretaries of State as aforesaid, or until it shall be otherwise ordered according to law. Given under our hands and seals at the Guildhall justice room in the said city, this 21st Dec., in the year of our Lord 1869. SAMUEL WILSON (L.S.) WM. A. ROSE (L.S.)." Which said supposed order was and is illegal and bad on the face thereof by reason that it does not show that Adelaide Freedman therein mentioned, was at the time of the making of the said supposed order, kept in custody or imprisoned within the jurisdiction of the said justices who made the said supposed order, and by reason that the said supposed order does not show that it was made upon or in respect of any complaint or information made to or before the said justices who made the said supposed order, and by reason that the said supposed order does not show that we, the said guardians of the poor, had any summons or notice to appear or attend before, or did in any way appear before the said justices on their inquiry mentioned and referred to in the said supposed order into the place of the legal settlement and the pecuniary circumstances of the said Adelaide Freedman.

5. And we, the guardians of the poor aforesaid, do further humbly certify and return to our said sovereign lady the Queen, that the said supposed order of justices mentioned and referred to in the said writ was not duly served upon the said guardians of the Stepney Union as alleged in the same writ.

6. And we the guardians of the poor aforesaid do further humbly certify and return to our said sovereign lady the Queen, that although the said supposed order mentioned and referred to in the said list, was in fact made on the 21st Dec. 1869, the said supposed order has never been served

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upon us the guardians of the poor aforesaid by the delivery of a copy or counterpart of such supposed order, accompanied by a statement in writing setting forth the grounds of such supposed order, including the particulars of the settlement or settlements relied upon in support thereof, and that by reason of the said supposed order never having been served as last mentioned, we the said guardians of the poor aforesaid have hitherto been prevented from appealing against the said supposed order, and having the said supposed order quashed by the quarter sessions of the peace holden in and for the City of London.

7. And we the guardians of the poor aforesaid, do further humbly certify and return to our said sovereign lady the Queen that as to 25*l.* 4*s.* part of the sum of 44*l.* 18*s.* mentioned and referred to in the said writ, the same consists of thirty-six sums of 14*s.* each, supposed to have been ordered to be paid by and to have become due from us the guardians of the poor aforesaid at intervals of a week from the 14th Jan. 1870, until the 23rd Sept. 1870; that if the said thirty-six sums of 14*s.* each ever were ordered to be paid by and became due from us the guardians of the poor aforesaid, the same were debts, claims, or demands, and their total the sum of 25*l.* 4*s.*, was a debt, claim, or demand lawfully incurred by and becoming due from us the guardians of the poor aforesaid as the guardians of an union, namely, the said Stepney Union, in the county of Middlesex, after the passing of the Act made in the session of Parliament holden in the 22nd and 23rd year of the reign of our sovereign lady the Queen, to provide for the payment of debts incurred by boards of guardians in unions and parishes, and boards of management in school districts, and were so incurred, and so became due before the 29th Sept. 1870; that the half-year's accounts for the said Stepney Union ought to have been and were closed, according to the order of the Poor Law Board, up to the 25th March 1870, the said 29th Sept. 1870, and the 25th March 1871, respectively; that no proceedings for the recovery of the said thirty-six sums of 14*s.* each or any of them, or for the recovery of their total the said sum of 25*l.* 4*s.*, or for the recovery of any part of any such sums, were commenced within the said half-year ending the said 29th Sept. 1870, or within three months after the expiration of such half-year, nor has the Poor Law Board granted any extension of time for the payment of the said thirty-six sums of 14*s.* each or any of them, or for the payment of their total the said sum of 25*l.* 4*s.*, or for the payment of any part of any such sums, nor was the said writ issued nor any application for the same made within the time so limited by the said statute as aforesaid.

8. And we the said guardians of the poor humbly submit that for the reasons and causes aforesaid, we ought not to and cannot pay to the superintendent for the time being of the criminal lunatic asylum at Broadmoor mentioned and referred to in the said writ, the sum of 44*l.* 18*s.* 0*d.* mentioned and referred to in the said writ, under and in pursuance of the said supposed order mentioned and referred to in the said writ, for the maintenance of the said Adelaide Freedman in the said criminal lunatic asylum.

To this return the prosecutor pleaded that the said A. Freedman was found to be insane as stated in the writ of *mandamus*; that the order of justices was in the words and figures set forth in the fourth

paragraph of the return, and was in full force and validity; that the justices had jurisdiction; that the guardians were duly summoned and had due notice to appear before the justices on the said inquiry; that the said order was duly served; that the said half-yearly accounts were not closed up to the 25th March 1870, 29th Sept. 1870, and 25th March 1871, respectively.

There was also a demurrer to the first, second, third, fourth, sixth, and seventh paragraphs of the return.

The defendants took issue on the plaintiff's second, third, fourth, fifth, sixth, and seventh pleas. And as to the fifth plea the defendants, on equitable grounds, say that after the said supposed order had been in fact made, and after the said Adelaide Freedman had been removed to and admitted into the said Broadmoor criminal lunatic asylum, to wit, on or about the 14th Jan. 1870, a copy of the said supposed order, but not accompanied by a statement in writing, setting forth the grounds of such supposed order, including the particulars of the settlement relied upon in support thereof, was served on the defendants; that the defendants, desiring and intending to appeal against the said supposed order, duly entered their appeal against the same for hearing at the general quarter sessions of the peace holden in and for the said city of London; that the said appeal duly came on to be heard at the general quarter sessions holden on the 9th April 1870, before Sir Robert Walter Carden, knight, Sir Thomas Gabriel, baronet, alderman of the said city, the Right Honourable Russell Gurney, recorder of the said city, David Henry Stone, esquire, Thomas Scambler Owden, esquire, other of the aldermen of the said city, and others their fellow justices of the peace of our said lady the Queen in and for the said city of London, in which said appeal the defendants were the appellants, and Edward James Read, the clerk of the peace for the said city of London, was the nominal respondent for and on behalf of the plaintiff; that both parties duly appeared by counsel at the said quarter sessions; that the said nominal respondent for and on behalf of the plaintiff, by his said counsel, then and there objected to the jurisdiction of the said court to proceed in the hearing of the said appeal, on the ground that the said supposed order had not then been duly served on the defendants, by reason that the same had not been accompanied by a statement in writing, setting forth the grounds of such supposed order, including the particulars of the settlement relied upon in support thereof, and that, until such statement had been served, there was no grievance to the defendants against which they could appeal, and as to which the said court of quarter sessions were empowered to give relief; that the defendants, by their counsel, then and there agreed and admitted that no such statement had been served, and thereupon the said court of quarter sessions refused to hear the said appeal, and the said counsel for the said nominal respondent, for and on behalf of the plaintiff, then and there said that the said supposed order should be duly served on the defendants, and that although by the said supposed order the moneys therein mentioned are ordered to be paid weekly, yet, from the 9th April 1870, to the 31st March 1871, no application for payment, or in respect thereof, was made to the defendants; and the defendants say that, believing and relying by reason of the premises that

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before the plaintiff would attempt to enforce the said supposed order he would cause the same to be duly served, accompanied by such statement in writing as aforesaid, and that the defendants would thereby have the opportunity to appeal against the said supposed order to, and get the same quashed at, the general quarter sessions of the peace in and for the said city of London, they, the defendants, took no steps to remove the said supposed order by writ of *certiorari* into this honourable court, in order that the same might be quashed or otherwise to obtain the quashing of the said supposed order; that no service whatever of the said supposed order has been made on the defendants since the said 9th April 1870, and that the plaintiff ought not now to be admitted to say that the said supposed order was duly served upon the defendants.

Replication to the sixth plea on equitable grounds, repeating the allegations in the foregoing replication, that the plaintiff ought not now to be admitted to say that the order was duly served upon the defendants according to and in pursuance of the statutes in such case made and provided.

Demurrer to the second plea, and joinder in demurrer to the first, second, third, fourth, sixth, and seventh paragraphs of the return.

Joinder in demurrer to the second plea, and demurrer to the equitable replications to the fifth and sixth pleas.

Joinder in demurrer to the equitable replications.

Poland (with him *C. Bowen*) for the prosecution, contended that the order made by the two justices of London was valid. Sect. 1 of 39 & 40 Geo. 3, c. 94, enacts "that in all cases where it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing such offence, the court before whom such trial shall be had, shall order such person to be kept in strict custody in such place and in such manner as to the court shall seem fit, until his Majesty's pleasure shall be known; and it shall thereupon be lawful for his Majesty to give such order for the safe custody of such person during his pleasure in such place and in such manner as to his Majesty shall seem fit," &c. Then sect. 54 of 9 Geo. 4, c. 40, provides that "in all cases where any person shall be kept in custody as an insane person by order of any court, or by his Majesty's order, subsequent thereunto, it shall and may be lawful for any two justices of the peace of the county where such person shall be so kept in custody, to inquire into and ascertain by the best legal evidence that can be procured under the circumstances of personal legal disability of such insane person, the place of the last legal settlement, and the circumstances of such person; and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall and may be lawful for such two justices to make order, under their hands and seals, upon such parish

where they adjudge him or her to be legally settled, to pay such weekly sum for his or her maintenance in such place of custody as one of his Majesty's principal Secretaries of State shall, by writing under his hand, from time to time direct; and where such place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county where such person shall have been apprehended; but if it shall appear that such person is possessed of such sufficient property as aforesaid, then such justices shall order and direct the same to be applied to pay and satisfy the expenses of the maintenance of such person in the manner hereinbefore directed." To this section is added a proviso "that the churchwardens and overseers of the parish in which the justices or the major part of them shall adjudge any insane person to be settled, may appeal against such order to the general quarter sessions of the peace, to be holden for the county where such order shall be made, in like manner and under like restrictions and regulations as against any order of removal, giving reasonable notice thereof to the clerk of the peace of such county, who shall be respondent in such appeal, which appeal the justices of the peace assembled at the general quarter sessions are hereby authorised and empowered to hear and determine in the same manner as appeals against orders of removal are now heard and determined." As to prisoners who became insane during imprisonment, 3 & 4 Vict. c. 54, s. 1 provides that in such case "it shall be lawful for any two justices of the peace of the county, city, borough or place where such person is imprisoned, to inquire, with the aid of two physicians or surgeons, as to the insanity of such person; and if it shall be duly certified by such justices and such physicians or surgeons that such person is insane, it shall be lawful for one of her Majesty's principal Secretaries of State, upon receipt of such certificate, to direct, by warrant under his hand, that such person shall be removed to such county lunatic asylum, &c., as the said Secretary of State may judge proper and appoint," &c. Sect. 3 of the same Act, as to persons charged with misdemeanor, makes a provision similar to that made by 40 Geo. 3, c. 94, in cases of felony, and power is given to justices to make the same inquiry, &c., "and to make the like order for the payment of such person's maintenance as above mentioned;" a power of appeal being given by ss. 4 & 5. Then sect. 7, after reciting 9 Geo. 4, c. 40, s. 54, and that it is expedient that so much of that Act as relates to the direction to be given by the Secretary of State should be repealed, enacts "that so much of the said Act as relates to such directions to be given by such Secretary of State shall be and the same is hereby repealed; and that it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish in which they shall adjudge such insane person as last aforesaid to be legally settled, or in case such parish shall be comprised in a union declared by the Poor Law Commissioners, or shall be under the management of a board of guardians established by the Poor Law Commissioners, then the guardians of such union or parish, as the case may be, to pay such weekly sum for the maintenance of such person as they or any such two justices shall, by writing under their hands direct." Under this section the order in the present case was made, and its validity is denied by the defend-

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ants, on the ground that the Act of 9 Geo. 4, c. 40, including sect. 54, is wholly repealed by 8 & 9 Vict. c. 126, s. 1. But it was obviously not the intention of the Legislature to do away with the power to make such orders in cases of felony, whilst the power to make them in cases of misdemeanor still exists under ss. 2 and 3 of 3 & 4 Vict. c. 54: (*Guardians &c. of Leeds v. Guardians &c. of Wakefield*, 7 El. & Bl. 258, was referred to.) So far as a statute is incorporated in a subsequent statute, its simple repeal does not repeal the incorporated part (*Reg. v. Smith*, L. Rep. 8 Q. B. 146); so that notwithstanding the repeal of the whole of 9 Geo. 4, c. 40, by 8 & 9 Vict. c. 126, sect. 54 of the older Act may still be held in force by reason of its incorporation in sect. 7 of 3 & 4 Vict. c. 54. If the court does not adopt this view, it is submitted that sect. 7 of 3 & 4 Vict. c. 54 (above cited) contains a sufficient substantive enactment to enable two justices to make this order. It is objected, in the next place, that even if the justices had power to make the order, its service should have been accompanied with a statement of the grounds and particulars of settlement; for by sect. 54 of 9 Geo. 4, c. 40, a right of appeal against the order is given to the general quarter sessions "in like manner and under like restrictions and regulations as against any order of removal;" but this does not apply to the service of the order itself, but only to the appeal: (*Reg. v. Derbyshire*, 22 L. J. 147, M. C. was referred to.) The objection that the order was made *ex parte* cannot be sustained: (see *Ex parte Monkleigh*, 17 L. J. 76, M. C.) It is now too late to urge the objections contained in the equitable replications, because the order, if the justices had power to make it, continues valid until set aside on appeal. Finally, the remedy by distress against the overseers having been taken away, there is no other remedy left except that by *mandamus*. Besides any objection on this score should have been taken before the writ issued: (see per Lord Campbell in *Reg. v. Bristol Dock Co.*, 2 Q. B. 70.)

Sir J. B. Karslake, Q.C. (with him *Edward Clarke*) for the defendants.—Sect. 54 of 9 Geo. 4, c. 40, having been repealed by the Legislature, whether *per incuriam* or intentionally, the justices had no power to make the order in this case. Under that section the justices, before making the order, were to inquire into and ascertain the circumstances of the lunatic, and see whether he had sufficient property to be applied to his maintenance. It cannot be that sect. 7 of 3 & 4 Vict. c. 54, which was obviously designed to make only a partial alteration in the law, viz., as to the direction by a Secretary of State, has the effect of enabling the justices to make orders under all circumstances whatever, and no matter what the circumstances of the lunatic; yet this effect it must have if that section is held to preserve to justices the power of making such order. [COCKBURN, C.J.—That is, no doubt, a strong argument; but it is a choice of inconveniences.] It may be that the Legislature intended that in cases of felony the county where a lunatic is confined should pay for his maintenance. In the next place, even if the justices had power to make the order, it was not properly served, and is therefore inoperative. Sect. 54 of 9 Geo. 4, c. 40 assimilates the order in all respects to an order of removal, and appeal being given against it "in like manner, and under like restrictions and

regulations as against any order of removal," and the justices in quarter sessions are to hear and determine it "in the same manner as appeals against orders of removal are now heard and determined": (see *Reg. v. Glamorganshire*, 13 Q. B. 561; *Reg. v. Newport*, 33 L. J. 155, M. C.) The procedure on these is now regulated by 11 & 12 Vict. c. 31, sect. 2 of which renders necessary the sending of the grounds of removal, including particulars of settlement. An appeal will not lie until the order of removal has been served, accompanied by the grounds of chargeability and the particulars of settlement: (See *Reg. v. Glamorganshire*, 8 El. & Bl. 694; and *Reg. v. Recorder of Shrewsbury*, 1 El. & Bl. 711); in the latter of which cases Lord Campbell, C.J. said (p. 721): "The service of the order is a mere nullity without the service of the notice of chargeability; till this service there is no power of removal; and the time for appealing dates from the service. That being so, there is no grievance until there is notice of chargeability, and there being no notice there is no right of appeal." As to the 25th, the demand is clearly barred by sect. 1 of 22 & 23 Vict. c. 49, which enacts that "with respect to any debt, claim, or demand which may, after the passing of this Act be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards, the commencement of such half-year to be reckoned from the time when the last half-year's account shall or ought to have been closed according to the order of the Poor Law Commissioners or Poor Law Board, provided that the Poor Law Board, by their order, may, if they see fit, extend the time within which such payment shall be made, for a period not exceeding twelve months after the date of such debt, claim, or demand." In *Baker v. The Guardians of the Billericay Union* (2 H. & Colt, 645), Pollock, C. B. said, as to that enactment, "the question is whether a plea setting up the fact that the action was not commenced until after the period expired, is an answer to the action; or, in other words, whether when the Legislature has said that a debt shall be paid within a limited time, but not afterwards, an action may be brought for it, and the defendant compelled to apply to a court of equity to restrain the execution. I am clearly of opinion that when a statute says that a debt shall not be paid after a certain time, no action can be maintained for it. . . . Here the statute says that the debt shall not be paid after the time prescribed, and the common sense is that if it is not to be paid it cannot be sued for."

Poland in reply, contended that sect. 1 of 22 & 23 Vict. c. 49 was not applicable to a case where the Crown sought to enforce the performance of a statutory obligation, such not being a case of a "debt, claim, or demand." [BLACKBURN, J.—I do not see why the limitation should not apply to liabilities created by statute.] *Ward v. Lowndes* (1 El. & El., 940) was referred to.

COCKBURN, C.J.—This is a *mandamus* to the guardians of the poor of the Stepney Union to pay, in obedience to an order of two justices of the City of London, a sum of money for the maintenance of a criminal lunatic, at present in confinement in a public lunatic asylum; and there can

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be no doubt that if the statute of 9 Geo. 4, c. 40, were still in existence, this would be a valid order, subject to one or two subordinate points which have been raised. The main and sweeping objection to the order is taken on the ground that the Act of 9 Geo. 4, c. 40, has been repealed by 8 & 9 Vict. c. 126, s. 1. But then it is said on the part of the prosecution that the 7th section of 3 & 4 Vict. c. 54, which engrafted on the former statute certain modifications of it, although the former statute has been repealed, contains still substantive enactments sufficient to support the order which has been made in the present case. There is no doubt that sect. 7 of 3 & 4 Vict. c. 54, was introduced not for the purpose of creating substantive enactments, but for the purpose of modifying the enactments of the prior Act of 9 Geo. 4, c. 40, s. 54. I suppose by some oversight, when the Legislature repealed the statute of 9 Geo. 4, c. 40, they had not in their minds a distinct and accurate recollection of the 7th section of 3 & 4 Vict. c. 54, of the precise language and form of that section, and thought that that section would suffice for the purpose of providing for criminal lunatics in the position in which the lunatic in the present case is placed. But the difficulties which have been pointed out are somewhat striking. The Act of 9 Geo. 4, c. 40, points out that the justices before they make the order are to find out about the pecuniary means of the lunatic. There were provisions as to appeal which must be held to have ceased to exist with the repeal of that statute unless they were by implication incorporated in and kept alive by sect. 7 of 3 & 4 Vict. c. 54. I confess I am not prepared to go the length of saying that those salutary provisions of the Act of 9 Geo. 4 are kept alive by and incorporated in the 7th section of 3 & 4 Vict. c. 54. I do not say it is not so; but I do not think it necessary for the purpose of upholding the order made under the 7th section of the latter Act, to hold that those provisions of the former Act are embodied in and kept alive by it. I should rather be inclined to think that it was by an omission or oversight on the part of those who framed the later Act, that those provisions were allowed to drop. The question to which I have applied my mind is this—to see whether there is a sufficiently substantive enactment in sect. 7 of 3 & 4 Vict. c. 54, for the purpose of the present case. I cannot adopt the view contended for by Sir John Karslake that the Legislature intended to repeal the Act of Parliament upon which sect. 7 of 3 & 4 Vict. c. 54, is engrafted. I cannot think the Legislature intended anything so exceptional and unusual as that criminal lunatics confined in a public lunatic asylum should be left there without the parish or union in which they are settled being called on to contribute to his maintenance; and if I can find anything in sect. 7 of 3 & 4 Vict. c. 54, which will suffice for the purposes of the present case, I think I ought at once to adopt it. Now, passing over for a moment the recital in that section, after repealing a certain part of the Act of 9 Geo. 4, c. 40, s. 54, it enacts that “it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish in which they shall adjudge such insane persons as last aforesaid, to be legally settled, or in case such parish shall be comprised in a union declared by the Poor Law Commissioners, or shall be under the management of a board of guardians established by the Poor Law Commissioners, then the guardians of

such union or parish, as the case may be, to pay such weekly sum for the maintenance of such person as they or any such two justices shall by writing under their hand sdirect.” Now the whole of that is complete in itself with one exception, namely, that it speaks of the justices by whom the order is to be made by reference to something else, calling them “such two justices.” I think the reference is supplied by the preamble of the section which recites sect. 54 of 9 Geo. 4, c. 40, by which it was among other things enacted “that it should be lawful for the justices of the peace of the county where any person should be kept in custody as an insane person, &c.” Looking at that, the words “such two justices” in sect. 7 of 3 & 4 Vict. c. 54, receive a sufficient explanation, and it becomes clear that what the enacting part of the section refers to is the justices of the county where the criminal lunatic is kept in custody. It is true that this section does not contain the various provisions of 9 Geo. 4, c. 40, s. 54; but there is a substantive enactment, and in so important a matter, in order that the maintenance of a criminal lunatic should not be a *casus omissus*, I think that anything in that enactment which can be held applicable should be so held. I think, therefore, that sect. 7 of 3 & 4 Vict. c. 54, is sufficient for the purposes of this case. But then, it has been argued, even if this is so, there are certain conditions necessary to the enforcing of the order, and they have not been satisfied; and it has been contended that this order is analogous to an order of removal. Practically, it has the same effect, though there is no actual removal from one parish to another, because the lunatic is adjudged to be settled in and chargeable in a particular parish, though he remains in the same place of confinement. Then let us see whether there is any legislative enactment making the regulations as to poor law orders of removal applicable to such a case as the present. I do not find that there is any such enactment. The Act which was referred to, 11 & 12 Vict. c. 31, modifies the previous legislation on the subject, viz., the Act of 4 & 5 Will. 4, c. 76, s. 79 of which provided that the notice of chargeability should be accompanied by a copy of the examination. The Act of 11 & 12 Vict. c. 31, repeals that enactment, and then, in sect. 2, substitutes for the copy of the examination a statement in writing under the hands of the overseers or the guardians setting forth the grounds of removal, including the particulars of the settlement relied upon in support thereof. [His Lordship read the section.] Here the guardians could not comply with that if there is no removal. That enactment is therefore inapplicable to the present case; for if there is no removal, there cannot be any statement of the grounds of removal. The argument based on the non-compliance in this respect with the requirements of 11 & 12 Vict. c. 31, therefore fails. We come next to consider the cases which show that an appeal must be conducted in like manner with an appeal against an order of removal. These cases do not seem to me to apply in the present instance, where we are considering, not the proceedings on appeal, but the proceedings accompanying the order and the service of the order. We come, lastly, to the point that only a portion of this sum can be recovered. I think that the prosecution have failed to meet the contention of the other side as to this. The Legislature having, by 22 & 23 Vict. c. 49, s. 1, enacted

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that "with respect to any debt, claim, or demand which may, after the passing of this Act, be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half year in which the same shall have been incurred or become due, or within three months after the expiration of such half year, but not afterwards, the commencement of such half year to be reckoned from the time when the last half year's account shall or ought to have been closed according to the order of the Poor Law Commissioners or Poor Law Board." The statute begins to run from the time when the order is served. I see no answer to the argument furnished by this as to this part of the money, I am, therefore, of opinion that on this our judgment must be for the defendants. As to the rest our judgment will be for the prosecution.

BLACKBURN, J.—I am of the same opinion. The main question really turns on what is the proper construction of sect. 7 of 3 & 4 Vict. c. 54. As things now stand the statute of 9 Geo. 4, c. 40, is repealed *simpliciter*. This case furnishes an instance of the difficulty which frequently arises from one statute repealing another, and things happening which those who drew the statute never contemplated. The 9 Geo. 4, c. 40, s. 54, enacted that "where any person shall be kept in custody as an insane person by order of any court, &c., it shall and may be lawful for any two justices of the peace of the county where such persons shall be so kept in custody, to inquire into and ascertain, by the best legal evidence that can be procured, &c., the place of the last legal settlement, and the circumstances of such person; and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall and may be lawful for such two justices to make order under their hands and seals upon such parish where they adjudge him or her to be legally settled, to pay such weekly sum for his or her maintenance in such place of custody as one of his Majesty's principal Secretaries of State shall from time to time direct, &c.; but if it shall appear that such person is possessed of such sufficient property as aforesaid, then such justices shall order and direct the same to be applied to pay and satisfy the expense of the maintenance of such person in the manner hereinbefore directed." Then there follows a power of appeal given by the same section. As that section stood, therefore, it was quite plain that two justices were to inquire into the legal settlement of the lunatic, and they were also to inquire whether he had any means, and if he had no means so that he could be supported out of his own property, then an order was to be made upon the parish to pay such sum as the Secretary of State should from time to time direct. At that time there was no power with regard to persons detained in custody charged with misdemeanors who had been acquitted on the ground of insanity. Then came the Act of 3 & 4 Vict. c. 54, sect. 3 of which enacted that where a person charged with misdemeanor has been found not guilty on the ground of insanity, he shall be detained, "and in all such cases two justices of the peace of the county, city, or place where such person shall have been acquitted on account of insanity, or shall be kept in custody, shall have the like power as is given in the cases before mentioned," that is, when a prisoner has become

insane while in prison, "to inquire and ascertain the last legal settlement of such insane person, and also to make the like order or orders for the payment of such person's maintenance, and the other charges as above mentioned," that is, they are to have power to make an order for such weekly sum as they or any two justices shall from time to time direct. Then follows, in ss. 4 and 5, a power of appeal. So far the statute of 9 Geo. 4 was left untouched, and if matters stopped there, it would follow that the power of the two justices to make an order in the case of a person who was found insane upon a charge of felony would have been the same as formerly, namely, they would have been obliged to make an order on the place of settlement of the lunatic to pay such sum as one of the Secretaries of State might under his hand from time to time direct. But then, certainly in a very clumsy and artificial way, perhaps, to be accounted for by the supposition that the clause was put in in committee after the Bill had been drawn, sect. 7 of 3 & 4 Vict. c. 54, after reciting sect. 54 of 9 Geo. 4, c. 40, and that it is expedient that so much of that Act as relates to the direction to be given by a Secretary of State should be repealed, and other provisions made in place thereof, enacts "that so much of the said Act as relates to such directions to be given by such Secretary of State shall be, and the same is hereby repealed; and that it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish in which they shall adjudge such insane person as last aforesaid, to be legally settled, or in case such parish shall be comprised in a union declared by the Poor Law Commissioners, or shall be under the management of a board of guardians established by the Poor Law Commissioners, then the guardians of such union or parish, as the case may be, to pay such weekly sum for the maintenance of such person as they or any such two justices shall by writing under their hands direct." Taking it as it stood thus, it would appear clearly that the part of s. 54 of the statute of Geo. 4, which said that the payment of the weekly sum was to be as a Secretary of State should, from time to time, direct, was repealed, and the cases of persons acquitted of misdemeanor and of felony on the ground of insanity were placed on precisely the same footing. Then comes the substantial difficulty, namely, that in the subsequent Act of 8 & 9 Vict. c. 126, the statute of 9 Geo. 4 is altogether repealed *simpliciter*: what under these circumstances it was the intention of the Legislature to express, is an extremely embarrassing question. If it were necessary to decide whether a power of appeal were given, and under what circumstances, I should require a great deal more time to consider before giving a final opinion, more especially after what my Lord has said. At present the inclination of my opinion is not quite the same as that of the Lord Chief Justice. The present inclination of my opinion as to the effect of sect. 7 is this:—when we find in sect. 7 that the former enactments of the statute 9 Geo. 4 are to be altered in some respects, and when so altered, we find that such two justices shall make the order for such sum as the justices may think fit, I think that, if necessary, it should be considered in the same way as if they had altered the enactments of 9 Geo. 4, and all were re-enacted with the alteration in the words of sect. 7; so that according to my view, the effect of sect.

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7 would be really this: Two justices are to make the inquiry as in 4 Geo. 4, and if they find that the lunatic has no means of his own, they will then make an order to pay such a sum as two justices may appoint, subject to an appeal, exactly as in the Act of Geo. 4. That is, taking the words and expanding them, and giving the like effect to them as Lord Coke said of Littleton's "et cæteras," namely, that in his "et cæteras" much is implied (Co. Litt. 173 C). No doubt we do imply a good deal on this construction, but this is the best opinion I can form upon the matter. The order is to be made subject to appeal, which appeal is to be subject to all the same restrictions and regulations as an appeal against an order of removal. In the present case, a valid order having been made and served, there is an objection raised that the order is inoperative, because no grounds of chargeability and particulars of settlement were served with it. I think, as soon as the mode in which the grounds of chargeability and the necessity of sending them as provided by the Legislature is looked at, the objection will be found to be grounded on a misapprehension, and that we are not embarrassed by this ground of objection at all. The old enactment was sect. 79 of 4 & 5 Will. 4, c. 76, the Poor Law Act, which provided that the pauper should not be actually removed under any order of removal from any parish by reason of his being chargeable to or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy of the order of removal and of the examination upon which such order was made, shall have been sent by post or otherwise by the overseers of the parish obtaining such order, to the overseers of the parish to whom such order shall be directed. That was the provision, and the construction put upon it—whether rightly or wrongly—was that, inasmuch as the making of the order of removal was in itself no hardship upon nor caused any wrong at all to the parties, it was only when it had been served under such circumstances as made the removability follow from it that there was a grievance; and it was held that there could be no notice of appeal until not only the order of removal was served, but, as the law then stood, accompanied also by a copy of the examination upon which such order was made. Then, by a subsequent Act—11 & 12 Vict. c. 31—the sending of the examination was done away with, and instead of it, sect. 2 provided that the grounds of removal, including particulars of settlement, should be sent. The consequence remained, that notice of appeal could not be given till these grounds were served with the order of removal, because there was no grievance until the person could be removed. As to the time of appeal, there were a great many regulations, to which I need not now refer. The argument, as I understand it, of Sir John Karslake is this, that inasmuch as the appeal in the present case is to be subject to all the rules and regulations of an appeal against an order of removal, and as there is a rule or regulation which says that the order of removal shall be no grievance in itself until it has been served with grounds of removal and particulars of settlement, so the order of maintenance cannot be operative until it has been served with grounds of chargeability and particulars of settlement. But in the present case the lunatic never can be removed. She has been detained in prison. It is an order of

maintenance, not of removal, consequently all the enactments that apply to the time when the lunatic pauper may be removed under ordinary circumstances, and what may constitute a grievance against which there might be an appeal, do not apply. There was here a grievance as soon as the order was served; and, therefore, I think that the cases which have been cited in no way touch the present case, and that the absence of the grounds of chargeability is no reason at all why the order should not be enforced. With reference to the fact that the quarter sessions decided the other way, and were wrong in so doing, and the fact of their having been induced so to do by the learned counsel on behalf of his client, that does not really amount to an estoppel. I cannot understand upon what principle it is said that the facts stated in these equitable replications are an objection on the return to the *mandamus*. If there had been any case of that kind made when the rule was asked for, namely, that the one party had induced the quarter sessions to decide wrongly, and the other had been in this way tricked out of their appeal, that might have been an excellent reason for saying that we would not grant the *mandamus*; but it is no answer after the *mandamus* has been granted. The only other question is this, whether the statute 22 & 23 Vict. c. 49, s. 1, is a bar to that portion of the claim to which it is pleaded. I think it is so. The effect of that enactment is that when demands or claims are made against a parish, they must be paid within three months after the six months within which they accrue. The object of the enactment is to prevent stale demands being made upon the ratepayers. Mr. Poland endeavoured to make out that this must be applied only to things arising on contract, but the words "claim or demand" would cover everything, and therefore I see no reason at all why a demand or claim like the present should not be paid as promptly within the nine months as any other. The effect of the statute is, that if you commence litigation to recover it within nine months, then they cannot avoid it by delaying you by process of law; but if you do not commence litigation within nine months, the claim is barred. In the present case, as to 25th, litigation was not commenced in time, and consequently, as to that sum, I think they are barred. As to costs, 6 & 7 Vict. c. 67, s. 1, enacts that, on giving judgment on demurrer in the case of a *mandamus*, "it shall be lawful for the said court respectively, and they are hereby required in and by their said judgment, to award costs to be paid to the party in whose favour they shall thereby decide by the other party." The effect of that is that the prosecution are entitled to their costs; but on the taxation the defendants will be allowed costs as to those demurrers on which they have succeeded.

Judgment accordingly.

Attorney for the prosecution, *Solicitor to the Treasury*.

Attorney for the defendants, *Sweepstone*.

LAUNCESTON ELECTION PETITION.

ELECTION PETITIONS.

Reported by F. O. CAUM, Esq., Barrister-at-Law.

THE BOROUGH OF LAUNCESTON.

(Before MELLOR, J.)

May 4, 5, and 6, 1874.

Corrupt practices—Relation of landlord and tenant—Reservations in leases—Waiving rights reserved—Licence to tenants to kill rabbits—Penal consequences.

D., the sitting member for L., at the time of his candidature, was the owner of an estate in the neighbourhood which had, for a long period, carried with it the representation. In the leases made by the previous owners of the estate with the tenants, there was an absolute reservation to the landlord of the right to shoot game, hares, and rabbits. After D. came into possession, there were complaints by the tenants of the damage done by the rabbits, and shortly before the dissolution of Parliament D. had employed trappers to destroy the rabbits, and arranged to distribute some of the proceeds of their sale among the tenants who had suffered damage. In his address to the electors, D. made no reference to the game laws, and he was unpopular in consequence of the "rabbit grievance." At a meeting, however, during the election he said, "I am anxious that every rabbit should be killed, and every tenant is at liberty to kill them as he can." The report of his speech in a local newspaper was widely circulated by D.'s agents, one of whom, at another meeting, referred to the fact that all differences between D. and his tenants were removed, saying, "These animals, which you choose to style vermin, will no longer disturb you."

Held, that this permission to the tenants to kill the rabbits was a concession having a money value, and, being given on the eve of the election, must be taken to have been intended to influence the electors; that D. was personally guilty of a corrupt practice; and that the election was void.

This was a petition against the return of Col. Deakin. The allegation upon which the judgment is founded, and the case set up by the petitioner, will be seen from the opening statement of counsel.

Leresche and Bompas, were counsel for the petitioner,

Parry, Serjt., and Edwards for the respondent.

Leresche, in opening the case, said that the respondent was in a large way of business as a brewer and wine merchant, a magistrate for two counties, honorary colonel of a regiment of volunteers at Manchester, and owner of Werrington Park and estates within the Parliamentary borough of Launceston. The petition alleged that the respondent, "having, for the purpose of influencing voters at the election, given to certain voters in the said borough, immediately before and at the said election, a right to shoot and trap rabbits, was guilty of a corrupt practice, and was disqualified from becoming a candidate for the said borough, and that all votes given for him after due notice of such disqualification would be thrown away." With one exception, this was the first contest in the borough for two centuries. Before the Reform Act the borough, which was under the influence of the Duke of Northumberland, returned two members to Parliament. At the time of the Reform Act, the adjoining borough of Newport, which previously had returned two members to Parliament, was joined

to Launceston, with other territorial area, and one member was given to the newly constituted borough. The Werrington estate was subsequently sold to Mr. Campbell, who, after a little time, was returned as an unopposed representative of the borough. It was afterwards sold to Mr. Dick, and Mr. Lopes, Q.C., was elected member in 1865, and also in 1868, continuing to represent the borough until the late dissolution. At the last election the borough had 790 voters on the roll, and, deducting double entries and deaths, about 770 remained to vote, of whom no less than 210 voters were tenants upon the Werrington estate. [Parry, Serjt.—No, not so many; we say 175.] At the end of 1871 Col. Deakin bought the estate, and took possession at Lady-day 1872. In September 1873, Col. Deakin announced his intention to become a candidate at the next vacancy, and Mr. Lopes taking offence at this, a correspondence ensued. From the time of buying the estate, the respondent became a strict preserver of the game on the estate, and under the term game rabbits were included, not only on the home domain, but on the farms in the occupation of the tenants. The tenancies were for the most part yearly. On an estate of this size, 4000 acres, the rabbits were numerous, and a large number were capable of being disposed of. In Jan. 1873, respondent's keeper or bailiff disposed of the rabbits to Mr. James Treleaven, Launceston, at 8d. per head delivered. In Sept. Mr. Paver sold at 10d. to Mr. Brown, who fetched them. Brown contracted to take the rabbits to the 1st April, being told they were likely to be 200 a week, which would be at the rate of some 300l. or 400l. a year. Before the arrangement had existed a month, Mr. Paver wanted to raise the price 1d. per head, but a compromise was made at ½d. advance. In Nov. 1873, when Brown went to the hall for rabbits, Paver told him that Col. Deakin had written to say he was not to sell the rabbits for less than 1s. Brown was dissatisfied, and as soon as he could relieve himself of his contract with a dealer in London, would have nothing more to do with the arrangement. Paver then sold the rabbits to a Mr. Freeman, a large dealer in the London meat market, and this continued until the very day of nomination. The tenants did not like to have so great a herd of rabbits on the estate, for it did injury and led to dissatisfaction. The respondent claimed all the rabbits, and the tenants had no right to trap or shoot them. As a matter of courtesy, on one day in a year each tenant had permission to shoot. Dissatisfaction existed, and complaints reached Col. Deakin, who promised to employ a trapper purposely to keep down the rabbits, but the extra rabbits killed were sold and converted into a source of revenue for Col. Deakin. Although the respondent had offered himself as a candidate in Sept. 1873, he did not issue an address until Thursday, the 29th Jan. 1874, the sudden dissolution of Parliament having taken place on the preceding Saturday. On Wednesday, the 28th Jan., Launceston was excited by the advent of not less than three Liberal candidates. They were Mr. Norris, a barrister of the Western Circuit; Mr. Snell, a director of the South-Western Railway; and Mr. Drinkwater, the petitioner. There was an embarrassment of riches with the Liberal party, and a meeting was held to determine which should be chosen. Mr. Norris's views on the game question were not satisfactory, and the two other gentlemen, probably seeing how the land lay,

spoke very strongly on the subject. Mr. Drinkwater was specially strong on the point, and after the room had been cleared of non-voters and Conservatives, was selected as a candidate. Col. Deakin arrived the next day (Thursday) and issued his address. He found that the petitioner was working vigorously, and holding a meeting the same day at St. Stephens, Mr. Drinkwater, being unable to meet in the Northumberland Arms, held an open air meeting, and no doubt the rabbit question was much talked about, and caused a great deal of excitement. On the same evening Col. Deakin had a meeting of his supporters at Launceston, where, referring to the rabbit question, he said: "Something has just been handed to me in which a comparison is attempted to be drawn between 'what Mr. Drinkwater will do—(laughter)—and what Col. Deakin will do.'—(Cheers and laughter.) If you will allow me, I will make some remarks on this document. It says that Mr. Drinkwater would treat all ground game as vermin but that Col. Deakin would preserve them, for the purpose of supplying the London market. That would be a fine thing, and very profitable to supply the London market—(loud laughter.) Then it says that Mr. Drinkwater would abolish the laws of entail, do away with the laws of primogeniture, while 'Col. Deakin prefers a law which would give everything to one child.' That statement is utterly and entirely untrue, for I am desirous above everything that every one of my children should be treated alike—(loud cheers). As to the matter of rabbits, on which question my opponent is trying to make capital against me, I tell you I am anxious that every rabbit in the neighbourhood should be destroyed, and am taking every step to destroy them and am now employing more trappers for that purpose—(loud cheers)—and shall be glad for any of my friends to have them when they are shot—(cheers)." He read that passage to show it was an important local question, and what was afterwards done was very likely to have a material influence on the votes of the electors. When the Colonel left the meeting he was followed by a crowd, who called out "rabbits" after him. The petitioner made the most of the rabbit question, and the respondent seemed to think that this was telling against him. Col. Deakin did not seem to have thought the statement that he was anxious for every rabbit to be killed was sufficiently explicit to meet the emergency, and addressed a meeting on the Friday evening at St. Stephens, the parish in which Werrington Park was situate, and in the midst of his own tenants and friends. There were no doubt other voters present who sympathised with those who suffered from keeping too great a herd of rabbits. The respondent made a speech, in which he gave up absolutely to his tenants a valuable money property, which had been a source of revenue to him, and under such circumstances as to lead to the conclusion that he gave it up with a view to induce the voters to vote for him at the election. The report of what Col. Deakin said at the meeting was: "Referring to the much debated rabbit question, Col. Deakin said: 'I am anxious that every rabbit should be killed, and every tenant is at liberty to kill them as he can.'—(Immense cheering, with cries of bravo! and clapping of hands, and other signs of approval, lasting some minutes.) When the cheering had subsided, Col. Deakin said, 'If there is one thing more than another I cannot bear, it is to see a man's pocket picked.

If rabbits exist in a field how can a poor man's seed bring a crop when they go and eat it off?—(Cries of bravo! and renewed cheers.) I am fond of a little sport, but would rather shoot a bird than a rabbit, and I am sure that no gentleman would begrudge the landlord who behaved well to his tenant, going over his ground.'" If there was any doubt with regard to this concession, this gift of some valuable consideration, it seemed to have been conclusively set at rest by the observations of Mr. Cowlard, Col. Deakin's agent, who at the same meeting was reported to have said: "A good deal of aspersion has been cast on Col. Deakin, but he has fully vindicated himself this evening—(cheers). Having a residence in the neighbourhood, and holding perhaps the largest property in the neighbourhood, he desires to have the ties which bind him to his tenantry confirmed by being elected as their representative in Parliament. I don't know that a single question of difficulty remains between you and him, especially now that the little four-legged question has been got rid of—(laughter and cheers). I am thankful that I am not a rabbit just now. But perhaps I am not quite right in saying that, as after a few months rabbits will be much prized—(laughter). Those animals which you choose to style vermin will no longer disturb you, and farmers will be able in future to indulge the hope of having that to which they are entitled—(cheers)." [MELLOR, J.—Was that said in the presence of Col. Deakin?] It was my Lord. [MELLOR, J.—Do I understand that your contention is, that the concession of the right to kill rabbits was a distribution of money's worth, or a valuable consideration to gain popularity and influence at the election?] That is my proposition. [MELLOR, J.—If those present consisted both of voters and non-voters, would the same result follow?] I think that would be so: The result was calculated to interfere with the freedom of election. The respondent and his agent caused a thousand copies of the reports of those meetings in the *Launceston Weekly News* to be printed and circulated among the electors. Attached to the reports was a leader of the Launceston paper and a copy of verses, much of the ordinary election standard. This sheet as issued was to be regarded as an election address of Col. Deakin.

The nature of the evidence and of the arguments is fully stated in the following judgment:

MELLOR, J.—In this case a petition has been duly presented complaining of the return of a gentleman of the name of Deakin—who is a colonel of volunteers, as I understand, in Lancashire—as not being duly elected, upon the ground of corrupt practices by himself or his agents at the late election attributed to the sitting member or to his agents. Now these cases resolve themselves into one single question—the whole validity of the late election turns upon the fact whether the concession or the statements made at the various meetings during the election, and just before the poll, by Col. Deakin, in the presence and hearing of certain tenants and others, did or did not amount to a corrupt practice within the Election Petitions Act; or, as was alleged by Mr. Leresche, to a corrupt practice or an act of bribery at common law, which he says would in itself suffice to disqualify the person who committed it from being a candidate qualified at the election. Now the circumstances are entirely novel, and very peculiar indeed they are, and it is my duty to bear in mind

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not only the consequences which may result in the one view of the case—penal in the one case, as my brother Parry has truly expressed it—upon the sitting member, in case I hold that what was done at that time amounted to a corrupt practice. On the other hand, I must be careful that for the future I do not at all events open a mode of construing the Act of Parliament which may let in a great deal of mischief, which the policy of the law is to avoid. Now the history of the case appears to be this: In the year 1872 Col. Deakin, a gentleman of fortune in Lancashire, either saw or heard that this estate of Werrington Park was in the market, and it appeared that amongst other advantages held out to the purchaser was the influence, rightly enough and naturally enough, which it would give him in the return of a member for the borough of Launceston. Now Col. Deakin purchased the estate as an investment, but that was amongst the temptations held out to any person who might purchase it. Very soon after, in the year 1872 (I think the purchase was agreed for at the end of 1871), at Lady Day 1872 or thereabouts, Col. Deakin took possession of the estate which he had purchased. When later he came again (for at that time nothing particular transpired), it appeared to be a general visit to the estate; but later on he came again, and at that time he brought with him two persons as gamekeepers, one a principal gamekeeper and the other as an assistant gamekeeper, and in the presence of Paver who was then, and had been up to the time of Col. Deakin coming into possession of this estate by purchase, the employed agent with regard to the game and the park, and, I suppose, of the deer in the park, of the former owner—Col. Deakin makes inquiry at that time as to the state of the game upon the estate. He is told that there is a pretty fair lot of hares, and pheasants, and partridges; but one of the keepers tells him that there are too many rabbits. Col. Deakin there and then, at that time, and as early as that, expresses a determination that the rabbits must be kept down; that he will not permit tenants of his to suffer in consequence of an excess of rabbits or game. Now, when Col. Deakin bought the estate, the farms, such of them as were of any extent in the hands of agricultural tenants, were let under agreements for leases or on agreements from year to year, subject to be put an end to by a six months' notice to quit. In each of those agreements there was a reservation to this effect: "The landlord reserves to himself all minerals, clay, sand, and gravel, with power to work the same, and all game, hares, rabbits, fish, and wild fowl, with exclusive liberty of sporting for the same, and to allow other persons"—that is to say, other persons whom he chose to permit to do so—"a power to enter upon any part of the premises," and so on. Therefore there was an absolute reservation of all the game, fish, rabbits, and wild fowl to the owner of the estate, and to his friends and persons whom he chose to permit to sort. Now this was the state of things at the time that Col. Deakin came into possession, and it continued in all cases where the agreements were not put an end to. No steps were taken to give notice to the tenants, or the tenants to give notice to the landlord, except in two instances. One of these was a person of the name of Rundell, who seems to have left the farm, I think, before Christmas of last year, but to have insisted upon

retaining in his hands the sum of 50*l.*, to hold as a sort of security in respect of various alleged claims which he had to make against Col. Deakin—whether they were valid or not it is not for me now to say. Amongst them, not altogether dependent upon this matter of 50*l.*, but upon various matters, was a claim for damage done by rabbits. Mr. Gubbins was another gentleman who took a small farm, I believe a grass farm, very recently from Mr. Paver, the agent of Col. Deakin in the matter, and he insisted upon the right to sport of killing rabbits for himself; that was conceded to him, and no objection was made, and I believe it was proved that when Col. Deakin heard of it he said, "With all my heart," or some expression of assent of that sort. Now, after that time, there were undoubtedly complaints made by tenants of injury done by rabbits, and those complaints were so repeated that an expression was attributed to Col. Deakin that he could not put his nose out of doors without meeting with some complaint about these rabbits. As soon as Col. Deakin became aware that a grievance was felt by any of his tenants with regard to rabbits, I am satisfied that he gave orders that a trapper should be engaged, and that proper steps should be taken to diminish the quantity of rabbits, and as far as possible to reduce it to a minimum, in the case of the tenants of this estate. I think it is due to him to say that he seems to me, down to a very late period indeed, to have been struggling to satisfy the tenants upon the ground of damage which they had suffered, or alleged that they had suffered, in respect of rabbits eating the crops which were growing upon the farms. Now the state of the law, as I understand it, upon that reservation of Col. Deakin, was, that he was at liberty—at least I am not aware of any decision to the contrary—to keep the shooting in his own hands. The farmers very foolishly took their farms subject to a reservation, an absolute and entire reservation, of game, hares, and rabbits; and it appears to me that they had no claim in point of law against the landlord under whom they held. However that might be, every landlord who had got a reservation of that sort would naturally, if he were a considerate gentleman, not insist upon the reservation as warranting serious mischief to his tenants; and probably, if a rich man and a good-natured man, would make compensation to any tenant who should feel damaged, or could show that he had been damaged, by the rabbits. At the same time, one's experience leads one to know that farmers are rather a complaining race, who seem to think that by complaining a good deal they shall get something, and I very rarely or ever heard in a court of justice any farmer ever express that he was doing well upon his farm. Therefore I think it is not unlikely that Col. Deakin and Col. Deakin's agent—at all events, his agent Mr. Paver—might have supposed that, though there was some foundation for the claim, it was not so serious as perhaps it was represented, because we know that it is not unfrequent, at all events, that things are attributed to rabbits which are due to other noxious animals, such as rats, and even to insects in the shape of wireworm, which do a great deal of damage which is often attributed to rabbits. However, all these considerations had this effect: Col. Deakin was anxious that no just cause of complaint should remain with regard to excess of rabbits; and there is a correspondence put in which I was very glad to have put in, because it

enables me to say that at a very late period indeed he was in correspondence with his agent; and I think his agent, Mr. Cowlard, took, very judiciously and wisely, a lenient, but at the same time a considerate view of the complaints the tenants had made with regard to damage by game. Now, as late as the 5th Dec.—and at that time, although there were general rumours that a dissolution might occur in the course of the present year, yet nobody really anticipated at that time a dissolution as a thing at all immediate or imminent—Mr. Cowlard writes his letter: “My dear sir,—We had a very good court, and I have paid so much on account of receipts to your account at the Devon and Cornwall Bank. The only discordant element at the court was the rabbit damage.” Therefore it appears that at the rent day, the audit—or court as it is called in this letter—there was a discordant element upon the subject of rabbit damage, and I cannot doubt that there were complaints frequently made; indeed, it is not denied that there were such complaints, and that Col. Deakin had a knowledge of them, and that upon the receipt of this letter, which contained the suggestion which I will immediately read, he assented to the proposition which was there made; but I only use it at the present moment in this respect, that the discordant element at the court was the rabbit damage. Then it goes on: “Mr. Mitchell, one of the chief sufferers, said that Mr. Kitton had valued the damages at your instance with Paver, and that in consequence he expected that I should be prepared to say what allowance he was to have. I had heard nothing of this valuation, and could only say to him and the others (five in number) that I would report their application to you, stating, however, the efforts you were making to get rid of them.” It is, however, plain, that the main of the rabbits were supported upon the tenants’ crops, and it occurs to him that it might be done in this way, that is to say, by the employment of a trapper, and by the employment of another trapper, who ceased to be employed because his trapping did not pay the expenses of his employment. Col. Deakin says that is what they tried; they employed a second trapper, but it was found that the amount of rabbits he took by trapping did not in point of fact cover the expenses of his trapping. That being so, he says: “I assume that 200 are killed each week, worth 9d. each, and dividing them by thirds, namely, trapper 3d., keeper’s wages 3d., and tenants’ damages 3d., we should have for distribution in six months’ time amongst the tenants 60l., which would run off thus:—Mitchell 20l., Burt 7l., Facey 14l., Wilcox 14l., Jenkins 5l.; 60l. in all.” I should anticipate that that was rather a high estimate of what would be the product of killing the rabbits. However, that was the proposal contained in the letter of Mr. Cowlard to Col. Deakin. Now what is Col. Deakin’s answer? “I am duly in receipt of your favour,” and so on; “I am sorry the rabbit question should have been the cause of any annoyance; however, I hope the little difficulty will be arranged quite satisfactorily to all parties. I shall have no objection to carry out your suggestion.” He immediately accepts the suggestion made by his agent, and so on. “I note your advertisement in the *Field*”—that was in reference to engaging a trapper; and on the 1st Jan. to Mr. Paver he writes: “I am glad to receive your letter of the 29th Dec. I note that you have engaged two

trappers, which I feel pleased to hear. Please get rid of the rabbits by all means. Mr. Cowlard has arranged to divide the rabbit money amongst the tenants who have sustained any loss.” That is the position of things down to the month of January. Then towards the close of January everybody, apparently, was taken by surprise by the fact that there was a dissolution of Parliament in the *Gazette*, and, of course, every person who had any desire to stand for any county or borough was obliged to be upon the alert as soon as possible. Now it turns out that Col. Deakin had before that time, I think six months before, announced his intention, whenever a dissolution should occur, of standing for this borough. Some reference has been made to the correspondence between Col. Deakin and Sir Massey Lopes, which is a matter which I have nothing to do with. Col. Deakin had as much right to stand for the borough as anybody else could have, and he chose to announce that at the approaching dissolution he should stand for the borough. Accordingly, a dissolution taking place, three gentlemen appear upon the Liberal side, as it is called, to contest or to endeavour to get selected as a candidate to stand in opposition to Col. Deakin. The three gentlemen appeared at the meeting of the electors—a Mr. Norris, a Mr. Snell, and Mr. Drinkwater. Mr. Norris did not give satisfaction in consequence of the opinions which he held with regard to ground game; and after some discussion, in which, I think, he rather accused Mr. Drinkwater of being a game preserver, Mr. Drinkwater’s explanation about his renting 7000 acres, and his right to shoot over them, appears to have been satisfactory, and ultimately he was adopted by the meeting as the candidate who was to stand in the Liberal interest against Col. Deakin. Now that is the state of things in the borough when Col. Deakin comes down upon the Thursday, and upon the Thursday he issues his address to the electors of Launceston. At that time Col. Deakin is coming out with his opinions upon various points of interest to the constituency, and he refers to his promise. [His Lordship went through the address.] He says: “I recognise the responsibility which is thrown on landed proprietors of providing convenient and healthy dwellings for the artisans and labourers in their locality. I believe that a liberal outlay of this description, though not directly remunerative as an investment, will elevate the moral position of the inhabitants, and tend to their comfort and well-being.” No human being can object to these sentiments, so far as I have hitherto stated them. [Having noticed other topics his Lordship concluded.] Then he says: “Being a considerable proprietor in Launceston and the neighbourhood, where I hope in future to be resident, it is my desire and interest to promote your local prosperity; and my best exertions shall be devoted to doing so, and to discharging my duty as the representative of your borough.” Now I have read those various topics referred to in that address for the purpose of showing that there is no suggestion or mention in that address of the policy or impolicy of the game laws—that, although there is a mention of the relations between landlord and tenant, and of providing cottages, &c., fit for them to live in, there is an absence of any suggestion relating to the topic of rabbits and game. This being the state of things, and having issued this address, Col. Deakin attends a meeting

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upon the Thursday (that is the same day that that address was issued), and then he goes through the various topics which have been referred to in his address; but it appears that Col. Deakin was followed by a mob, shouting "rabbits," and a rabbit skin was exhibited upon a pole, and an attempt made to get up considerable uproar—I dare say, with regard to that rabbit question, which had been undoubtedly mooted at the meeting of the preceding evening, when the Liberal candidate was selected. Therefore, that being so, a handbill was issued, which was put in and read, which contained two columns, in which some one sang the praises of Mr. Drinkwater and disparaged Col. Deakin, and amongst other things there were allusions to the game. This was put out as an anonymous placard, and no doubt my brother Parry was quite warranted in saying that the man who put it out, if he had known the real facts, would not have done it. It is a gross misrepresentation of facts, but its only importance is, that one of the points mentioned in it is the game laws. With regard to the game laws, now what would Mr. Drinkwater do? He would treat all ground game as vermin. What would Col. Deakin do? He would supply the London markets with rabbits, and prosecute to the utmost every trespasser. Undoubtedly, when Mr. Leresche opened the case, he opened a case which was true to a certain extent, and he represented from his instructions that Col. Deakin was a game preserver, and had issued those orders about rabbits and game, and that he made a profit by the sale of rabbits at Launceston; and three places were specifically named and mentioned, and certain quantities of rabbits were shown to have been sold by Mr. Paver to a man of the name of Brown, and, I think, to a man of the name of Trellavan, and another gentleman in London, who received consignments from time to time for a short time of rabbits for sale on commission, and the amounts were given in evidence by those gentlemen as to what they had paid, and also upon the side of Col. Deakin a statement was made, which I see no reason whatever to doubt, of the amount which was realised by the sale of those rabbits. Now it is not true—that I am satisfied; I am only speaking of the impression made upon my mind—that Col. Deakin profited one farthing by the sale of those rabbits. The only thing which can be suggested is this, that Col. Deakin, being to some extent at all events a game preserver, had a certain portion of rabbit money, to pay the wages of a keeper as well as the wages of a trapper, from which he did get some benefit; because if a man wants to have two keepers on an estate of 4000 acres, it is not more than is required; and to that extent it is true that he was overborne by rabbits, and employed a trapper to keep down the rabbits upon the estate, and did employ another, or would have done so, only it was found that the amount of money earned by him in trapping did not equal the expense of his wages. Now at the time that card was put out, it misrepresented the state of things by imputing that he got a quantity of money from the rabbits. I am satisfied that was not true; that Col. Deakin did not put a farthing of money in his pocket. He was anxious, consistently with his position, to keep down the rabbits to such an extent, at all events, that none of his tenants should have any legitimate claim to consideration for damage done by the rabbits. There must be some damage done upon an estate

where there are a good many rabbits kept. Even if a landlord employs a dozen trappers, there will be found to be some damage done, and that the trappers cannot quite keep them down, and it is only by the co-operation of the tenants that these things can be effectually put an end to. That was the state of things at the time of the meeting, and, referring to this very placard, Col. Deakin says: "As to the matter of rabbits, on which question my opponent is trying to make capital against me, I tell you that I am anxious that every rabbit in the neighbourhood should be destroyed, and am taking every step to destroy them, and am now employing more trappers for that purpose (loud cheers), and shall be glad for any of my friends to have them when they are shot." Now I quite agree with the observation of Mr. Leresche, that if it had stopped there nobody could have said that there was anything which could affect in any way the qualification of Col. Deakin to be a candidate at that election. He expresses there nothing more than his desire, which I believe was an honest desire so far, that the rabbits should be kept down, and that he was quite willing that any friends of his—that is, I suppose, any of the people who shot them or killed them—or that anybody who wanted an odd rabbit or so, might have them as far as he was concerned; that he did not consider them of so much importance as regards the value of the rabbits. Now it appears to me that, if it rested there, there could be no suggestion which would hold water that Col. Deakin was in any way making the rabbit question a question by which he was to affect the votes of his particular tenants, because his tenants were aware, I suppose, that he was making exertions to keep the rabbits down. I do not know whether it was actually proved; but it seems that the five tenants actually received compensation according to the division suggested in the letter of Mr. Cowlard. Still it is suggested that that was not enough, and that was not all that the people wanted, whether they were farmers or tenants, or other persons; that they desired a much more explicit statement, and a much more extensive one, before they were satisfied as to this question; that is the suggestion of Mr. Leresche upon the matter. Then Col. Deakin the next night attends a meeting at St. Stephen's, and that I understand is where he owns a good deal of property; and with regard to that, I may say at once that I think the report of that speech is admissible in evidence as to the statement it contains, as affecting this question, not only by its being an accurate report of what was said, but it was thought to be important and in the interests of Col. Deakin that this speech should be circulated amongst the inhabitants and voters of Launceston; and, accordingly, upon the Saturday a thousand copies of this sheet were struck off, and they were circulated amongst the voters of Launceston; and we must ask ourselves by and by what was the object of the agent of Col. Deakin in ordering these copies. Col. Deakin took no part in it; he did not order them himself, but his agent did; and he is responsible undoubtedly for the circulation of this newspaper sheet amongst the electors on Saturday. It contains a report of the meeting to which I have referred, and it also contains a report of the meeting to which I am about to refer; it begins by saying: "Most enthusiastic meeting. A densely crowded meeting was held in the large room of the

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Northumberland Arms, St. Stephen's, yesterday evening, when a most heartily received address was delivered by Col. Deakin. The gallant colonel's remarks were received with repeated applause." I may say here that upon this rabbit question, it may be that a good deal of the excitement was got up for a purpose; at all events it was a good election cry. The people wanted, if they could, either to bring Col. Deakin to some statement, or wanted really to have this question of ground game settled, as the one main and important matter. The report was circulated amongst them, and undoubtedly it was calculated, I cannot doubt that, to produce an impression upon the minds of all the persons who read it, that Colonel Deakin had at this particular meeting to which I now going to refer gone much further than he had gone at the preceding meeting. Now in this report it is said, "The gallant colonel's remarks were received with repeated applause." That would have been the mere observation of the reporter, and would have been his opinion and nothing more; but being circulated in print by the agent of Col. Deakin, it must be understood that they adopted it as a matter calculated to impress the minds of those to whom the circulation of it was addressed. I will read the passage from where my brother Parry desires to take it up. "Referring to the question of compensating farmers, Col. Deakin expressed himself in favour of compensating farmers at the expiring of a lease, and to widows in case of death and in any unforeseen circumstances, for any outlay made in the way of improvement. He would give the most careful consideration to the question of extending the franchise in counties. It would need care, as it would involve the extinction of several small boroughs and joining them to electoral districts." Referring to the much-debated rabbit question, Col. Deakin said: "I am anxious that every rabbit should be killed, and every tenant is at liberty to kill them as he can." Now those are the words which—to a great extent explained, or rather strengthened in some sense, by what occurred at the subsequent meeting—it is said, were a concession made to the tenants which is alleged by Mr. Leresche to be one which is capable of being appreciated as of money value; that is to say, a concession to tenants who were heretofore restricted from the right of killing rabbits and destroying them, that they might not only take them by net, but shoot them, and so on. I take it that in a general way that concession is given. I take it that in this case the right to kill game was a concession on the part of Col. Deakin that from that time his tenants should be at liberty to kill game anyhow. By and by I shall have a word to say upon the allegation by Mr. Leresche, that that was a consideration not only likely to influence the farmers, the actual tenants, but also likely to influence the tenant farmers, if there are any such persons besides Col. Deakin's tenants in this borough, and also those who felt an interest in the farmers and in their grievances, and was a mode at all events of acquiring popularity, apart from its effects upon the tenants themselves. Now comes a very important statement, when we consider the most ingenious and able argument which has been addressed to me by my brother Parry, which did produce upon my mind a very strong impression; and if I am not able to agree with him entirely, still it was an argument calculated

to produce a very strong impression upon anybody who heard it. I am bound to say that the statement which was made by Mr. Cowlard had a twofold bearing; it not only shows what it was understood and what it was intended to convey to the electors and the other inhabitants of Launceston who were present at that meeting, but it very emphatically describes the removal of this grievance as a most important matter, which would hereafter be felt by the tenants in a manner which he describes. Mr. Cowlard says: "I don't know that a single question of difficulty remains between you and him"—that is, between Col. Deakin and the electors at the meeting. Mr. Frost describes it to have been said, in the presence of all the tenants—that must have been an exaggeration—but at all events in the presence of a number of tenants of Col. Deakin at that meeting, Mr. Cowlard said: "I don't know that a single question of difficulty remains between you and him, especially now that the little four-legged question has been got rid of." I have no doubt that was a jocose way of putting it, but still it was a statement calculated to convey to the minds of the persons who heard him that he was referring strictly to the rabbit question. He says: "Now that the little four-legged question has been got rid of; I am thankful that I am not a rabbit just now." Now Mr. Cowlard disclaimed being a good electioneering speaker. I will not say that I think it was a wise thing to have made this speech, but it was most clever and ingenious, and was likely to hit the temper of a meeting of this description. He says: "I am thankful that I am not a rabbit just now, but perhaps I am not quite right in saying that, as after a few months rabbits will be much prized." The evident impression Mr. Cowlard wished to convey to the tenants was, that from that time, in consequence of the removal of this difficulty between Col. Deakin and his tenants, rabbits would become very scarce; that is to say, a very much more effectual destruction of rabbits would take place than had hitherto been the case. He says: "These animals which you choose to style vermin will no longer disturb you, and farmers will be able in future to indulge the hope of having that to which they are entitled." Now what is that? To have their crops free from the destructive influence of rabbits?—and that will be the result of what has taken place in the removal of that question between Col. Deakin and his tenants. That is the essential meaning of it. Had this been merely an extempore speech at a public meeting, not circulated, I could have made some allowance for energy of expression; but I am bound to say that I think the printing and circulation of these thousand copies does set the seal of approbation, upon the part of Col. Deakin's agents, at all events of the statements which are there reported to have been made by Col. Deakin and by Mr. Cowlard; and also that they adopt the language of this leading article. Now this is it: "The election of a member of Parliament for Launceston, to take place on Monday, is exciting a great amount of interest. Both candidates have addressed meetings of their supporters, and an active canvass has been prosecuted on their behalf. There is very little doubt as to the triumphant return of Col. Deakin, who is beyond all comparison the more popular candidate of the two, and we venture to say the majority of those who are now opposing him feel that for the

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town Col. Deakin is by far the better man to be elected. As the largest landed and house proprietor in the neighbourhood, his interests are identical with our own. As a landlord he has rendered himself highly popular by the kindest consideration for the interests of his tenants. He has most handsomely removed the rabbit difficulty out of the way." How? By giving his tenants there and then, and from that time forth, permission to kill the rabbits anyhow, and in any way they choose. That is the view and the only view I can take of it. I cannot blind myself to common observations which arise upon reading a paragraph of this description. I must use my common sense, and I must take the meaning of the words to be as if I had been an auditor at the meeting and heard those statements. I must consider the effect upon my mind, and I must also consider in reading the statement what is the matter to which it refers, and for which it takes credit for Col. Deakin. That is, that he has removed the difficulty most handsomely by a concession—for in yielding to the strict claims of justice he deserves no very great credit; but in making the concession I can see that the expression is justifiably made use of: "Every cause of dissatisfaction upon the part of the tenants is now set aside." If I wanted anything to show that there was a strong feeling among the tenants upon the rabbit question, I could not ask for anything more conclusive than that. No doubt there was a great amount of feeling. I cannot take it, as it was suggested by Col. Deakin, that it was all got up by the Liberals; because I take it from the proceedings in the town, the general complaint which had been proved by the farmers who met Col. Deakin's tenants at the market—whom my brother Parry did not cross-examine, and very wisely, for I think they came to speak to complaints at a certain time which was not brought down to this particular period, but very likely they were made prior to the time to which Mr. Cowlard's letter refers—I take it that these were complaints which might be adjusted. I have said that farmers are a complaining body, and that they are apt to make complaints, sometimes well founded sometimes not well founded; but, however, there was that feeling, and it is only necessary to show the importance which it appears to me that feeling acquired and that sentiment acquired, connected with what Col. Deakin said and did. That was the state of things on the Friday. On the Saturday after that paper had been circulated in the borough, there was another meeting, and this seems to be a meeting about the representation of Launceston; and Mr. Frost, who was present at that meeting, was reported to have said: "On Friday night Col. Deakin told the electors at St. Stephens to kill every rabbit upon their estates, and do what they liked with them, and he should be glad to hear that they had killed every rabbit upon the estate." Now the actual words which were used by Col. Deakin at that meeting, at which Mr. Gurney, the partner of Mr. Cowlard, was in the chair, were these. Mr. Frost said, "Col. Deakin has not done justice to himself upon that matter"—that is the rabbit question, which he had previously talked about—"for Col. Deakin last night, in the presence of all his tenants at St. Stephen's, said this": "I give authority for you, every one of you, to kill every rabbit upon my estate." He went on further: "kill them, ferret them, shoot

them, trap them; do whatever you like; send them to market, do whatever you will; I shall consider it a great comfort if you come to me next month and say to me you have killed every rabbit upon the estate." Now, although I think it bears evidence in Col. Deakin's favour that he was anxious to have every rabbit upon the estate kept down and killed, still, at the same time, if those words were used by Col. Deakin, he there and then, in the presence of his tenants, though other persons might have been there, said, "I now give you authority to kill every rabbit on the estate as you like; trapping, shooting, or netting, or any way, kill them and sell them, send them to market, and do whatever you like with them." Was that true? Was not that the meaning? Could there be any other meaning attributed to it? And Mr. Gurney being appealed to, also says when it was that Col. Deakin had first said it: "He gave immediate orders, when he became aware of the grievance, and he said so last night." Therefore "last night"—that is, the night before, when Mr. Gurney was in the chair—was alleged by Mr. Gurney to be the time from which dated this change of circumstances with regard to Col. Deakin. Those are the circumstances of the case, so far as the actual facts proved go. I believe Col. Deakin thoroughly that he never did write any letter himself about the price of rabbits in Leadenhall market or the London market; he probably would know nothing about it—he lived in Manchester. I think it highly probable that there was a mistake made by Brown as to that matter. Upon the whole, I think it only fair to say, taking the whole course of conduct of Col. Deakin down to the time of the election, and the correspondence, that it shows that Col. Deakin was really desirous of putting down the rabbits; he might be desirous of raising the price, or his agent might be, but that was not to put the money into his own pocket, but it was to make the most of the distribution in respect to the damage done to the tenants by the game. Now there is only one other circumstance, and then I have done with the facts. A farmer of the name of Benoy was at the meeting, who just did a thing (he was a tenant of Col. Deakin's) which shows that he was so struck with the concession that was made, that he used an expression which was to the effect that he would lift Col. Deakin in an arm chair; or, at all events, it was an expression of great satisfaction upon the part of this man at the declaration which had been made. But, however, whether promising Col. Deakin the honour of chairing or not, it seems to have been an expression of the satisfaction and of the great delight of the man at hearing this explanation of Col. Deakin. Now that would not of itself do; the mere fact that a man had said to his tenants, "You may kill game how you like, when you like, and dispose of it as you like," would be nothing unless there was another object in doing it, because a landlord may undoubtedly—and it would be a very strange thing if it were not so—yield to the solicitations of his tenants and say: "Although the game is reserved to me by my leases, yet I shall regard them as so much waste paper; you may shoot and kill game, and do not bother me about rabbits; kill them all, get rid of them all." That would be quite right if the landlord were so disposed; he has a right to give away and to get rid of any privilege which is reserved to him; and, so far from complaining of it, everybody would be

delighted that Col. Deakin had in so handsome a manner refused to regard the reservation of rabbits to his sole use as an operative part of any agreement with his tenants. Therefore I must go further; I must be satisfied that what passed at these meetings was done for the purpose of influencing in some way the election then about to take place. Now, ordinarily, judges, when they have felt that there have been very hard cases, have been enabled to escape by either finding that there was some doubt about the agency, some doubt about the words which were used, or some doubt which enabled them to come to a conclusion that, where they thought that in other respects the election had been an honest election, they would not upset it; and I have also always expressed my opinion, that where I believe an election has been honestly conducted, I should be most unwilling to upset such an election, and I should weigh with great nicety and care the expressions which were used, and I should doubt, if there were any contradiction, upon which side the truth lay; and then, as it would be the duty of those who sought to impeach the seat to produce a conviction upon my mind, I should say that the case must fail, because I was not satisfied either that the words were actually used and bore the meaning attributed to them, or that I was not satisfied that they were said by any person who was authorised to say them. Now that is not the case here; whatever was done was done by Col. Deakin himself. I am not embarrassed with any question of agency; I am not embarrassed with any question of whether the words were used, because there they are in print, and upon the paper which was circulated amongst the tenants and inhabitants of this borough upon the Saturday. I am not embarrassed, therefore, with those considerations which ordinarily enter into the duty of a judge to consider upon a trial of this sort, but I must look at it with the eyes of common sense; I must not be led astray from my duty by any feeling that the measure of justice is hard—that it is a cruel consequence which is to follow. If I come to the opinion that this corrupt practice is proved, I must not be deterred by any consideration of the kind. If I am satisfied that the object was not probably to induce a particular tenant or particular tenants to vote for Col. Deakin, but if I believe that the object was to get rid, to get out of the way, that rabbit question which was the only cause of dissension between Col. Deakin and certain tenants; if I believe that the object was to get that out of the way, to remove the impression which that cry had produced, and which the statements made by various persons had produced upon the voters; if I think that that was so, it is not a mere concession made as a measure of abstract justice, but it is made for a purpose of acquiring, at all events, popularity; and though I have endeavoured to see my way out of it, I confess I cannot come to any other conclusion than that statements of this description made during the very act of election almost, that is to say, made just before the nomination and the poll, and made in this manner, were made and intended to produce an effect upon the electors—and did, because there is no doubt, as is stated in one of the papers and by the reporter, that statement was received with enthusiastic cheering. All these things did undoubtedly give a great access, at all events, of popularity to Col. Deakin, and I am bound to say I should be rather

stultifying myself if I see a candidate upon the eve of an election cross-examined by persons hostile to him, anxious to know what he would say about this rabbit question; and saying, "To put an end to all this stuff, you, my tenants, are at liberty to kill the game any way and how you like," if I came to any other conclusion than that that was done, not so much from an abstract sense of justice, as from a desire to influence the election. Now I am very far from believing that either Col. Deakin or Mr. Cowland had any notion in their minds of the extent and effect of the Corrupt Practices Prevention Act; they had either not known it or they had forgotten it; they must have been entirely unaware of the effects of statements of this description made by persons in their position. Therefore, although I have had some difficulty in coming to the conclusion to which I will refer, I have come to the conclusion that, although this statement and the principal statement were made at a meeting said to be composed very much of the tenants of Col. Deakin, it was an offer, and amounted to an offer, which came within the meaning of this Act. So far as the meaning of an offer is concerned, I think it is analogous very much to the case of an offer of a reward which I put, and which may be accepted by anybody. The person who offers is not sure that it will be accepted, but at all events it was an offer calculated to produce the impression which I have mentioned. Now that being the state of things, the words of the Corrupt Practices Act are these: "Every person who shall directly or indirectly, by himself or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid on account of any voter having voted or refrained from voting at any election." Now the word "corruptly" has been several times under the consideration of the judges, and, as far as I know, they all agree. My brother Blackburn, certainly on two occasions, has laid down the law in reference to it in terms which are exceedingly clear. He says "What is the exact meaning of the word 'corruptly'?" This was undoubtedly upon the 4th section, and not upon this section which prohibits treating. "The word 'corruptly' means contrary to the intention of this Act, with motive or intention by means of it to produce an effect upon an election, not going so far as bribery, but going so far as to produce an effect upon the election." Now I construe that, and expressions of a similar character, as meaning that where the motive is, not a *bonâ fide* one of giving a privilege to a tenant, where the landlord expects nothing in return, and to have no influence upon his conduct—it is not that; but it is where the motive is to produce an effect upon an election. Then I think the offer, if it be an offer within the meaning of the section, made to the voters, comes by force of that meaning, to be within the definition of that section—an offer made, and made to influence a voter by the means I have already pointed out. But then comes this question, whether or not this is a valuable consideration? Now, undoubtedly, I think I must take it that, although the statement was received at the time it was made with immense applause, the tenants, finding that

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the expense of trapping and the trouble of trapping was greater than they had supposed, some of them at all events, have since the election come back to Mr. Paver and wished to be put upon the old terms, namely, letting Paver trap for them, or send a trapper, and they pay the trapper 3d. each, they having the rabbit. I think that was proved, and having paid the trapper 3d. they get the rabbit, Paver making up to the trapper any loss in consequence of the trapping money not coming up to the wages that he had originally agreed to pay him. Now I think it is not improbable that a farmer would very much prefer to have his landlord do the trapping or provide a trapper for him, he getting the advantage of trapping by getting a rabbit for the price of 3d. instead of having to pay 9d. or 10d., or whatever might be the value of the rabbit at the time it was trapped. But I do not think that that makes any difference in the case. I cannot help thinking that it is a consideration which is valuable and appreciable. If a landlord, instead of reserving to himself the entire right to kill the game and rabbits upon his estate, does permit his tenants to do it when they like and as they like, in any mode they like, I cannot help thinking that that is a valuable consideration appreciable in money, and for which money would be given, or a higher rent at all events would be given for the farm; because I take it that any man of any sense going to take a farm, makes inquiry with reference to the game and various other things, and with reference to the supply and quantity of game which the farm produces; and that in point of fact, if he is at liberty to kill the game, he would rather take the game himself, and would rather, probably, give some increase of rent. At all events, this I think is clear, that a person would prefer to take a farm upon which the rabbits were not reserved to the landlord, and upon which he would have the privilege himself, in his own way and by his own means, of exterminating them from the farm. We know very well that the rights of shooting are constantly the subject of damage and rents; that is to say, I let the shooting upon my farm at a shilling an acre, or I let the shooting of rabbits upon my farm. I do not see why it should not be exactly the same; indeed, you cannot go about the country without seeing that the rabbits are so abundant in some places that the privilege of killing rabbits is almost equal to the value of everything else upon the farm, and it must therefore be that in those cases the killing of the rabbits upon a farm is a valuable consideration. I cannot help thinking that it was to those tenants a valuable consideration, and that the effect upon the minds of these tenants was, that they had acquired by that concession a valuable consideration capable of being represented by some money value. Of course I cannot estimate what money value, nor is it necessary that I should do so; it is only necessary that I should arrive at the conclusion that it was money or money's worth, and that the respondent considered that he was parting with something which was, or might be in his hands, a source of great enjoyment or pleasure or otherwise, which he gives up to a tenant, and thereby destroys the effect of the reservation under which the tenant had been formerly holding. I cannot help thinking, therefore, that it was a concession which had an appreciable value. That being so, I

am bound to come to the conclusion, as it appears to me, that this was an act done by Col. Deakin; and although I say it with unfeigned regret, I come to that opinion, coerced in point of fact by considerations which are higher than any regard I can have to the feelings or the consequences which may follow to an individual. I must see that in construing the Act of Parliament intended to put down all corrupt practices and influences at an election, I am not narrowing by any construction of mine the effect of it, but am giving all proper effect to it. At the same time I hope I am giving it no extended or subtle effect, which I was warned against, and was thankful to be warned against—not that it was necessary, for I have anxiously looked to see if I could come to any other conclusion than the conclusion at which I have arrived. The conclusion at which I have arrived is, that the giving of this concession to the tenants under the circumstances was either a promise or a grant; it was not a legal grant, because that would require something more than a parol expression; but when we are dealing with an election question, we must deal with the motives which are apparent, and which appear from the act itself. I cannot go into any intention of Col. Deakin. I must be governed by what he said, and by the inferences I ought to draw from what he did and what he said, and by the inferences drawn by those persons who were present and who heard what he did and what he said.

Solicitor for petitioner, John Gurney.

Solicitors for the respondent, Peacock and Goddard.

COURT OF COMMON PLEAS.Reported by ETHERINGTON SMITH and J. M. LELY Esqs.,
Barristers-at-Law.

June 4, 5, and 22, 1874.

LAUNCESTON ELECTION PETITION.

DRINKWATER (pet.) v. DEAKIN (resp.).

Parliamentary election—Notice of act of bribery on the part of a candidate given to the electors before polling—Incapacity of being a candidate—Votes thrown away—Sufficiency of notice.

A candidate, in view of an impending election, committed what an election judge afterwards declared to be an act of personal bribery. Before the polling a notice of the fact of the candidate's bribery, and of his consequent disqualification, and that all votes given for him would be thrown away, was published to the electors:

Held, that the act of bribery did not, from the moment of its commission (it not having been then declared to be such by an election judge), render the candidate incapable of being a candidate in such sense as to cause all votes given for him after notice to be thrown away.

THIS was a case stated by Mellor, J., who tried the petition, reserving for the opinion of the court the question whether the petitioner was under the circumstances entitled to the seat, the respondent, who had received a large majority of the votes at the election, and had been declared elected, having been subsequently unseated for corrupt practices.

The facts were shortly these:

At the last election for Launceston, the two candidates were Col. Deakin and Mr. Drinkwater, and the former was the owner of an estate of some

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4000 acres in the neighbourhood. A few days previously, Col. Deakin gave his tenants leave to take the rabbits on a particular part of his land, this being a privilege they had not before possessed.

On the morning of the election, before the poll opened, the following notice was put forth by Mr. Drinkwater's agent and posted about the borough:

To the Electors of the Borough of Launceston.

Col. Deakin having, for the purpose of influencing votes at this election, given to all his tenants on the Worrington estate and voters in this borough a right to trap and shoot rabbits, has, I believe, been guilty of a corrupt practice, and as agent for Herbert Charles Drinkwater, Esq., a candidate at this election, I hereby give you and each of you notice, that under these circumstances, the said Col. Deakin is disqualified from being a candidate, and that all votes given for him will be thrown away.—I am, yours obediently,

JOHN GURNEY.

4, Great Queen-street, Westminster, London, S.W. Launceston, 31st Jan. 1874.

Col. Deakin was returned by a majority of two-thirds of the voters over Mr. Drinkwater, but was unseated by Mellor, J., on the ground that by giving the right to take the rabbits to voters on the eve of the election, he had been personally guilty of a corrupt practice within the meaning of the Act.

The seat was claimed for Mr. Drinkwater, and the question was, whether, without having recourse to a scrutiny, and being able to strike off each vote that was proved to be bad, the whole mass of votes given after notice for a disqualified candidate as to be considered thrown away, so as to leave Mr. Drinkwater in effect returned by a majority of good votes.

Manisty, Q.C., Leresche, and Batten, for the petitioner.—There is no question here as to the notice having been brought to the knowledge of the voters, and so far, therefore, as the notice extends, it was duly published; but there are two other questions as to the sufficiency and effect of the notice, for we say that it was a proper notice, and that all votes given for Col. Deakin after it were thrown away, and that therefore the petitioner is entitled to the seat. First, then, as to the notice itself; secondly, whether, having regard to the notice, the votes were thrown away. The proposition that I shall contend for is this. If a candidate in point of fact and in point of law is disqualified, and notice of that fact in a sufficiently definite form be given to and brought to the attention of the voters before they give their votes, then they vote at their peril; and if it is found afterwards as a fact that the candidate is disqualified, and notice has been given of that fact, then the authorities bear me out in saying that the second candidate is entitled to the seat. Now there are two classes of authorities—the Parliamentary Election Cases and the Common Law Cases. Under the first head comes *The Belfast case* (Falconer & Fitzherbert's Elect. Cas. 595). The notice there of the disqualification was, that the parties signing it were "advised that Mr. Gibson was disqualified." In respect of form this was held to be sufficient, as the fact turned out to be that he was disqualified, and the votes given after the publication of the notice were held to be null. In *Rogers on Elections*, 7th edit., 1st appendix, p. xiii, the authorities are specified, and the text says: "So that if, after notice given that a candidate is disqualified, a voter poll for him, he does so at his own risk and upon his own responsibility, and it

is no excuse for him to say that the law is uncertain or obscure." In *Heywood on County Elections*, p. 537, in reference to the same point, it is laid down: "Where the disability of the candidate is notorious, it should seem that it is not necessary to give notice to the electors, and it might be doubted whether more can ever be requisite than barely to give notice, without producing any evidence of the fact;" and quoting the case of *R. v. Blissel* (19 Geo. 3), Lord Mansfield's judgment is repeated: "Do you doubt, if he is really disqualified, whether such disqualification is notorious or not, that the votes given for him are thrown away?" The next case is *Taylor v. The Corporation of Bath* (3 Luders, 324). The electors had notice there that Bigg was not qualified; and though he obtained the majority of votes, yet, not only could he not sit, but the candidate next to him on the poll was seated instead. The judgment says: "As the fourteen electors who voted for Bigg had notice that he was not qualified, their votes were thrown away. . . . And when they do vote for a person not qualified, it is the same thing as if they had given no vote at all, and in that case it is not disputed, but silence would have been a constructive consent." *The Fife Election case* (1 Luders, 455) was a similar decision of an election committee, holding that the electors who voted for the sitting member had thrown away their votes, he being disqualified by holding an office which had been recently created, and consequently notorious. From these I gather that either the disqualification must be notorious or notice must be given of it. *The Kircudbrightshire case* (1 Luders, 72), is another instance of a committee seating the minority candidate upon the proved incapacity of the other, of which notice had been given to the electors. *The Wakefield case* (Bar. & Aust. 319, cited in *Rogers*, p. 224), was where the candidate had been appointed returning officer, but had resigned and stood. A written notice that he was nevertheless disqualified, given to a voter before voting, was held to cause his vote to be thrown away, although the ineligibility was disputable, as well on the facts as on the law. So much for the cases which are wholly in favour of my contention; there are others which give rise to a conflict, as no such clear and distinct rule pervades the decisions. *The Tavistock case* (2 Power, Rodwell, & Dewe 5), where the want of qualification was *bonâ fide* disputed, and notice given before the polling that the candidate's qualification would be impeached, to which a counter statement asserting a sufficient qualification was put forth, resulted in fact in the committee resolving that the qualification was insufficient; and it was held that this being established, the minority candidate was to be seated, all the votes after that notice given for the other candidate having been thrown away. In *The Cheltenham case* (1 P. R. & D. 224), notice that one of the candidates had been at a previous election guilty of bribery, was put forth to the electors; the objection taken before the committee when the seat was claimed by the other candidate, who was in a minority on the polling, was, that the notice was insufficient in form, as not declaring what the acts of bribery and treating were. The committee declared the election void, but without giving reasons; so that it may very well be that they refused the seat on the ground urged of the insufficiency of the notice to affect the electors with

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knowledge. This case, therefore, does not act as an authority against me here, for that objection was obviated by the notice at Launceston, specifying accurately what, when mentioned, was manifestly an act of bribery. In *The Horsham case* (1 P. R. & D. 240), however, which was later, and in which the *Cheltenham* case was cited, the committee seated the petitioner under these circumstances, as stated in the marginal note: "Upon petition alleging that the sitting member was disqualified from being a candidate by reason of bribery and treating at a former election, and that notice thereof had been given to all who voted for him, such sitting member having been an unsuccessful candidate at the former election, but a petitioner against the return, on the ground of bribery and treating, although not claiming the seat, the committee resolved that the sitting member was guilty of treating at such former election, and was disqualified from being elected, and that votes given in his favour were thrown away." The rule of law which was there urged upon the committee as existing, and which by their decision they appear to have upheld was, that if it is afterwards proved that in point of fact a disqualification did exist at the time of election, and that due notice thereof was given to the electors, the votes of such electors given for such candidate must be deemed to have been thrown away. *The Clitheroe case* (2 P. R. & D. 276), on the other hand, was one where the committee declined to consider a vote given for a disqualified candidate thrown away, because a notice had been posted in the borough and served on every elector before polling. The committee alludes to the unsatisfactory state of the law on this point, and says that the cases are contradictory; but unless notice of disqualification before polling, followed by proof of disqualification as existing in fact at that time, be sufficient to cause the votes wilfully given to be thrown away, it would seem that there can be no case short of an actual adjudication of bribery which would suffice to seat an untainted candidate without involving him in a fresh election. Then there are many cases at common law showing the law to be as stated by the Clitheroe Election Committee: "By the common law the principle seems to be firmly established that where a candidate is in point of fact disqualified at the time of an election, all votes given for him with knowledge of the fact upon which such disqualification is founded, must be considered as thrown away." First there is *R. v. Hawkins* (10 East, 211), affirmed in the House of Lords (2 Dow's Rep. 124). In that case Hawkins was disqualified, through not having complied with the Test Act, from being elected an alderman. After the polling had begun, he was asked whether he had taken the sacrament previously, and on his answering in the negative, notice was publicly given to the electors of his incapacity. It was there held that all votes subsequently given to him were thrown away, and that the other candidate was duly elected, the votes which he had received being more than those given to Hawkins before the notice was published. To the same effect is *R. v. Parry* (14 East, 549). The head note says: "And if such disqualification be notified to the electors at the time of election, votes afterwards given to such person are then thrown away; and any candidate having the most legal votes, though in fact inferior in number to the first, is duly elected." In *Claridge v. Evelyn* (5 B. & Ald.

81), an infant was elected clerk of a court of requests. Notice of his incapacity was given to the commissioners, the electors, before and at the time of the election, and that votes given for him would be thrown away and void. Claridge, who was second on the poll, brought an action on the case against the commissioners for a false return to a writ of *mandamus* which he had obtained, commanding them to admit him to the office to which they had returned that the infant had been duly elected. It was there held by the judgment of the court upon a special case, not only that the infant was ineligible, but that Claridge was consequently elected. Abbott, C. J. says: "I am of opinion, therefore, that he was ineligible to this office; and due notice of his incapacity having been given to the electors at the time of their election, their votes were thrown away, and, consequently, there must be judgment for the plaintiff." A later case is *R. v. The Mayor, &c., of Tewkesbury* (18 L. T. Rep. N. S. 851; L. Rep. 3 Q. B. 629). There Blackburn, J. says: "It is plain that if an elector knows as a fact that the candidate for whom he is about to vote is disqualified, and yet persists in voting for him, the elector's vote is as utterly thrown away as if he had voted for a dead person or for the man in the moon." This is founded on Lord Campbell's judgment in *R. v. Coaks* (3 E. & B. 253), and the only qualification that seems to be drawn by Blackburn, J. is that knowledge of a circumstance which legally constitutes incapacity is not necessarily knowledge of the incapacity, and he decides the case on the ground that the votes were given in ignorance that Blizard the mayor was in law disqualified. The latest decision in reference to this point is that in the *Galway* case, where the judgment of Lawson, J. supports my contention. [He then read passages at length from the judgment.]

Sir J. Karslake, Q.C., Parry, Serjt., and J. Edwards, contra.—The authority of the Parliamentary cases is brought to a close by the *Clitheroe* and *Cambridge* cases, where the committee acted on the general result of the practice and decisions previous to them. What is the rule to be drawn from them? I should be content to say that the question is, "Do the persons who give their votes for the tainted candidate knowingly, throw their votes away?" There must be either a general notoriety, and that not only of the fact but also of the consequent incapacity, or there must be express individual knowledge. It is true that the Parliamentary authorities are conflicting, but in the two latest the committees refused to seat the minority candidate. A summary of the decisions will be found in Rogers on Elections, 10th edit., p. 557. This case must come under the fourth head, where the disqualification is doubtful; for it is at any rate clear, that not only must the fact causing the disqualification be known, but also the voters must have knowledge of the absolute disability of the candidate. Now here the notice states the fact of Col. Deakin having given the right to his tenants to shoot the rabbits, but that would not alone be enough. Then it goes on in these terms: "I believe it disqualifies him." Surely a mere expression of belief by an interested person cannot be enough. [Lord COLERIDGE, C.J.—Does the addition of the belief of the agent make the notice bad, if it is good otherwise?] It ought to allege a state of facts which are a reason for disqualification. "I believe," qualifies all the rest. In *The*

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Belfast case (ubi sup.), "we are advised," was held to be a sufficient notice; but then, if the judgment be examined, it will be seen, at p. 601, that the decision did not turn wholly on the notice, as it was only one element of notoriety. [BRETT, J.—If the decisions in the Parliamentary cases are conflicting, what law are we to follow?] The common law, as interpreted in analogous cases. I would adopt the words of Lord Campbell in *R. v. Coates (ubi sup.)*, where he says: "Now it is the law, both the common law and Parliamentary law, and it seems to me also common sense, that if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a nonexistent person;" and Blackburn J., in *The Tewkesbury case (ubi sup.)*, explains this by saying, "that in order to make the vote a nullity, there must be a wilful persistence against actual knowledge." Alderson, B., in *Coaling v. Veley* (12 Q. B. 387), says that the reason why an elector voting knowingly for a disqualified candidate loses his vote is, that his act is nugatory, because contumacious. So that the votes must be thrown away, in the sense of not caring whether anyone is elected or not. The Clitheroe Election Committee seem to me to have expressed the rule properly thus: "To give effect to the notice, the disqualification must be founded on some positive and definite fact existing and established at the time of the polling, so as to lead to the fair inference of wilful perverseness on the part of the electors voting for the disqualified person." On the other question, I shall, notwithstanding the judgment in the *Galway* case, ask the court to say that what Col. Deakin was alleged to have done, if established, was not a disqualification at the time so as to render the votes void and thrown away. The judgment of Lawson, J. is founded on a misapprehension of what was said by Martin, B. in the *Yorkshire* and *Norwich* cases. Lawson, J. quotes as if Martin, B. had said that the fact of an act of bribery having been committed, annihilated a man's status in such sense as to make him a dead man or not a candidate at all. So far from that being so, Martin, B. makes a statement for the purpose of correcting a mistaken interpretation of his language, and says: "It is not that the vote is thrown away, in the sense in which my brother Ballantine seems to have supposed. I did not mean it in that sense. I meant that the moment an act of bribery is done by the agent for whom the candidate is responsible, from that moment the man is incapable of being elected. The law puts its hand upon him and says it cares not if nine-tenths of the electors vote for him. The act of bribery incapacitates him from sitting in Parliament." The confusion is between the incapacity of the member which, so far as his election is concerned, makes it impossible, from the moment the corrupt act is committed, that he should be duly elected, and his status in relation to the voters—between the votes being thrown away, in the sense of their being useless from that moment to seat the candidate, and being thrown away in the sense of there being a perverse wasting of them on a candidate known to be under disability. Again, bribery is an offence created by statute; and 17 & 18 Vict. c. 102, repeals the old Acts, and has new enactments about bribery and treating. Sect. 2 has reference to bribery, and under that section the person bribing need not be a candidate; but under sect. 4, as to treating, the words are, "every

candidate." Then sect. 36 shows the result of bribery or treating. It is: "If any candidate at an election shall be declared by an election committee guilty . . . he shall be incapable of being elected." So that the incapacity does not arise until he is found guilty, and until conviction a man is under no incapacity. The same principle must hold good as to charges determined by an election judge, and the disqualification dates from his report. Indeed, ss. 45 and 46 of 31 & 32 Vict. c. 125, tend to show that this is so, for the words are, "any person, other than a candidate, found guilty . . . shall, during the seven years next after the time at which he is so found guilty, be incapable," &c., and the report of the judge is substituted for the declaration of an election committee. Then the judges have power to make rules, and until they are made, by sect. 26, "and so far as such rules do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed." When the rules are made therefore, the court is bound by them alone. [Lord COLERIDGE, C.J.—I think that it is always to be bound beyond the ambit of the rules by the authority of committees. BRETT, J.—In the case about the right of peers to vote, Keating, J. held that "principles" had reference only to procedure.] All that has happened is the report of the judge that bribery has been committed, but except for the purposes of the petition this is not conclusive evidence of it. The *Horsham* case was decided under the old Acts, which have been repealed by 17 & 18 Vict. c. 102. The *Galway* case, which has been relied on, is not satisfactory, for the *Cambridge* case is not mentioned in it, and the reasoning of Lawson, J. is not sound, because it professes to be founded on a quotation of a judgment of Martin, B., which is shown to be inaccurate. It is said that the finding of the judge is, that bribery was committed, and that this finding, coming after the notice, is conclusive; and that, therefore, the innocent voters, who cannot be heard on the petition, are to suffer, and not to be allowed to exercise their votes. The voters have not been heard to disprove bribery as regards themselves; the notice involved a question, not only of the statutory disability, but also of the operation of the mind; and here I contend, on the authorities generally, there was no such notoriety as to make the voters perverse.

Manisty, Q.C. in reply.—The distinction in some of the cases arises from the disability being caused by holding an office, which might be got rid of, but bribery cannot be got rid of; its consequences attach on the moment of its being committed. Here there was bribery in public openly done with a view to influence voters. The question is, what was the status of the candidate committing it on the day of election? [Lord COLERIDGE, C.J.—Do you say that a man guilty of bribery, but unconvicted, is by common law disqualified?] Yes; because bribery at common law is left just as it was, the statutes have only imposed certain penalties, and bribery at common law deprives the candidate of the status of a candidate at the moment the offence is committed. [BRETT, J.—Are there any cases to show this? Elections used to last six weeks, surely there would be some case where a notice was given during an election and the seat claimed.] Acts of bribery by a candidate himself were very rare, but any act which at common law

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incapacitated a man for being a candidate rendered him in the same position as if he were an alien or an infant, and he could not be voted for. But in order to cause the votes given to such a man to be thrown away, something else has to be done. Sir John Karslake would admit that absolute knowledge in the voter's mind would do, so that he intends to throw away his vote; but I contend that distinct notice of the fact is sufficient. I say, then, that personal bribery stands on the same footing as other circumstances of incapacity; it avoids the seat; and with notice it causes all votes given for the person bribing to be null. [BRETT, J.—What was the effect of bribery before the statute? The candidate could not sit, nor be a candidate at the consequent election, but that was all. Lord COLERIDGE, C.J.—If bribery be a disqualification in the same sense and effect as infancy, &c., how is it that considering it must have been at least as common, there is no trace of its being held to seat the minority candidate?] I am now only upon bribery at common law, and it is the statutes that have dealt with bribery by an agent. The Acts have extended the consequences, but the offence remains the same. [DENMAN, J.—The *Penryn* case, cited in Rogers, p. 561, is against your contention. It was there argued that the bribery had been so notorious that the votes were thrown away. But the seat was not given to the petitioner. There seems to be the distinction to be drawn between the notoriety of a fact and the notoriety of a charge. Lord COLERIDGE, C.J.—In several of the cases you cite there was a scrutiny, and the seat may have been given when a sufficient number of bad votes had been struck off to reduce the majority.] Scrutiny is only a form; if the votes are all invalid they may be struck off at one blow by declaring them void.

Our. adv. vult.

Lord COLERIDGE, C.J.—This is a case arising out of the Launceston petition, tried before my brother Mellor at Launceston, and referred to us by him. Col. Deakin, the respondent, was returned as member for the borough at the last general election; and Mr. Drinkwater, the petitioner, was the defeated candidate. He petitioned against Col. Deakin's return, and claimed the seat. My brother Mellor, on the trial of the petition before him, found that Col. Deakin had been guilty of what he terms a "corrupt practice," because, in the words of the learned judge himself, "he had at a meeting of the electors on the day of nomination, and on the day after the nomination, consisting of his tenants and other electors, given to certain voters in the said borough, at the said election, being his tenants, a right to trap and shoot rabbits, and appropriate them to their own use." It was proved that subsequently to the commission of the offence, viz., on the day of the poll a printed notice was issued in the following words:

To the Electors of the Borough of Launceston.

Col. Deakin having, for the purpose of influencing votes at this election, given to all his tenants on the Worrington estate and voters in this borough, a right to trap and shoot rabbits, has, I believe, been guilty of a corrupt practice, and as agent of Herbert Charles Drinkwater, Esq., a candidate at this election, I hereby give you and each of you notice, that under these circumstances, the said Col. Deakin is disqualified from being a candidate, and that all votes given for him will be thrown away. (Signed) JOHN GURNEY.

The learned judge found as a fact, that this notice was issued on the polling day, before the opening

of the poll, and was brought to the notice of the voters of the borough before they voted. He found also that Col. Deakin was not duly elected and returned; and three questions have been left to this court by my brother Mellor. The real matter we have to determine is, whether the petitioner, Mr. Drinkwater, is or is not entitled to be declared elected for the borough of Launceston. Three propositions have to be made out in order to arrive at this conclusion: First, that the candidate was at the time of the election, in point of law, disqualified; secondly, that notice of that fact having been conveyed to the voters in a form sufficiently definite, any vote given after such notice was in law thrown away. The peculiar circumstances of the case made it necessary to contend further, that, thirdly, the uncertainty or obscurity of the legal question, on which the disqualification depends, makes no difference. Given the fact of legal disqualification as the result of argument, however elaborate, and decisions however conflicting; and given the fact of notice, the voter gives his vote at his own risk and on his own responsibility. The law as to the disqualification of the candidate, and the notice of such disqualification to the voter, is to be collected from the decisions of courts of law and of Parliamentary election committees, which latter, if not binding upon this court, by the 26th section of 31 & 32 Vict. c. 125, are yet to be treated with respect as expositions of the law of Parliament, which is part of the common law itself. And, if there be any difference discoverable in the authorities between the rules applied to Parliamentary elections and the rules applied to elections of other sorts, there seem to be reasons of good sense why a somewhat less rigid and technical rule as to throwing away of votes should obtain in the case of Parliamentary constituencies. It may not, however, in the present case, be necessary to decide this point, because it has first to be established that the candidate was at the time of the election, in point of law, disqualified; and if this cannot be made out, any further inquiry becomes useless. Was Col. Deakin, then, disqualified, in point of law, at the time of the election? That depends upon the meaning of the word "disqualified;" and in this case, as so often happens with regard to the English language, much argument would be prevented by accurately defining the terms to be employed, and always using them in the sense defined. The word "disqualified" may be used in two senses at least—either to signify a person disqualified to be elected, so that, although the great majority of the electors voted for him, his election would be void; or to signify a person disqualified to be a candidate, so that upon notice of the disqualification, if the great majority of the electors voted for him, his election would be void, with the further consequence, as regards the electors, that they would be held to have intentionally and deliberately abstained from voting, and to have acquiesced in the choice by the other electors of the other candidate, because they would not do what alone could prevent such choice—vote themselves for a candidate duly qualified to be one. It is in this latter sense that we must hold Col. Deakin to be disqualified, before we can decide that Mr. Drinkwater is, as the result of this election, entitled to be returned to the House of Commons as member for Launceston. The facts are simple. Col. Deakin is found by the judge to

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have been guilty of bribery before the polling day. And it is contended that, from the moment of the commission of the act afterwards found by the judge to be bribery, he was *ipso facto*, and *eo instanti*, disqualified, in the latter of the two senses I have explained of that word. There is, indeed, no doubt there are certain disqualifications which, if they had existed in the case of Col. Deakin would, upon notice of them, have had the effect contended for. In many cases in the courts at Westminster, and in several of the election committees, the decisions have undoubtedly gone this length. *Rees v. Hawkins* (10 East, 211) was such a case, where votes given for a man incapable of being elected into a corporate office, under the provisions of 13 Car. 2, c. 12, by reason of his not having taken the sacrament, were held to be, after notice of such incapacity, as if not given; and Lord Ellenborough assented to the general proposition that "votes given for a candidate after notice of his being ineligible, are to be considered the same as if the persons had not voted at all." But this was upon the ground that the status of a candidate was taken away by the operation of the statute of Charles II.; for in the later case of *Rees v. Parry* (14 East, 549), Lord Ellenborough and the other judges held a man to be duly elected, who had been at the time of the election disqualified, for exactly the same reason as in the former case, because before his election could be questioned he had become qualified, which he was not when elected, and his subsequent qualification by retrospectively restoring his status, called into existence the votes which would otherwise have been treated as not given. These and other like cases were decided upon the Test Act, where a condition made by law a condition precedent to candidature had not been fulfilled, and where notice of its nonfulfilment was notice that the man who had not fulfilled it was not and could not be a candidate. Under the same principle may be classed cases where the disqualification was infancy, such as was *Naridge v. Evelyn* (5 B. & A. 81), a want of estate, as in *The Belfast case* (Falc. & Fitz. 595), *The Tavistock case* (2 P. R. & D. 5), and in some others. The cases of a woman, of an alien under the old law, of a convicted felon, stand upon the same footing. In all these cases something is wanting in the candidate himself, which cannot be supplied, the existence or nonexistence of which is not dependent on argument or decision; but which the law insists shall exist in everyone who puts himself forward as a candidate. Bribery, however, is altogether a different matter, and is subject to considerations altogether different. No doubt, as Lord Mansfield says in *Rees v. Pitt* (3 Burr. 1335), it was always a crime at common law punishable by indictment or information. That, however, would not by itself prevent a person who had bribed from being a candidate at an election; and there is no case in which any such consequence has been held to flow from the commission of the offence, except under circumstances which, when rightly considered and properly understood, establish, and do not vary or qualify the rule. The offence of bribery has, however, been dealt with in various statutes, and the argument to be drawn from the language appears to me, I own, to be conclusive the other way. The 17 & 18 Vict. c. 102, consolidated and amended the laws relating to bribery, treating, and undue influence at elections of members of Parliament. It begins by repealing

in whole or in part many of the old statutes relating to these subjects; nor is it necessary for the present purpose to consider the provisions of those which remain in force. It enacts, in the 2nd section, in words sufficient to cover the case of Col. Deakin, that persons who do certain acts shall be deemed guilty of bribery, and punishable accordingly. It then proceeds, in the 36th section, as follows, in words which are of the utmost importance: "If any candidate at an election for any county, city, or borough, shall be declared by any election committee guilty, by himself or his agents, of bribery, treating, or undue influence at such election, such candidate shall be incapable of being elected or sitting in Parliament for such county, city, or borough, during the Parliament then in existence." The words, it will be observed, are not "shall be guilty," but "shall be declared guilty by an election committee;" and it seems clear that, but for these words, a man guilty and declared guilty might have sat even during a current Parliament for the very seat which he had lost by bribery except at the particular election rendered necessary by that avoidance, which is regarded as an adjournment only or continuance of the election so avoided. The Act of 26 & 27 Vict. c. 29, does not contain any provisions which, with reference to this particular subject, it is necessary to consider. The 31 & 32 Vict. c. 125, by which the jurisdiction of the House of Commons in matters of election petitions was transferred to the judges of Westminster Hall and to this court, contains very important provisions, especially ss. 3, 43, 45, 46, and 47. These clauses deal with the punishment to be inflicted upon candidates and other persons in respect of bribery and other corrupt practices; these punishments being greatly more severe in the case of bribery than of other corrupt practices. It seems to me to result from them all, that the disqualifications created by them are intended to be and are the result of the finding or report of the judge or other tribunal, and that they attach only on such finding or report, and from its date. In the case of the candidate, his "incapacity of being elected to and of sitting in the House of Commons during seven years," is expressly to begin "after the date of his being proved guilty." The other severe provisions of the 43rd section are limited in like manner. Precisely the same words are to be found in the 45th section, which deals with the case of bribery in persons other than the candidate himself. The 46th section re-enacts the 36th section of 17 & 18 Vict. c. 102, substituting the words "reported by a judge on the trial of an election petition" for the words "declared by an election committee," on which I have already commented. The 47th section provides for the removal of the disqualifications created by the former sections, in cases where they are proved to have been procured by perjury; and this section also declares, in effect, that such disqualifications did not exist till they had been so proved, that is, after trial and as the result of it. The conclusion, therefore, is that neither apart from the statutes, nor created by the statutes, is there in a candidate, from the moment of his bribing, and after notice of the fact of his bribing, any such disqualification as to prevent him thereupon from being a candidate at the then election, and to make all votes given in his favour after such notice as if they had not been given at all. Invalid upon proof of his

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bribery for the purpose of seating him they are; thrown away for the purpose of seating his opponent they are not. I have already explained, and will not repeat why, entirely accepting and being bound by the authority of such cases as *Rex v. Hawkins* (10 East, 211), they seem to me to be altogether inapplicable to the present case. Cases, however, were cited to us, decided by election committees, which it was contended had established the propositions contended for by Mr. Drinkwater's counsel. Most of them, however, are clearly distinguishable; and I think there is not one which, accurately considered, is inconsistent with the conclusion at which I have arrived. I am now speaking of those cases only which have been decided by election committees on questions of bribery. In every case in which I have been able to refer to, the bribery relied upon as creating a disqualification, is bribery committed by the candidate at the election which was avoided; and it has been held, no doubt, that such bribery is a disqualification for a candidate at the election rendered necessary by such avoidance. It could not be held otherwise, for the second election, under these circumstances, is but a continuation of the first, the exigency of the writ not being satisfied till there is a good return; and by supposition the return of the candidate found guilty of bribery is not a good return, and there must therefore be a return of some one else. The cases in which a man guilty of bribery in fact at an election declared void, has been held disqualified in a second election, though his bribery had not been inquired into on the first petition, fall under the same principle. On this point the decisions have been uniform, though as to the consequences to the voters of such disqualification the decisions seem to be conflicting. The principle of all the earlier cases will be found very well discussed in a note in 1 *Luders* 79; and there is nothing in the later cases at all to qualify the law as there laid down. There remains, however, one decision to be considered to which these remarks do not apply, which I admit to be in point, but which I am unable to follow. It is the decision of the majority of the Court of Common Pleas in Ireland, in the *Galway Petition* case in 1872, which I take from the Report ordered by the House of Commons to be printed in July of that year. The case was peculiar. Captain Nolan, the candidate whose election was questioned, was found guilty by Mr. Justice Keogh, of undue influence by himself and his agents, the undue influence having been practised as the result of arrangements made by the candidate and his agents previous to the election. The learned judge held that by this "the status of Captain Nolan as a candidate qualified to be elected was destroyed, and that he was disqualified to be elected for the county by such acts committed by him and his agents: and that such disqualification existed previous to the day of nomination for such election." On a case reserved for the Court of Common Pleas in Dublin, the majority of the court upheld this decision; and Mr. Justice Lawson, who delivered the opinion of the majority, uses the following language upon this part of the case: "If (says he) the earlier sections of 17 & 18 Vict. c. 102, ss. 2, 4, and 5, defining the offences of bribery, treating, and undue influence, and making them misdemeanors, do not disqualify the candidate who is guilty of them from being elected, I do not destroy his status, upon what ground

is a judge to unseat him? He cannot unseat a man because he has committed a misdemeanor: and it would seem, therefore, to follow in strictness from this argument, that the judge could not unseat him unless he had already been found guilty." This might be so, no doubt, if avoiding the election of a candidate and destroying the status of a man to be a candidate, were the same thing. But I have already pointed out that they are very different things; that the common law of Parliament and the language of statutes, has always treated them as very different; and being which they are, very different, it is only by treating them as being, which they are not, the same, that any such consequence follows, as Mr. Justice Lawson supposes. He proceeds to say: "This is, however, an absurd consequence, and I think that the true construction of the statute is that the commission of any of the offences *ipso facto* disqualifies the candidate from being elected; or, to use the language of Baron Martin, in the *Norwich* case, 'annihilates his status as a candidate.'" I have already expressed the sense in which I conceive the statute is to be construed, and I am very very glad to find that I do not conflict with any view of Baron Martin. It is probable that Mr. Justice Lawson was quoting from some unauthentic and imperfect report of Baron Martin's words, for in the full report of his *Norwich* judgment, printed by order of the House of Commons, he is careful to disavow, in express and accurate language, the sense which Mr. Justice Lawson has affixed to his words. He explains that he uses them only in a sense in which I entirely agree with them, and gladly adopt them as my own. His words are these: "But by the 46th section, coupled with the 36th section of another Act of Parliament (the 17 & 18 Vict. c. 102), another offence is created. These two sections enact that, in the event of a candidate, by an agent, committing bribery, he becomes incapable of being elected; and where a candidate, by an agent for whom he is responsible, commits an act of bribery, by that act the capacity of the candidate to be elected ceases; his status is destroyed, and no vote given to him will be of any avail. Some misapprehension occurred with regard to what I stated the other day in reference to that matter. It is not that the vote is thrown away in the sense in which my brother Ballantine seems to have supposed. I did not mean it in that sense; I meant that, the moment an act of bribery is done by the agent for whom the candidate is responsible, from that moment the man is incapable of being elected. The law puts its hand upon him, and says it cares not if nine-tenths of the electors voted for him. The act of bribery incapacitates him from sitting in Parliament, and the real question which is to be decided in this case is, whether or not the admitted bribery by Hardiment [the agent] about two or three o'clock in the afternoon, is an act for which Sir Henry Stracey is responsible according to the law of England, or the election law, if you think fit to call it so." I adopt these words entirely in the sense in which Baron Martin is careful to explain that he used them. I reject them in the sense in which Baron Martin himself expressly rejected them. If this be, as I think it is not, a refined distinction, it is one not of my inventing; it is to be found in every case, whether decided in the Courts or in Parliament, with the exception only of the *Horsham* and the *Galway* cases. It was

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recognised and acted upon by Baron Martin in the *Norwich* case; for although he unseated Sir Henry Stracey, he expressly declined to seat the candidate of the minority, or to hold that the votes of the majority were as if they had not been given. I need hardly say that the judge who thus decided has as much broad sense, and was as little given to hair-splitting as any judge of our time. I do not apprehend such consequences in fact, as it has been suggested will follow from his view of the law. But, whatever the consequences, I am clearly of opinion that, although Col. Deakin's conduct has properly avoided his election, and subjected him to the consequences enacted by the 17 & 18 Vict. and the 31 & 32 Vict., he was not at the time of the election disqualified from being a candidate, so that all votes given for him after notice were, in law, as if they had not been given. This being my opinion, it is, I think, not necessary to consider whether, if the disqualification had been such as I have already said I think it was not, the two further propositions for which Mr. Drinkwater's counsel had to contend, can be sustained. I content myself with saying that, as at present advised, I think they cannot. The case is, indeed, free from the objection which, for myself, I should have found insuperable (though the Court of Common Pleas in Dublin did not find it so in the *Galway* case), that the notice was not served upon a sufficient number of electors to turn the scale. I feel no difficulty, moreover, as to the language of the notice, which appears to me sufficiently definite and specific in its terms; and I entirely agree, as indeed I am in a special manner bound to do, in the general law laid down as to the throwing away of votes, in the judgment in *Gosling v. Veley* (7 Q. B. 406), a judgment which was written by Sir John Coleridge. But I do not think that this case falls within that general law; and I further think, as at present advised, that in a parliamentary election, "in order to give effect to the notice, the disqualification must be founded on some positive and definite fact existing and established at the time of the polling, so as to lead to the fair inference of wilful perverseness on the part of the electors voting for the disqualified person." These are the words of the Clitheroe committee (2 P. R. & D. 285). They go on to state that they "believe them to be in accordance with the sound construction of the law, as well as with justice and reason." I was of that opinion, and acted upon it, when, as a member of the House of Commons, I served upon the Cambridge committee in 1866, and I retain it still. I am, therefore, of opinion that the first question put by my brother Mellor should be answered in the affirmative, and the second and third in the negative.

BRETT, J.—I am sorry that I have not been able to prepare a written judgment in this case, but I think it is right for me to express the view I take upon it. There were two questions reserved for the consideration of the court: First, Assuming that the bribery of which Col. Deakin was found guilty by the judge, rendered him incapable of being a candidate at that election, was the notice of the fact given to the electors sufficient? secondly, was the bribery committed by him such as to render him incapable of being a legal candidate? First, then, what is the true function of such a notice as was given here, i.e., when does it operate so as to cause those who vote after it is received, to throw away their votes, so as to leave the poll

in exactly the same state as if they did not vote at all? When there are two candidates, one of whom is qualified and one not, and there is an actual knowledge of facts as to one, and also a knowledge that such facts cause him to be disqualified, then the voter who, possessing this knowledge, yet votes for the disqualified candidate, throws away his vote. If the voter has the knowledge of the incapacity, he cannot prevent the legal consequences of the fact from following; he cannot, merely by saying that he did not know that the law would give the seat to the other candidate, prevent that from occurring if it be the law. But there is a further state of affairs upon which the consequence follows, and it is this: when there are certain circumstances existing in fact, and notice of those circumstances would tell a person of ordinary care, sense, and intelligence, that they produced incapacity in the candidate, then the voter who nevertheless votes for such candidate throws away his vote. Or it may be further stated thus: where there is notice given of such facts as would put a person of ordinary care and intelligence upon an inquiry which would tell him of the disqualification, then he cannot absolve himself by asserting that he had no knowledge of the consequences of the facts he was cognisant of, or of the law applicable to them. It is a rule that no one can render an invalid act valid, by asserting that he does not know the law. This seems, perhaps, to be contrary to the *Tewkesbury* case, but then I think that the enunciation of the law in that case went further than it had ever done before; and, as there is an undoubted conflict of authority arising upon it, I prefer to agree with that which was recognised as the law before the decision in the *Tewkesbury* election. And I state it thus: where by law a certain state of facts produces an incapacity in any person to be a candidate, and where notice of that is given, then the voter cannot make his vote valid which would otherwise be not valid, by saying that he did not know. Applying this to the present case, if it had been clear law that bribery made a candidate incapable, not merely of being elected but of being a candidate, then this notice would have been sufficient for the purpose for which it is given, and so I answer the first question in the affirmative. But the main question seems to me to be, whether the bribery of which Col. Deakin was found guilty did render him incapable of being a candidate. Before the passing of the Corrupt Practices Act, what would have been his position? For, as there is nothing there to disqualify him from being a candidate, we are thrown back on the common law of Parliament. Now, if the proposition which is contended for by the petitioner here be true, it must have been one that was raised at every general election that occurred. I do not say that it was necessarily decided, but the point must have been taken over and over again. But if this be so, the law must have been challenged repeatedly, and yet how is it that no case can be produced with reference to it, unless it be the *Horsham* case? In one case, indeed, the committee challenged the counsel to the production of a case on this very point, and he was unable to produce one; and, therefore, the result is, that unless the *Horsham* case be a ruling decision to the contrary, we must perforce say that the law of Parliament is against the view that has been urged upon us by the petitioner's counsel. Then, as to the *Horsham* case, what did it decide? There was

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[Ex.]

a petition in the first instance against the sitting member, in which Mr. Fitzgerald, the defeated candidate, did not claim the seat for himself. If he had done so, the evidence showed that there would have been a counter petition. As it was then there was another election, at which Mr. Fitzgerald was elected, and then a charge was made against him of corrupt practices at the former election. Now, if the Parliamentary committee had been entitled to act on equitable principles, or on an equitable view of the circumstances, they might have considered that, as Mr. Fitzgerald had not claimed the seat previously, he might very well have been known by all the electors to be disqualified in consequence of some incapacity, which would become patent upon an inquiry. But they were not entitled to apply equitable principles, and that made their decision wrong, and accordingly it has never been accepted by the Parliamentary authorities, and it is not a binding case upon us as to what was the practice. It is, moreover, in direct opposition to the Clitheroe and Cheltenham judgments. If, therefore, we are to decide this on the authority of Parliamentary committees, the predominating number of cases says that bribery is an offence which makes his election void, but does not incapacitate the man who has been guilty of it from being a candidate. There is a manifest difference. In the one case there is the default of himself or his agents, for whom he is responsible, and the consequence properly falls upon him. In the other the innocent electors might be the persons who suffered. Beyond the decisions of Parliamentary committees, we have also a right to look at the text books, and see what has been understood to be the state of the law, by writers on the subject. There we find a long string of cases in which bribery at the election itself which is avoided has never been treated as a fact producing incapacity of being a candidate. But more than that, an examination of the later statutes shows that before them the alleged incapacity did not exist. The Act of 1854 (17 & 18 Vict. c. 102), defines what shall be considered as bribery, and the consequences of it are clearly set out. It says that the person bribing shall be guilty of a misdemeanor, and that he shall forfeit 100*l.* to any person who shall sue for the same, together with full costs of suit, but it does not say that he is rendered incapable of being a candidate. The next section defines treating, and enacts that, as a result of treating, the vote of the elector who has been treated shall be void; but it does not say that the man who is guilty of treating is therefore incapable of being a candidate; and another section deals in the same way with undue influence. It is to be noticed that in the very same statute where the Legislature does deal with incapacity, the appropriate term is used in sect. 36: "And such candidate shall be incapable of being elected or sitting in Parliament," and that incapacity arises when the candidate has been "declared by any election committee guilty." The Corrupt Practices Act itself, therefore, is also a strong authority which we have a right to notice, for it was settled by a committee of the highest authority as to Parliamentary usage. If they had thought that bribery did constitute an incapacity of the nature contended for, they would have put it in; but they made incapacity rest on previous bribery, bribery founded on the decision of a committee, or, as it would now be, on the candidate having been found guilty by an election judge. Therefore, on

the authority of Parliamentary committees, or a review of the books on the subject, and on a consideration of the subsequent statutes, I have come to the conclusion that the bribery of which Col. Deakin has been found guilty, though avoiding his seat, did not render him incapable of being a candidate at the election which was so avoided. Then we are met by the decision in the *Galway* case; and with reference to that, although we are most anxious to agree with the Court of Common Pleas in Ireland if we can do so, yet if we are convinced that the case was decided on a misapprehension of the law, we must, sitting here in this court, say so. It seems to me a curious circumstance that the point which we are now deciding was not in that case reserved for the consideration of the court at all. The judge who tried the petition seems to have assumed that it was so clear that, therefore, he did not reserve it; and so the court, upon the argument in Dublin, was not strictly speaking entitled to consider it. Nevertheless, there are observations in the judgment of Mr. Justice Lawson, intimating that the question was still open, but it does so happen that that part of the judgment dealing with this point is not so elaborate as the other parts. Indeed, in the *Galway* case, the whole contest between the judges was not the incapacity of the candidate, but the notoriety of the notice. In the result then, however sorry I may be to differ from the judgment of the court deciding that case, I have in the end come to the conclusion that, if that is a decision that a corrupt practice by a candidate at the election, of which sufficient notice is given to the electors, without however there being any previous finding of the fact by a committee or by an election judge, makes that candidate incapable in the sense in which the word has been used, I cannot follow it. I quite agree that it was right to unseat Capt. Nolan, but not that it was right to seat his opponent. With great hesitation and some doubt, in consequence of the decision of the Irish Court of Common Pleas being to the contrary effect, I cannot agree with Mr. Justice Lawson's judgment on that point, and so I think here that the facts did not render Col. Deakin incapable. Therefore, although the notice issued would have been, in my opinion, sufficient, if Col. Deakin had been incapable, yet the result is that Col. Deakin's own seat is avoided, but Mr. Drinkwater cannot be seated in his stead. I have to add, that my brother Denman agrees in this judgment as to both points. He thinks that the notice would have been sufficient if an incapacity on the part of Col. Deakin had existed, but that such incapacity did not exist.

Attorney for the petitioner, *John Gurney*.

Attorneys for the respondent, *Peacock and Goddard*.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

Jan. 30; Feb. 9; and June 4, 1874.

MILL v. HAWKER AND OTHERS AND WICKETT.

Highway board—Trespass by in removing obstruction on alleged highway—Corporation—Individual liability of members of for corporate act—Order of board to district surveyor—Liability of surveyor for obeying same—"Respondeat Superior"—"Ultra vires"—Damages and costs of action against board—How to be paid—5 & 6 Will. 4,

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c. 50, ss. 69, 72, 73, 109; 25 & 26 Vict. c. 61, ss. 9, 11, 12, 16, 17, 18, 19, 20, and 43, subsect. 3.

In November 1872 the plaintiff, who was the occupier of a close of land at M., through which a footpath ran which was alleged to be a public road, closed two gates which crossed the said footpath, by placing locks upon them, which he locked, thus obstructing the footpath. Thereupon, upon the complaint of the churchwardens of M., that the path had been obstructed, a meeting of the highway board, at which all the defendants (except W., the district surveyor) were present as members of the board, was held; and after hearing the complainant, and also the plaintiff and his attorney, and the witnesses, a resolution of the board, to which all the defendants (except C., the clerk of the board, and W., the surveyor) were parties, was passed, "declaring the footpath to be a public road, and directing notice to be given to the plaintiff to remove the obstruction, and that, on his failing to do so within a specified time, the district surveyor do remove the same." On the following day, the plaintiff not having removed the obstruction, W. received an order in writing, signed by C., as the clerk, and purporting to be "by order of the board," directing him "forthwith to remove the locks from the gates across the footpath, and for the future to take care that no obstruction whatever be suffered to exist to the free user of the road by the public." Acting upon this order, W. removed the locks, and thereupon the plaintiff brought the present action against all the members of the board, individually, who had concurred in the resolution and order, and against C., the clerk, and W., the surveyor.

At the trial before Kelly, C.B., the trespass being proved, objection was taken by the defendants' counsel that the action should have been against the highway board as a corporation, the defendants not being liable individually for their acts as members of the board; and that, as to the defendants C. and W. (the clerk and surveyor), the maxim "Respondet Superior" applied. The objection being held good, a nonsuit was directed as to all the defendants; and upon a rule to set it aside and for a new trial, as regards all the defendants except C., against whom it was admitted there was no evidence beyond his signing, as clerk, the order to the surveyor, it was

Held by Cleasby and Pigott, BB. (Kelly, C. B. dissenting), that the nonsuit was wrong, and that the rule for a new trial must be made absolute.

By Cleasby and Pigott, BB., on the grounds, that all the defendants (except W.) were liable, because the act of trespass, committed in pursuance of the resolution and order to which they were parties, was an act wholly ultra vires of the highway board, and such as, in their corporate capacity, they were not competent or qualified by law to perform; and that the mere fact of giving a corporate form to the act did not prevent it from being the act of those who caused it to be done. And that W. was liable, because, as to him, the general rule that a servant doing an unlawful act cannot justify it under the order of his master or employer, was applicable, and that the fact of persons holding a public office or employment (whether created by statute or not), did not take them out of the operation of this rule; and there was nothing in the statute under which he was appointed exempting him from liability, the effect

of the statute being to create the relation of principal and agent, or master and servant, between him and the board, and its object being to regulate his conduct, and not to limit his responsibility to third parties.

Sed contra, by Kelly, C.B.—The resolution was the act of the corporation, and it is settled law that no action lies against individual members of a corporation for a corporate act, unless the act be done maliciously by the individuals charged, and the corporate seal be used as a mere colour for the malicious act, or unless the act is ultra vires, and not in law a corporate act at all. The defendants, therefore, are not liable, and the action should have been against the board as a corporation, and not against the defendants individually. The resolution and order to the surveyor were not ultra vires, and it is a misapplication of the term to call them so. If an act merely unlawful and unauthorised, such as a trespass or the conversion of a chattel, were to be deemed ultra vires, and therefore no action would lie against the corporate body who authorised it, a corporation would not be liable for any tort at all. The board are a public body, incorporated for public purposes, and acting bona fide, and within the scope of their duties and authority under the Act of Parliament, and the defendant W. is not liable, because the surveyor is a public officer, charged with the performance of public duties, and bound by the direct words of the statute to obey the orders of the board, in obeying which he acts ministerially only; and he had no means of knowing whether such orders were valid and lawful or otherwise.

By Cleasby and Pigott, BB. (dissentiente Kelly, C.B.).—The highway board have no means provided for paying damages and the costs of defending an action of trespass like the present, as such damages and costs could not be costs of the board, or in any way chargeable upon the parishes forming the district, or payable out of the district fund: (25 & 26 Vict. c. 61, ss. 18, 19, 20.)

THIS was an action for trespass in breaking and entering a close of the plaintiff's, called Crapp's Park, in the parish of Minster, in the county of Cornwall, and breaking and destroying the gates of the said close, and removing, taking, and carrying away and destroying the goods of the plaintiff, to wit, certain locks of the plaintiff's, then being on the said gates, and converting the same to the defendants' own use.

The defendants pleaded not guilty (5 & 6 Will. 4, c. 50, s. 109. Public Act), and on that plea issue was joined.

The facts of the case, as they appeared at the trial before Kelly, C.B. at the Summer Assizes for Cornwall, at Bodmin, in 1873, were shortly as follows:

The plaintiff, a farmer at Minster, in the county of Cornwall, was the occupier of the close of land in question, through and over which a footpath ran which was alleged and claimed by the defendants to be a public footway, leading from the public highway road from Boscastle to the parish church of Minster, and also to other parishes and places. The defendants (except the defendants C. O. Hawker and Wickett) were members of the board of guardians or highway board for the Camelford district, in the county of Cornwall (constituted under the

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25 & 26 Vict. c. 61), within which district the close and path in question were situated. The defendant C. O. Hawker was clerk to the board, and the defendant Wickett was the duly appointed surveyor of the board; and the trespass complained of was committed by him as such surveyor, under the authority and by the order and direction of the other defendants, acting as such highway board, under the circumstances herein-after stated.

The plaintiff, in the autumn of 1872, under the direction of his landlady, the owner of the close in question, who denied the existence of a public way over her land, caused a gate which crossed the said footpath in the said close to be locked, and thereby obstructed the public in the use of the path altogether. The matter having been brought to the attention of the highway board of the district by the churchwardens of the parish of Minster, notice was, on the 27th Aug. 1872, given by the churchwardens to the plaintiff that a complaint would be made to the board, and he was requested to attend a meeting of the board, which he did, accompanied by his attorney, on the 30th Aug.

At this meeting all the defendants, except Wickett, the surveyor of the board, were present, and after an investigation into the matter and the hearing of witnesses on both sides, a resolution to the following effect was then and there come to by the board, and entered in the minute book of their proceedings: "Resolved, that the board having heard the complainant, and the defendant, Mr. Mill (the present plaintiff), and the witnesses, as well as Mr. White, the defendant's attorney, is of opinion that the road leading from Boscastle by the Wellington hotel to Crapp's-park is a public road, and that therefore Mr. Mill, the tenant, and Miss Helyar, the owner of the land through which it passes, be served with notices to remove the obstruction they have erected, and if the same be not removed on or before six o'clock of the 31st inst., the district surveyor remove the same." The locks not being removed by the plaintiff, the defendant Wickett, as surveyor of the board, under their direction, removed them.

The locks were again placed upon the gate by the plaintiff, and this being reported to the board by the surveyor, they made an order at a meeting of the board, on the 29th Nov. 1872, at which all the defendants, except Wickett, were present, that the surveyor should at once remove the locks, and suffer no obstruction in future to exist to the free user of the path by the public; and on the following day, the 30th Nov., the defendant Wickett received the following board order from the clerk of the board:—

Camelford Highway District, 30th Nov. 1872.

Dear Sir,—The Highway Board, at their meeting yesterday, ordered that you are forthwith to remove the locks again placed on the gates across the highway leading from Boscastle Bridge to the highway leading from Boscastle to Minster Church and Llanewth; and for the future you are to take care that no obstruction whatever, either from doors or gates being locked, be suffered to exist, and that no hindrance to the free user of the road by the public be permitted for any time to remain after you are acquainted with the attempt to close the road.

By order of the Board,

CLAUDIUS C. HAWKER, Clerk.

To Mr. Wickett.

Upon receipt of that order the defendant Wickett at once again removed the locks from the gate,

and threw open the path over the said close, and thereupon the plaintiff then brought the present action against all the members of the board who had concurred in the above-mentioned resolution and order, including Mr. C. O. Hawker, the clerk to the board, and the defendant Wickett, their surveyor.

At the trial the trespass having been proved, it was objected on the part of the defendants, that the action was wrongly brought against them as individuals, and that it should have been brought against the highway board as a corporation; and also that, with respect to the defendant, C. O. Hawker, the clerk, and Wickett, the surveyor, they were not liable as they acted ministerially only, and under the orders of the board, and that the maxim "*Respondeat Superior*" was applicable to their cases. The learned Chief Baron upheld the objection, and it being admitted that there was no evidence against the defendant, C. O. Hawker, the clerk, and that he had taken no part in the proceedings beyond signing in his capacity as clerk, and by direction of the board, the letter or order to Wickett of the 30th Nov., a verdict was taken, as to him, in his favour. With respect to the other defendants, other than Wickett, his Lordship was of opinion that assuming this path to be a highway and an obstruction to have existed, an authority was given by Act of Parliament to the highway board to act in their corporate capacity, and for the public interest, in ordering its removal, and that, for having so acted, they were not liable individually, and therefore, that, with respect to them, the plaintiff must be nonsuited. As regarded the defendant Wickett, his Lordship said he had for some time doubted whether, as he had personally committed the act of trespass, he might not be liable, although it was done by the board's order. But he (Wickett) was bound to obey the board's order, and was not bound to know the various Acts of Parliament, and to refuse to do what he was instructed to do, because he believed it to be illegal. As surveyor he was entitled to the benefit of the section of the Highway Act which enacted that he was to carry out the instructions of the board, and in all respects to conform to their orders. He thought, therefore, that the action should not have been against the surveyor, but against the board who instructed him; and he ruled that neither the surveyor nor the members individually were liable, and that the plaintiff's action was not maintainable.

Cole, Q.C., having moved for and obtained a rule, on the part of the plaintiff, to set this nonsuit aside and for a new trial, on the ground of misdirection on the part of the learned Lord Chief Baron in ruling that the defendants (other than the surveyor) were not individually liable, and that the surveyor was not liable, the same now came on for argument, in the course of which the 69th, 72nd, and 73rd sections(a) of the Highway

(a) Sect. 69. That every person encroaching on a highway by making any building, hedge, ditch, or other fence thereon, within 15ft. from the centre thereof, shall on conviction forfeit 40s.; and the surveyor shall cause such building, &c. to be taken down or filled up at the expense of the person to whom it shall belong; and power is given to the justices at a special sessions for the highway to levy as well the expenses of taking down the same, &c., as the several penalties by the section imposed, by distress and sale of the offender's goods.

Sect. 72. That if any person shall . . . wilfully obstruct the passage of any footway . . . or shall in any way wil-

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Act of 1835 (5 & 6 Will. 4, c. 50), and sects. 9, 11, 12, 16, 17, 18, 19, 20, and 43(a) of the Highway Act of

fully obstruct the free passage of any such highway, every person so offending, &c., shall for each and every such offence forfeit and pay any sum not exceeding 40s. over and above the damages occasioned thereby.

Sect. 73. That if any timber, stone, hay, straw . . . rubbish, or other matter or thing whatsoever, shall be laid upon any highway road to be a nuisance, and shall not, after notice given by the surveyor, assistant surveyor, or district surveyor, be forthwith removed, it shall and may be lawful for the surveyor, assistant surveyor, or district surveyor, by order in writing from any one justice, to clear the said highway by removing the said stone, hay . . . or other matter or thing as aforesaid, and to dispose of the same, and to apply the proceeds arising therefrom towards the repairs of the highway, &c.

(a) Sect. 9, sub-sect. 1. The highway board shall consist of the waywardens elected in the several places within the district, in manner hereinafter mentioned, and of the justices acting for the county, and residing within the district. Sub-sect. 2. The board shall be a body corporate by the name of the highway board of the district to which it belongs, having a perpetual succession and a common seal, with a power to acquire and hold lands for the purposes of the Highway Acts, without any licence in mortmain. Sub-sect. 5. Any minute made of proceedings at meetings of the board or committees of the board, if signed by any person purporting to be the chairman of the board, shall be receivable in evidence in all legal proceedings, without further proof. Sub-sect. 6. No member of a board, by being party to, or executing in his capacity of member, any contract or other instrument on behalf of the board, or otherwise lawfully exercising any of the powers given to the board, shall be subject to be tried or prosecuted, either individually or with others, by any person whatsoever, and the bodies, or goods, or lands of the members, shall not be liable to execution of any legal process by reason of . . . any lawful act done by them in execution of any of the powers of the board.

Sect. 11. All such powers, rights, duties, liabilities, capacities, and incapacities (except the power of making highway rates, &c.), as are vested in or attached, or would but for this Act have become vested in or attached to any surveyor or surveyors of any parish for any part of the district, shall vest in and attach to the highway board.

Sect. 12. Power to the highway board to appoint a treasurer, clerk, and district surveyor, and to pay them salaries.

Sect. 16. The district surveyor shall act as the agent of the board, in carrying into effect all the works, and performing all the duties by this Act required to be carried into effect, or to be performed by the board; and he shall in all respects conform to the orders of the board in the execution of his duties, and the assistant surveyor, if any, shall perform such duties as the board may require, under the direction of the district surveyor.

Sect. 17. The highway board shall maintain in good repair the highways within their district, and shall, subject to the provisions of this Act, as respects the highways in each parish within their district, perform the same duties, have the same power, and be liable to the same legal proceedings as the surveyor of such parish would have performed, had, and been liable to if this Act had not passed; and the district surveyor is to submit every year to the board an estimate of the probable expenses for maintaining the highways in repair during the year.

Sect. 18 gives power to any justice of the peace, on complaint of a highway being out of repair, to summon the board and the waywarden to appear (the board to appear by their surveyor or clerk, or any member of the board) before the justices in petty sessions, and unless the board undertake to repair, or the waywarden deny the liability of the parish to repair, the justices shall make an order on the board to repair within a limited time, and the expenses of such repairs, &c., with the costs of the proceedings, shall be paid by the board, &c.; and all expenses so directed to be paid by the board in respect of the repairs of any highway, shall be deemed to be expenses incurred by the board in repairing such highway, and shall be recovered accordingly.

Sect. 19. When, on hearing any such summons, the liability to repair is denied by the waywarden, or by any

1862 (25 & 26 Vict. c. 61) were referred to, and relied on by counsel on both sides, and were afterwards discussed and dealt with in the considered judgments of the court.

Kingdon, Q.C. and *Pinder* (with whom was *Lopes*, Q.C.), on the part of the defendants, showed cause against the rule, and contended, first, that the defendant, C. C. Hawker, the clerk to the board, and who had acted merely as clerk in signing by order of the board, was not liable to an action; (a) secondly, that the other defendants, except Wickett, the surveyor, had acted as a corporation and could only be sued in their corporate capacity as the highway board, and not individually as members of it; and thirdly, that Wickett, the surveyor, was not liable to an action, being in the position of a mere servant, obeying, as he was bound to obey, the orders of his masters, and that the maxim "*Respondet Superior*" applied to his case. The board, even assuming them to be in fault in what they have done, acted merely as a corporation, and cannot be liable as individuals. [*Picott*, B.—That argument would give the board a larger exemption than that which they would have at common law. However, if any one of these gentlemen had been asked, "will you be liable for this individually?" doubtless he would have said: "Oh no, I am acting as one of a board."] Precisely so. It is not the individual members who act at all. [*Kelly*, C.B.—It has been decided that the test of liability is not whether there be power to levy a rate.] The consequence of establishing an individual liability, seeing that one tortfeasor has no right to come upon another for contribution, might be ruinous; and no man in the country in his senses would take his seat upon a board of this kind, if by so doing he might probably be held liable to an action for its acts. It is however contrary to all rules of law and to the spirit of the statute (sect. 9, sub-sect. 6). [*Picott*, B.—Suppose the order had been to take down a house, could they have sheltered themselves by saying that they were acting as a board?] There might of course be some acts so obviously beyond the scope of their corporate jurisdiction as to make the members personally and individually liable; but the present act now under consideration is not such an one; it was an act duly and legally autho-

party charged therewith, an indictment is to be preferred at the next assizes or general quarter sessions for the county, &c., against the inhabitants of the parish or the party charged, and the costs of such prosecution shall be paid by such party to the proceedings as the court shall direct, and if directed to be paid by the parish, shall be deemed to be expenses incurred by the parish in keeping its highways in repair.

Sect. 20. The salaries of the officers appointed for each district, and any other expenses incurred by any highway board for the common use or benefit of the several parishes within such district, shall be annually charged to a district fund, contributed by and charged on the several parishes in proportion to the average expenditure, during the three preceding years, in maintaining the highways in such parishes respectively; but the expenses of maintaining the highways of each parish, and all other expenses in relation to such highways, except such as are by the Act authorised to be charged to the district fund, shall be a separate charge on each parish.

Sect. 43, sub-sect. 3. The highway board shall, for all the purposes of this Act, except that of levying highway rates, be deemed to be the successors in office of the surveyor of every parish within the district.

(a) This being conceded on the part of the plaintiffs, no argument was addressed to the point, nor was it touched on in the judgments.

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raised to be done. The point is rather bare of authority, the precise matter never having been mentioned before. It is true that in *Grant on Corporations* at p. 281, it is said that "a corporation is not responsible as a corporation for acts which, though colourably corporate acts, are not within the competency of the corporation to perform. In such a case, the individuals who take part in the pretended corporate act are personally liable," but the authority cited for that position, *Rees v. Watson and others* (2 T. R. 199), does not, it is submitted, bear out the statement in the text. But there are authorities expressly showing that the members of a corporation are not individually liable to an action in respect of acts done by them in their corporate character: (see *The Attorney-General v. The Mayor, &c., of Liverpool*, 1 Myl. & Cr. 171; 7 L. J., N. S., 51, Ch.; *The Attorney-General v. The Bailiffs, &c., of East Retford*, 3 Myl. & Cr. 484; 8 L. J., N. S., 49, Ch.; *The Attorney-General v. Wilson and others*, 1 Cr. & Phil. 1; 10 L. J., N. S., 53, Ch.) The act done by the defendants was voting in favour of the resolution, an act which cannot possibly make those who voted for it liable individually for the consequences of the resolution being carried out: (Com. Dig. Franchises, F. 11; *Harman v. Tappenden and others*, 1 East, 555), where it was held that an action does not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happens to the plaintiff, at least not without proof of malice. [CLEASBY, B. In that case the resolution or order of the Water Court of the Manor of Faversham, which formed the ground of the plaintiff's complaint, acted *proprio vigore*; but by the resolution here an act is directed to be done, and that act is the trespass for which the action is brought.] Then the surveyor being a mere minister and officer, doing an act at the bidding of his statutory superior whom he was bound to obey, is not liable. His duties are defined by sect. 16 of 25 & 26 Vict. c. 61, by which he is directed "in all respects to conform to the orders of the board in the execution of his duties." [PIGOTT, B.—Then what we have to see is, what his duties are; but how was it his duty to knock off this lock?] In the analogous case of *Deus v. Riley* (11 C. B. 434; 20 L. J. 264, C. P.), which was an action against the clerk of the Whitechapel County Court for trespass and false imprisonment, the plaintiff, having been arrested by a bailiff of the court upon a warrant under the seal of the court, in obedience to the order of the judge of the court, and which warrant was signed by the defendant as clerk of the court, Jervis, C.J., said, "The clerk is a mere ministerial officer, and cannot be liable in trespass for the mere performance of the duty cast upon him by the express language of an Act of Parliament." [PIGOTT, B.—That case is distinguishable. The very words of the Act of Parliament then under consideration (9 & 10 Vict. c. 95, s. 102) are "the clerk of the said court shall issue under the seal of the court a warrant of commitment," and that is exactly what the defendant in that case did.] So also in *Andrews v. Marris and Whitham* (1 Q. B. 3; 10 L. J., N. S., 228, Q. B.) the defendant Whitham, the sergeant of the Court of Requests, who executed the precept of the court, under an order of the court, signed by the clerk of the court (the other defendant Marris), was held "protected

from an action at the suit of the arrested plaintiff." And in *Young v. Davis and another* (6 L. T. Rep. N. S. 363; 7 H. & N. 760; 31 L. J. 250, Ex., affirmed in error 9 L. T. Rep. N. S. 145; 2 H. & C. 197; 10 Jur. N. S. 79) it was held that no action would lie against a surveyor of highways, appointed under the 5 & 6 Will. 4, c. 50, for damage resulting from an accident, caused by his neglect to repair the highways. They cited further on this point,

Buron v. Denman, 2 Ex. 167.

A. Charles (with whom was Cole Q. C.), for the plaintiff *contra*, in support of the rule.—The case of the defendant Wickett must be governed by the ordinary rule of master and servant. The order to the surveyor was the resolution of the board of the 29th Nov., and it directed an act to be done which they were not authorised in directing, and under those circumstances they are liable as individual members of the corporation, see

Grant on Corporations, pp. 281, 547;

Taylor v. Dulwich Hospital, 1 P. Wms. 655;

The Attorney General v. Wilson and others, 1 Cr. & Phil. 1; 10 L. J., N. S., 53, Ch.;

Rees v. Watson and others, 2 T. R. 199.

[KELLY, C. B.—Here the corporation, the highway board, have the duty imposed on them by the Act of Parliament, of repairing and keeping in good order and repair the highways in their district. Was not then this act within the scope of their authority?] It is submitted that it is not. In *Poulton v. The London and South Western Railway*, (17 L. T. Rep. N. S. 11; L. Rep. 2 Q. B. 534; 36 L. J. 294, Q. B.), the plaintiff took a horse by the defendants' railway to an agricultural show, and by the defendants' advertised arrangements was entitled to take it back again free of charge on producing a certificate. On its production the horse was put into a horse box without payment or booking, and the plaintiff took a ticket for himself and travelled home by the same train. At the end of the journey the station master demanded payment for the horse, and on the plaintiff's refusal to pay, two policemen by the station master's order kept him in custody till it was ascertained by telegram that all was right; and it was held that a railway company has power to apprehend a traveller on the railway who has not paid his own fare, but has power only to detain goods for non-payment of the carriage; and so, as the defendants themselves would have had no power to detain the plaintiff on the assumption that he had not paid for the carriage of his horse, there could be no implied authority from them to the station master to detain him, and they, therefore, were not liable for the station master's act. Had the company there had authority to detain a passenger in case the carriage of his goods were not paid for, they would have been liable for the mistake with regard to the fact of payment made by their servant; but if the mistake be not merely the erroneously assuming a state of facts which does not exist, but the doing of an act by the servant which the company themselves had no power or authority to do, and so could not impliedly authorise him to do, then the company or corporation are not liable. As Blackburn, J. there observed during the argument (p. 537 of L. Rep. 2 Q. B.), "It has been decided in the Exchequer Chamber, in the somewhat analogous case as to notice of action, that a *bona fide* mistake of facts entitles the defendant to the protection of the statute; but not when in the given state of

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facts the defendant was mistaken in law:” (See *Roberts v. Orchard*, 2 H. & C. 769; 33 L. J. 65 Ex.) And in his judgment in the same case, the same learned judge said (at p. 538, L. Rep 2 Q.B.): “Had the station master given him into custody under the erroneous supposition that he had not paid his own fare as an individual, then, inasmuch as there is an authority by the Act of Parliament to arrest and take into custody any person who does not pay his fare, and consequently the act would have been an act which the railway company were authorised to do, it might be said that the station master, being the head man on the spot, had authority to take into custody those who did not pay their fares, and if he made a mistake, it was a mistake in doing a thing which the railway company had given him authority to do, and then the company would be responsible.” So here, if the act done in the present case were within the scope of the board’s authority, then, though it were done under a mistake as to the facts, the corporation would be liable; but if, on the contrary, the mistake be one of law, and it turns out that the act done was not within their authority, then, even assuming the facts, the corporation would not be liable, and the individuals who took part in the act must bear the consequences. In *Sands v. Child and others* (3 Lev. 351) a *qui tam* action against the Governor of the East India Company and their solicitor and secretary, the defendants pleaded that they acted as agents for the company; and on verdict for the plaintiff, error was brought, and it was urged that the action should have been against the company, and not against the defendants, their servants. “But” (it is said) “this was overruled by both courts,” and the court of error held that “if it had been done by warrant originally from the company, yet that would not cover the matter, for the warrant of no man, not even of the king himself, can excuse the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the fact.” That is a remarkable case, and an authority for the plaintiff here on both points. But further, this was an act which the board of waywardens had no authority whatever to perform; and not only is that so, but there is authority under the Act to do this particular thing in another way. The board is placed in the position of the old surveyor of highways, under the 5 & 6 Will. 4, c. 50, and whatever he could have done they can do, and no more. Now, clearly, if the surveyor, under the old regime, had done this he would have been personally responsible. Sect. 9, sub-sect. 2, of 25 & 26 Vict. c. 61, makes the highway board a corporation; by sect. 11 all the powers, rights, duties, liabilities, capacities, and incapacities (except the power of making, assessing, and levying rates) vested in or attached to, or which, but for this Act, would have been vested in or attached to any surveyor of any parish in the district, shall vest in and attach to the highway board; by sect. 43, sub-sect. 3, the board is, for all purposes of the Act except the levying rates, to be deemed to be the successors in office of the surveyor of every parish within the district; and by sect. 17 the board are to maintain in good repair the highways in their district, and with respect to such highways, to perform the same duties, have the same powers, and be liable to the same legal proceedings as the old surveyors would have performed, had, and been

liable to if this Act had not passed. In case of an obstruction a private individual may take one of three courses: he may (1) proceed by indictment, or (2) take proceedings before magistrates, or (3) remove the obstruction. [KELLY, C.B.—Why may not the board do so?] Because they are a corporation under an Act of Parliament, which gives them no such authority. [KELLY, C.B.—They do not want it; their common law right is the same as that of any others of the Queen’s subjects.] The Act contains no such provisions. [KELLY, C.B.—Such a provision would have been superfluous. Why are they, as surveyors, to be deprived of the power which all other individuals have?] Because, *quod* “surveyors,” they are the creatures of the Act of Parliament, and must abide strictly by its provisions, and must not take the law into their own hands. [CLEASBY, B.—You contend that, be an individual’s power to do an act what it may, a corporate body can only act in the way pointed out by their Act of Parliament.] That is so. By sect. 109 of 5 & 6 Will. 4, c. 50, the surveyor, if he was sued in respect of what he had done, had the power of justifying under the Act. *Brook v. Jenney and another* (11 L. J., N. S., 10 M. C.; 2 Q. B. 265), and *Keane v. Reynolds* (2 E. & B. 748), are cases showing the liability of the old surveyors in trespass for acts done by them under the Act of Parliament; and in *The Waltham Navigation Company v. Padley and others* (4 B. & Ad. 69; 2 L. J., N. S., 5 K. B.), in trespass against surveyors for pulling down a house, it was held that sect. 82 of the 13 Geo. 3, c. 78, did not enable them, under “not guilty,” to justify the removing of it as being a nuisance on the highway: (See the judgment of Parke, B., there.) All the provisions of the Highway Act directing the surveyor to remove obstructions, &c., regard the provisions relating to the jurisdiction of the justices as a condition precedent to the taking of any action by the surveyor *quod* surveyor, and contemplate his proceeding before justices prior to so acting. He cannot act *mero suo motu*, neither can the board (5 & 6 Will. 4, c. 50, ss. 69, 72, 73). Then, as to the liability of the defendant Wickett. He is the surveyor, but not in the sense of the surveyor under the old Act; he is the servant of the board, duly appointed by them under sect. 12 of their Act. The defendant must go the length of contending that sect. 16 will justify him in performing all the board’s orders whatever they may be. [KELLY, C.B.—What, to knock a man down or to commit a felony?] At all events in knocking down a house. The section merely establishes the relation of master and servant between him and the board, and nothing more. He is to do all necessary works, but this was a trespass and not a work or duty required to be done; it is no man’s duty to do an illegal act. *Burton v. Denman* (2 Ex. 167) is relied on by the defendants but that is surely a long way from the present case, where the order was not issued by the Government, or as I submit, by any competent authority. There the Crown had authority to give the order, and the subsequent ratification was held to be equivalent to a prior command. But here the hand that drew the sword must be answerable. Then, as to *Young v. Davis*. [Kingdon, Q.C.—I admit the non-application of that case.] Then I am relieved as to that case, though it is I submit in favour of the plaintiff rather than otherwise. *Devis v. Riley* (*ubi sup.*) is distinguishable. There there was a case in a County Court, and

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the clerk was expressly authorised and bound by the Act to do the particular thing. He acted ministerially, and though the order was bad, yet it was made by a tribunal with jurisdiction, and the clerk was justified. [KELLY, C.B.—Have not the board jurisdiction over the roads, and is the surveyor to inquire into the fact of highway or no highway any more than the defendant in *Dews v. Riley*?] I can find no instance of the maxim "*Respondent Superior*" discharging an inferior as well as binding a superior, except the case of *Buron v. Denman*. [PIGOTT, B., referred to and read the argument of Mellish, Q.C., in *Young v. Davis*, at p. 768 of 7 H. & N., from "Now in the case of principal and agent," to "the maxim '*Respondent Superior*,' applies." See same, p. 252 of 31 L. J. Ex.] In *Stephens v. Elwell* (4 M. & S. 259) Ellenborough, C. J., said (p. 261)—"The only question is whether this is a conversion in the clerk which undoubtedly it was in the master. The clerk acted under an unavoidable ignorance for his master's benefit, when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with any property and disposes of it, and it is no answer that he acted under authority from another who had no authority to dispose of it. And the court is governed by the principle of law, and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable not only jointly with his master, but, if his master cannot satisfy it, for every penny of the whole damage?" No authority exists for the defendant's position, that where a man acts under another's authority he is discharged, unless of course there be an express statutory discharge. In *Andrews v. Marris and Whitham* (*ubi sup.*) the *ratio decidendi* was that the warrant was within the court's jurisdiction, and so Whitham, the serjeant of the court, was justified, though, having been issued without authority under the Act, Marris, the clerk of the court, was liable; but *Carratt v. Morley and others* (1 Q. B. 18; 10 L. J., N. S., 259, Q. B.) shows that, if the warrant had not been within the jurisdiction, even the serjeant would not have been protected. He cited also

Smith v. Hopper and others, 9 Q. B. 1005; 16 L. J. 93, Q. B.

KELLY, C.B.—This case has been very ably and admirably argued on both sides, and as it involves a question of considerable importance, the court will take time to consider its judgment.

Cur. adv. vult.

June 4. — Their LORDSHIPS (Kelly, C.B., and Pigott, and Cleasby, B.B.) having taken time to consider, and there being a difference of opinion amongst them, the following written judgments were now delivered.

CLEASBY, B. (delivering the judgment of Pigott, B. and himself).—There are two questions raised in this case: A trespass was committed upon the plaintiff by taking the lock off one of his gates; and the two questions are, first, whether the defendant, Matthew Wickett, is liable for the trespass; secondly, whether the other defendants (except Claudius Cregan Hawker) are liable. It was admitted that the defendant C. C. Hawker was not liable. The facts were that the plaintiff had caused a gate which crossed a footway on his property, at Crapps Park, to be locked. It

was alleged that this was a public footway, and the subject was brought forward at a meeting of the Board of Way Wardens, or Highway Board, of the Camelford Highway district, held on or about the 29th Nov. 1872. The defendant C. C. Hawker was the Clerk of the Board, and all the other defendants, except Wickett, were members of the board and present at the meeting. The defendant Wickett was the district surveyor of the board. It was urged in answer to the usual interrogatories administered by the plaintiff to the defendants, that all the defendants (except C. C. Hawker and Wickett) being present at the board meeting, directed or concurred in directing the defendant Wickett to remove the locks from the plaintiff's gate, and that the defendant Wickett did, on the day following the meeting, by the direction of the said board given at the meeting, remove them. Before the removal of the locks by Wickett, he received from the clerk of the board the following order: [His Lordship read the order.] At the trial it was objected, on behalf of the defendants, that the action should have been brought against the Highway board, and that the defendants were not personally liable. The learned judge who tried the cause admitted the objection, and nonsuited the plaintiff. For the purpose of the present inquiry, the trespass having been proved and no justification proved, it must be taken that the removal of the lock was unlawful; if the objection had not prevailed, as matters stood, the plaintiff would have been entitled to a verdict. With regard to the first question, viz., the liability of Wickett, it appears to us (my brother Pigott and myself) that the general rule applies, and that a servant who does an act which is unlawful, cannot justify it because it was done by the order of his master or employer. This rule applies as much to the servants of those who act in a public as in a private capacity. The more fact of persons having a public office or employment (whether created by Act of Parliament or not), does not take them out of the operation of this rule of law, and give to their acts any greater force or efficacy, or to their servants any impunity. There is an apparent exception to this in the cases of sheriffs or officers of courts of justice, who are excused if the judgments or processes under which they acted are subsequently reversed; and the officers are still excused if they acted in the executing of the process. The defendants relied on this exception, and cases were referred to. See the judgments in *Andrews v. Marris and Whitham* (1 Q. B. 3. 1 G. & D. 268; 10 L. J., N. S., 226, Q. B.), and *Dews v. Riley* (11 C. B. 434; 20 L. J. 264, C. P.). But there is no analogy between the case of an officer of a court of justice, whose duty it is to give effect to the judgment of the court, which, though erroneous, cannot be called illegal if the court have jurisdiction over the subject matter, and a servant obeying the order of his superiors, whose orders may be legal or not, as the case may be. It is no doubt a hardship that an act of obedience to the order of a public body should involve a responsibility; but the risk is small of public bodies (which act generally under advice) doing illegal acts, and the hardship is no ground for setting aside so fundamental a rule as this, that the person who does an illegal act becomes by doing so responsible, and may be sued by the person injured, without his looking any further. There is

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nothing in the Act of Parliament, under which the surveyor is appointed, to exempt him from liability. The effect of the sections (12 and 16 of the 25 & 26 Vict. c. 61) relating to the appointment of surveyor, is to establish the relation of principal and agent, or master and servant, between him and the highway board. The words of the 16th section, that he "shall in all respects conform to the orders of the board in the execution of his duties," cannot be read to mean that he shall be bound to obey the orders of the board, whatever they are. Previous to this Act of Parliament the surveyor had been authorised to act upon his own judgment; but this enactment makes it his duty to abide by the direction of the board, as his superiors, in all matters relating to the repairs of the road. It is hardly reasonable to read it as importing that he is relieved from responsibility for whatever he does, provided he acts by their orders; the object is to regulate his conduct, and not to limit his responsibility to third persons. As regards the other defendants who came to the resolution, in pursuance of which the illegal act was done, a question of some difficulty arises. It is said that the resolution, having been afterwards embodied in the order signed by the clerk, became a corporate act of the highway board, and that no personal liability of the members could arise upon it. We were referred to many authorities to show that, in respect of corporate acts, the individual members of the corporation cannot be sued. *The Attorney-General v. The Mayor, &c., of Liverpool* (1 Myl. & Cr. 171, 7 L. J., N. S., 51, Ch.) and *The Attorney-General v. the Bailiffs, &c., of Retford* (3 Myl. & Cr. 484; 8 L. J., N. S., 49, Ch.). There is, indeed, an express provision to this effect as regards the members of the highway board; but it is expressly limited to the lawful acts of the board, in sect. 9, sub-sect. 6 of the Highway Act (25 & 26 Vict. c. 61), and it is clear that this is so when the corporate acts are such as the corporate body are qualified to perform, and the resolutions and acts of the members are only introductory to the corporate body acting in the matter; but it is equally clear that, when the acts are such as the corporate body are not by law qualified to do, and the corporate body, if they pretend to do them, are acting *ultra vires*, the mere fact of giving a corporate form to the act does not prevent it from being the act of those who cause it to be done. It seems plain that, in such a case, the individuals and not the corporation really do the act, and no authority is cited for the conclusion; but the cases of *Taylor v. Dulwich Hospital* (1 P. W. 655) and *Reg. v. Watson* (2 T. R. 199) may be referred to in support of it. And in the present case, unless the letter of the 30th Nov. prevents it from being the act of the individuals, it certainly was so in point of fact, for the defendant Wickett swears, in answer to the interrogatories, that he removed the locks by the direction of the board, given at the meeting of the 29th Nov. In the case of *Poultton v. The London and South-Western Railway Company* (L. Rep. 2 Q. B. 534; 17 L. T. Rep. N. S. 11; 36 L. J. 294, Q. B.), and, particularly in the judgment of Blackburn, J., the difference is clearly pointed out between acts which are properly corporate acts, and acts which are not, as affecting the liability of the corporation. The question in the present case, therefore, is, whether the act of causing the locks to be removed, is one of those

acts for which the corporate body is constituted, or not. It appears to us that it is not one of those acts. Now, the highway board have authority to do what the surveyor would do under the previous Act. They have all the rights, duties, liabilities, capacities, and incapacities of the surveyor (sect. 11) and are to be deemed to be the successors in office of the surveyor (sect. 43, sub-sect. 3). It might be sufficient to say that, in the case of a disputed footway, the order to remove an obstruction could only follow upon something like a judicial act of the surveyor, in determining whether there was or was not a public footpath, and he has no authority whatever to act judicially in such a matter. But a reference to the section of the previous Act would show that the surveyor had no such power of removal: (5 & 6 Will. 4, c. 50.) Sect. 72 of that Act does not apply at all, and sect. 73 only enables the surveyor to remove the obstructions therein specified, after he has obtained the order of a justice. In like manner, the power of a surveyor to remove encroachments upon the highway is founded upon a conviction under sect. 69: (*Keane v. Reynolds*, 2 E. & B. 748.) In reality the right of a person to take the law into his own hands, and to use force to remove an obstruction, is founded upon this, that he is, at the time, using the highway (as he is entitled to do); and as he cannot use it without removing the obstruction, he is justified in removing it. And the precedents in pleading put it on that ground. There is no right to remove the obstruction as a retaliation upon the person who has put it there. But a corporate body who order the removal, and so use force in determining a legal right, are in a different position. They do not want to use the road, and have not the justification of necessity in the exercise of a legal right; they can only justify it on the ground that they have come to the determination that the obstruction is illegal, and ought to be removed; and they are not authorised to enter upon such an inquiry or form such a conclusion. It is the province of the justice to whom an application may be made, to form such a conclusion. The effect of holding that such a body as the highway board were competent, in their corporate capacity, to commit such an act of trespass as the one complained of in this case, would be that, whenever the trespass was illegal and redress was had, the persons who had really caused the trespass would not be responsible, and the damages would be paid out of funds which ought to be applied in maintaining the roads, and the persons eventually responsible would be the ratepayers, and among them perhaps the person entitled to redress, and to whom the damages were to be paid. And thus the members of the highway board would acquire a power to divert and waste the funds entrusted to them for public purposes by proceedings which might originate in feelings which it would be most inconvenient to inquire into. Sections from 17 to 19 show what the office of the highway board is, and that it is a corporation for a particular purpose, namely to do what is necessary to keep the highways in repair. And the provision in sect. 18, as to certain costs resulting from applications to justices being regarded as costs of the board in repairing the highway, and paid accordingly, shows conclusively, to our minds, that the damages and costs of defending an action of trespass such as the present, would not be costs of

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the board, or in any way chargeable upon the parishes forming the board, or any of them. It would appear to be only right, if such damages and costs were payable at all, that they should be paid by the parish in which the road is situate, like the expense of repairing the road. And yet the persons who ordered the trespass might be the persons representing the other parishes in the district, and not the parish in which the road was situate. And what a strange state of things this would introduce. Sect. 20 provides that there shall be a district fund, and that the salaries of the officers of each parish, and all expenses incurred by the highway board for the common use and benefit of all the parishes in the district, shall be paid out of the district fund. This could not include the damages and costs, and they could not come out of the district fund. The section goes on to provide that the expense of keeping in repair the highways of each parish, and all other expenses in relation to such highways, shall be a separate charge on each parish. It would certainly seem strange if the highway board had the power, by a resolution, of throwing upon a particular parish such a charge as that of paying the damages and costs of an action like the present; and, unless they could do so, there would be no fund out of which the damages and costs could be paid. When the parish denies the obligation to repair, sect. 19 points out the course to be pursued. It appears to us that it is not the province of the highway board to contest the question whether a particular way is a public highway or not, as the members of this board chose to do by the resolution set forth at the beginning of this case. For the above reasons, we think that, as the plaintiff was nonsuited, there ought to be a new trial in this case.

PICOTT, B., concurred in the above judgment of Cleasby, B.

KELLY, C.B.—Two questions arise upon this case. The first is, whether this action is maintainable, not against the highway board in their corporate character but, against the individual members of the board who were present at the meeting, and one of whom moved and another of whom seconded the resolution. And I am of opinion that it is not. The making of the resolution was a corporate act done at a corporate meeting, convened and held in strict conformity to the Act of Parliament; no one member of the board assumed to exercise, or did exercise, any personal authority or power. The resolution was the act of the corporation, and consisted of the minute made at the meeting according to the Act of Parliament, signed by the chairman, and by the statute receivable in evidence without further proof. I conceive it to be settled law, that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate seal be used as a mere colour for the malicious act; or unless the act is *tra vires* and is not and cannot be, in contemplation of law, a corporate act at all. In *Harman v. Appenden* (1 East, 555), the Free Fishermen ofaversham, a corporate body, at a corporate meeting made an order of amotion or disfranchisement against the plaintiff, a free fisherman and a member of the corporation, upon which the plaintiff brought his action for damages against the individual corporators who had made the order; and

it was objected "that no action would lie to recover damages against individuals for acts done by them in their corporate capacity, and that *non constat* but that all or some of the defendants might have voted against the order of amotion." When the case came before the court, upon a motion to enter a nonsuit, and in arrest of judgment, the "court intimated very strong doubts on this ground, how far the defendants were answerable in damages in their private character, for acts done by them in their corporate capacity," and Lord Kenyon, C.J. said that he entertained considerable doubt, notwithstanding what was said in *Rich v. Pilkington* (Carthew, 171), and *Reg. v. Rippon* (1 Lord Raymond, 564), and added that he had, many years ago, moved for a *mandamus* to the master and fellows of Wadham College, to compel them to put the college seal to a return which they were required to make, and to which Dr. Windham, the master, had great objection, with respect to the facts agreed upon by a majority to be returned, conceiving that he should thereby make himself individually liable to the consequences; but Lord Mansfield overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character. Lawrence, J. expressed the same doubt as to the maintenance of the action; and finally, upon cause being shown, the court held that, without proof of malice the action was not maintainable, and the rule was discharged: (see also *Ventris* 351, and *Reg. v. Windham*, 1 Camp. 377, the case alluded to by Lord Kenyon.) It is true that where individuals make a pretended corporate act a cloak for a malicious libel in the administration of justice, the court will grant a criminal information, as in *Reg. v. Watson and others* (2 T. R. 199). But an individual corporator is no more liable for a tort committed in his corporate capacity than for a debt due by the corporation. In either case I am of opinion that the action must be brought against the corporation in its corporate character, and not against an individual member, who, like Dr. Windham in the *Wadham College* case, may have been opposed to the act in respect of which the action may be brought. It was indeed once imagined, though on very technical grounds, that trespass would not lie against a corporation; and it is so stated in Comyn's Digest, title "Franchises." But, besides that many authorities are to be found in the Year Book to the contrary, the law is now well settled that upon any tortious act committed by a corporation, or under its authority, or by its direction, trover or trespass is maintainable. In *Yarborough and others v. The Governor and Company of the Bank of England* (16 East, 6) the plaintiff recovered in trover for the unlawful detention by a clerk in the Bank, under its authority, of a Bank of England note. Can it be contended that an action could have been maintained against one of the directors of the Bank of England, who might have been present at the resolution that the clerk be directed to detain the note? In *Smith v. The Birmingham and Staffordshire Gas Light Co.* (1 A. & E. 526; 3 L. J., N. S., 165, K. B.), trover was held maintainable against the company (a corporation) for the wrongful seizure of a quantity of furniture by a bailiff under their authority. And in *Maund v. The Monmouthshire and Staffordshire Canal Company* (2 Dowl. Rep. N. S. 113; 11 L. J., N. S., 317, C. P.), the plaintiff recovered in trespass

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for the seizing and converting, under the orders of the defendants, of certain barges and a quantity of coal. It was never suggested that in either of these cases the action should have been brought against the individuals who happened to be present when the act in question was ordered to be done. I cannot doubt, therefore, that this action ought to have been brought against the board, and all these decisions are uniform to show that it would have been maintainable. The mischief and inconvenience that would result if the contrary were held to be law is great and obvious. If judgment be recovered against these defendants, execution might issue for the whole amount of damages and costs against any one among them; and he would have no remedy for contribution against the rest, nor, as it should seem upon the facts of the case, for indemnity against the corporation. And it is at least doubtful whether the board would have a legal right to indemnify him out of the funds which came to their hands under the Act of Parliament. On the other hand, if the action had been brought against the board, and judgment had been obtained against them, they might pay the damages and costs out of the funds which they are enabled to provide for the various purposes of the Act by sections 20, 21, and others. It was argued that no action could be maintained against the board on the ground that the resolution and the order to the surveyors were *ultra vires*. But I apprehend that this is a misapplication of the term "*ultra vires*." If the board, by resolution or otherwise, had accepted a bill of exchange, directing their clerk or other officer to write their corporate name or title across a bill drawn upon them for a debt, this would have been *ultra vires*, and no holder of the acceptance could recover the amount against them. It would have been void upon the face of it, and it is immaterial to consider whether the individuals who had written or authorised the acceptance would have been liable to any, and if any to what, action at the suit of a holder for value. But it is otherwise with an act merely unlawful or unauthorised, as a trespass or the conversion of a chattel. If such an act were to be deemed *ultra vires*, and therefore no action would lie against the corporate body by whom it had been authorised, it is clear that a corporation would not be liable for any tort at all committed or authorised by them, and the decisions above cited would be contrary to law. Two cases only have been cited, which seem to bear upon the question against the defendants. But the first of them (*Poulton v. The London and South Western Railway Company, ubi sup.*) merely shows that there is no implied authority by a railway company to their servants to do an illegal act. But here no question arises upon an implied authority; for this board have expressly authorised and commanded the surveyor to do the act complained of. On the other hand, in the *Dulwich College case, Taylor v. The Dulwich Hospital* (1 P. Wms. 655), the constitution of the college requiring that leases granted should be at a rack rent, the contract for a lease not at a rack-rent was *ultra vires*, and not binding on the corporate body; and so, if the plaintiff had been entitled to the relief prayed, it would have been granted against the individuals who had executed an instrument in the form of a corporate act, but which, being *ultra vires*, was absolutely void. The

remaining question is whether Wickett, the surveyor, is liable to this action. The general rule, no doubt, is that one who does an unlawful act cannot justify himself by pleading the authority or direction of another. But here, the surveyor is a public officer charged with the performance of various public duties, and bound by the express words of an Act of Parliament to obey the order of the Highway Board—the board themselves being a public body, incorporated for public purposes, and having public duties to perform, and who, in ordering their surveyor to remove the obstruction in question, have acted *bona fide*, and within the general scope of their duties and authority under the Act of Parliament. To determine this question we must first consider the provisions of the Act. By sect. 17, "the highway board shall maintain in good repair the highways within their district," and it "shall be the duty of the district surveyor to submit to the board an estimate of the expenses likely to be incurred during the ensuing year, for maintaining and keeping in repair the highways in each parish within the district." And, by sect. 16, "The district surveyor shall act as the agent of the board in carrying into effect all the duties by this Act required to be carried into effect, or to be performed by the board, and he shall, in all respects, conform to the orders of the board in the execution of his duties; and the assistant surveyor, if any, shall perform such duties as the board may require, under the direction of the district surveyor." And then there are further provisions, already referred to, enabling the board to obtain funds for the performance of their duties, and the carrying of the Act into execution. Now, where all the public highways in any district are well known and ascertained, no difficulty can arise in the execution of the Act. The surveyor inspects them, and observes their condition; he makes his estimate of the expense of repairing and keeping them in repair during the ensuing year, and delivers it to the board, who thereupon direct him to effect the repairs from time to time accordingly; and he obeys their directions. But, where, as here, he finds a highway which requires, or will shortly require, to be repaired, but the owner of the land gives him notice that the land is his private property, and is no highway at all, what is the course to be pursued? We may suppose that, upon his report, an order has been given to him to repair the highway. and that, when he proceeds to do so, he finds a locked gate thrown across it, and he makes a report to that effect to the board. They, the board, after communicating with the owner of the land, and finding that the question is raised and must be determined, highway or no highway, must next consider how this may most conveniently be done. They may indict the landowner for the obstruction, or they may do as they have done here, they may give him notice to remove the obstruction and that in default of his doing so they will remove it themselves, and that he may try the question by bringing an action of trespass against them. They accordingly come to the resolution they made and they give the order in question to the surveyor, and he, in obedience to it, removes the locks. If an action be then brought against the board, they plead the Highway Act, or defend under the general issue by statute, and the question is settled by the ver-

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dict of the jury, and no difficulty arises; but if the law be that the landowner may select the surveyor as a defendant, in what condition is he placed? The board have ordered him to effect the necessary repairs, and for that purpose to remove the obstruction. He looks to the statute and he finds that its language is imperative. "He shall in all respects conform to the orders of the board," and "shall act as the agent of the board," in carrying the Act into effect. He has no means of ascertaining beforehand, or without the verdict of a jury, whether there is a highway or not; nor have the board themselves. He must, therefore, at the risk of absolute ruin, obey the order as required by the Act, or he must refuse obedience; in other words, he must disobey the order whenever a highway is in dispute. The board cannot themselves, in their own persons, remove the obstruction, any more than they can repair the highway. They must, therefore, either instruct their surveyor to act on their behalf, or resort to some other mode, as by indictment, of raising the question, and if a public highway be established, perform their duty by putting it into repair. I am not aware of any direct authority in reference to this Act of Parliament. But there are cases which establish a principle within which, I think, this case may be well decided. In *Buron v. Denman* (2 Ex. 167), it was held by Parke, B., after consulting the other judges of the Exchequer, that, where a naval officer had committed a series of trespasses, for which he was personally liable to an action for damages, but the Crown had afterwards ratified his acts, that the ratification was equivalent to a prior command, and that the action against him could not be maintained. Baron Parke himself had some doubt whether the ratification had that effect, but the judges, including Parke, B., were unanimous that the defendant, whose duty it was to obey the commands of the Crown, could not be made personally responsible in an action for the acts done in obedience to such commands. In *Andrews v. Marris and Whitham* (1 Q. B. 3; 10 L. J., N. S., 226, Q. B.) the clerk of a court of requests, whose duty it was to issue warrants or writs of execution at the order of the commissioners, having mistaken the effect of an order, issued a precept without authority, under which the plaintiff was taken in execution, and he was held liable in trespass accordingly. But it was also held that Whitham, the other defendant, one of the sergeants of the court, and to whom the warrant was directed, and who actually made the arrest, was not liable to the action, on the ground "that he was a ministerial officer of the commissioners bound to execute their warrants, and having no means whatever of ascertaining whether they were founded upon valid judgments, or were otherwise sustainable or not." It was further observed by the court, that there would be something very unreasonable in the law, if it placed him in the position of being punishable by the court for disobedience, and at the same time suable by the party for obedience to the warrant; and that "as the subject-matter of this suit was within the general jurisdiction of the commissioners, and the warrant appeared to have been regularly issued, the defendant Whitham was not liable." It appears to me that in the present case, the surveyor was in the exact position of Whitham in the case cited. *Dews v. Riley* (11 C. B. 434; 20

L. J. 264, C. P.), was a similar case. There, a void order of commitment had been made by a County Court, under which the clerk of the court made out a warrant of commitment, and the plaintiff was arrested by a bailiff under that warrant. It was held that the action was not maintainable, and the court observed that "the clerk was a mere ministerial officer to carry into effect the order of the judge, and cannot be liable in trespass for the performance of the duty cast upon him by the express language of the Act of Parliament." And in *Keane v. Reynolds* (2 E. & B. 748), where trespass was brought for pulling down a cottage which three magistrates had adjudged to be an encroachment within 15ft. of the centre of a highway, and convicted the plaintiff of having made the encroachment, and the defendant, who was surveyor of the highways, had pulled down the cottage in the supposed exercise of the Act of 5 & 6 Will. 4, c. 50. It appeared that the conviction was void, the way never having been repaired with stones or otherwise; but the court held that the defendant was not liable to the action, "on the principle that the surveyor acted in obedience to the judgment of a court of competent jurisdiction which he was bound to execute." It is true that, in most of these cases, the defendants who were held irresponsible were bailiffs or other officers, acting in obedience or supposed obedience to the orders of a court or some legal tribunal, made in the course of the administration of justice. But here also, as in all those cases, the surveyor is a mere ministerial officer bound by the express words of an Act of Parliament to obey the orders of the board, and having no means of knowing or ascertaining whether such orders were valid and lawful or otherwise; and the board itself is a public body having public duties to perform, and created and incorporated for public purposes. I know not therefore why these officers should not be protected by law as well as the subordinate officers of a court of justice. It appears to me, therefore, upon the whole case, that the defendants have acted throughout strictly within the scope of their authority and their duty. A complaint is made to the board that a highway is unlawfully obstructed; upon investigating the case they find that an obstruction exists, but that it is disputed whether the spot is a public highway or not. Upon first inquiry they are advised and believe that it is a highway, and therefore that it is their duty to keep it in repair and free from obstructions. There are two modes in which the question whether there is a public highway or not may be raised and determined, viz., by indictment and by action. They think, and I may venture to add that I think also, that an action is preferable to an indictment, inasmuch as in a civil action points may be reserved and motion made for a new trial and appeals facilitated. They determine to try the question in that form, and accordingly they give notice to the parties interested to remove the obstruction; and, as it is still persisted in, and the opposite parties are resolved to try the question, they hold a meeting and make the order in question, and it is executed. And we are now called upon to decide whether this action, in which a controversy between the board on behalf of the public, and the owner of the land is to be settled, may be brought against individuals who have acted, as they believe, in the strict performance of their duty, in holding

and attending a meeting and resolving, in their corporate character, that the necessary steps shall be taken, and who may possess no funds or means to meet the expenses of the suit, or to pay damages or costs, or against the board who are charged with the duties, intrusted with the powers, and provided with the funds, necessary to the management of the highways within the district, and to the carrying of all the purposes of the Act into execution. The question as between the surveyor and the board is of equal importance, and is open, in many respects, to the same considerations. I think, therefore, and for the reasons which I have assigned, that the action should have been brought against the board, and that this action is not maintainable. The majority of the court, however, being of a contrary opinion, the plaintiff's rule to set aside the nonsuit, and for a new trial, must be made absolute.

Rule absolute accordingly. (a)

Attorneys for the plaintiff, *Pattison, Wigg and Co.*, 50, Lombard-street, E.C., agents for *White and Dingley*, Launceston.

Attorneys for the defendants, *Cooke, Kingdon, and Cotton*, 7, Bedford-row, W.C., agents for *Hawker*, Boscastle.

V.C. MALINS' COURT.

Reported by F. GOULD and JAMES E. HORNE, Esqrs.,
Barristers-at-Law.

Monday, July 6, 1874.

NATIONAL SOCIETY v. THE SCHOOL BOARD FOR LONDON.

Elementary Education Act 1870, sect. 23—Transfer of school to School Board—Consent to alienation.

The N. Society were in the habit of granting money towards the establishment of elementary schools, and the trust deed of every school in union with the society contained a clause declaring that the school "should always be in union with and conducted according to the principles and in furtherance of the ends and designs" of the society, and one of the terms of union was that the children should "be instructed in the Holy Scriptures and in the liturgy and catechism of the Established Church."

The society assisted in establishing a school, and the usual trust deed was executed, which did not contain any provision as to any future alienation of the school, or as to any consent thereto.

Held, that the school might be transferred to a school board under the Elementary Education Act 1870, without the consent of the society.

THE question to be decided in this suit was whether an elementary school in union with the National Society could be transferred to the School Board for London without the consent of the National Society.

The National Society were a body corporate established by royal charter dated the 23rd May 1817 for promoting the education of the poor in the principles of the Established Church throughout England and Wales. By the charter a president, vice-president, and committee were provided, and the committee were empowered to frame rules and regulations for the management

and government of the society, and for carrying into effect its designs.

In pursuance of their charter the society had since their incorporation collected large sums of money and expended the same in aiding the establishment and maintenance of schools, the erection of school buildings and teachers' houses, the training of teachers, and the publication and supply of books. The society had also made grants of money to the promoters or managers of particular schools, and had united such schools to itself, exacting from them certain terms of union, among which were the following:

1. The children are to be instructed in the Holy Scriptures, and in the liturgy and catechism of the Established Church.

2. With respect to such instruction the schools are to be subject to the superintendence of the parochial clergyman.

4. The masters and mistresses are to be members of the Church of England.

Wherever the society assisted in establishing a school, it required the insertion in the trust deed of such school of the following declaration:

And it is hereby declared that the said school shall always be in union with and conducted according to the principles and in furtherance of the ends and designs of the Incorporated National Society for promoting the Education of the Poor in the Principles of the Established Church throughout England and Wales.

In the year 1867 the society, in conjunction with the Surrey Church Association and other persons in the parish of Emmanuel, Camberwell, established a Church school for that parish. A piece of land was purchased and conveyed by deed dated 25th Feb. 1867, whereby the trusts of the school were declared. By this deed David Smith and others conveyed the land to the use of the minister and churchwardens of the parish of Emmanuel, Camberwell,

Upon trust to permit the said premises and all buildings thereon erected, or to be erected, to be for ever hereafter appropriated and used as and for a school for the education of children and adults, or children only of the laboring manufacturing and other poorer classes in the ecclesiastical district of Emmanuel Camberwell, aforesaid, and for no other purpose. And it is hereby declared that such schools shall at all times be open to the inspection of the Inspector of Schools for the time being appointed in conformity with the order in council, bearing date the 10th Aug. 1840, and shall always be in union with and conducted according to the principles, and in furtherance of the ends and designs of the National Society for Promoting the Education of the Poor in the Principles of the Established Church throughout England and Wales, and subject to and in conformity with the declaration aforesaid.

The trust deed contained no provision as to any future alienation of the school by the managers. The purchase money for the land was contributed by the society, the Surrey Church Association, and other persons.

Shortly after the date of the deed a school house and master's residence was erected on the land by means of contributions from the society, the Surrey Church Association, and other persons, and, until the transfer hereinafter mentioned, the school house was constantly used for the purposes in the said deed mentioned.

In the year 1871, a meeting of the subscribers to the school, and other persons, was held, and a provisional committee was formed for the purpose of working the school on a more satisfactory footing, and on the 12th Feb. 1872, another meeting of the subscribers was held to consider the expediency of a proposed transfer of the school to

(a) The defendants, it is understood, intend to carry the case on appeal to the Exchequer Chamber.

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the School Board for London. The bill stated that the defendants, the vicar and churchwarden of the parish, and William English and others, in their alleged character of committee of the school, and in pursuance of resolutions passed at a meeting of the subscribers to the school, had purported to transfer the school to the School Board for London, who had accepted the same. A conveyance of the site to the School Board had been executed, and at the time of filing the bill, the School Board was in actual possession thereof, and the school was conducted under their directions. By the transfer it was provided, amongst other things, that the school should be deemed to be a school provided by the board within the meaning of the Elementary Education Act 1870.

The bill stated that the society had never consented to the transfer of the school to the School Board, but had from the first protested against it.

It appeared that the plaintiff society had established or assisted in establishing between 6000 and 7000 schools in England, and had spent upwards of half a million of money in promoting schools. Paragraph 15 of the bill stated as follows:—

"When the Elementary Education Act 1870 was under the consideration of the Legislature, the plaintiffs exerted themselves to protect the interests of the numerous schools existing throughout the country which had been established and were maintained on the basis of religious education being taught therein according to the principles of the Established Church, including more especially those schools which had been established with the assistance of the society or had been placed in union with it. In consequence of these exertions, divers alterations were made in the Act during its progress through Parliament, and the intention of the Act as ultimately passed was and is that no school in union with the society should be transferred to a School Board under the Act without the Society's consent. It is well known that as the fact was according to the rules and practice of the society, no alienation of any school in union with it was permitted before the passing of the Act without the society's consent, and this restriction was and is intended to be preserved by the Act."

The bill was filed on the 16th Nov. 1872 against the School Board for London, and the committee of the school, stating further that there were at the date of the alleged transfer of the school numerous persons able and willing to subscribe the funds necessary for the maintenance of the said school as a church school, and prayed: (1) A declaration that the provisions of the trust deed of 25th Feb. 1867 ought to be observed in the management of the school established thereunder, and that no departure from the principles of education according to which such school was established could properly be effected without the sanction of the plaintiffs. (2) A declaration that the transfer and conveyance of the said school to the School Board was illegal and improper. (3) That the School Board might be restrained from managing the school or interfering therewith. The suit of *Attorney-General v. English* was instituted in July 1872, and raised a question as to the regularity of the appointment of some of the members of the committee of the school, but the first-named suit alone was argued on this occasion.

Cotton, Q.C. and *Kekewich* for the plaintiffs.—The transfer attempted to be made, must have been under the 23rd section of the Elementary Education Act, but how could that be done, having regard to the provisions of the trust deed of the school, without the consent of the National Society, who have advanced their money on the faith of the teaching in the school being in accordance with Church of England principles? That is the primary trust of the deed. The power of the managers to transfer the school, if at all, is only to transfer it subject to the primary trust. Without the consent of the National Society the school cannot be conducted in a manner inconsistent with the trust deed. The 23rd section of the Act cannot apply when there is a primary trust as to carrying on the school, as there is here.

Glasser, Q.C. and *Speed* for the School Board.—*Re Burnham National Schools* (29 L. [T. Rep. N.S. 495; L. Rep. 17 Eq. 241] shows that it is lawful to hand over a school to the School Board. The National Society did all they could for their own interests at the time the Elementary Education Act was under discussion in Parliament.

Cotton, Q.C. replied.

The VICE-CHANCELLOR.—The question raised by this bill is one of very great importance, because it has a very material bearing, in my opinion, upon the operation of the Elementary Schools Act of 1870. Certainly, if the plaintiffs succeed, it will put in their hands the power of most materially impeding the operation of that Act. The bill is filed by the National Society, which is a society entitled to the highest consideration and respect. It was established by royal charter in 1817, having for its avowed object the "promoting the education of the poor in the principles of the Established Church throughout England and Wales." It appears by their report which, is in evidence, and which has been referred to, that the society, since its institution, has spent more than half a million of money in promoting schools for the education of children in the principles of the Established Church of England, and it also appears, there being 283 schools in the metropolis connected with them, that they have spent upon those schools no less a sum than 45,606*l.*; therefore, I repeat, it is a society entitled to the highest respect and regard by all men, and certainly by those who are members of the Church of England. It is not to be wondered at that a society instituted for such a purpose should feel great anxiety as to the transfer of any schools established by them, or in connection with them, to the School Board for London, who are the defendants in this case, when they find that by the 14th section of the Act of Parliament under which those transfers take place, it is provided that every such school "shall be a public elementary school within the meaning of the Act," and that "no religious catechism or religious formulary which is distinctive of a particular denomination shall be taught in the school." Then the National Society being the plaintiffs, and the School Board for London being the defendants, the question which I have to decide raises the general question whether a school established by the National Society, of which there are between 6000 and 7000 in England, can be transferred to the School Board without the consent of the National Society. Now that depends upon the proper construction of the Act of Parliament in question, but before I go to that I think I must read the 15th para-

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graph of the bill. [His Honour read the paragraph.] There is a statement there that it was intended that this power should be preserved—that is, the power of vetoing the transfer, but I confess I have not been able to find that the Act contains any such power. Now the particular case out of which this question arises is this. I have already pointed out what the objects of the National Society are, and the manner in which they have been carried into effect. It appears that in the year 1867 a body of gentlemen—the clergyman of the parish and a number of those no doubt living in the district—were very desirous of establishing a school in connection with the Church of England, and they expended some 2600*l.* in establishing that school. As was to be expected they applied to the National Society for assistance, and the National Society gave them assistance to the extent of 200*l.* A trust deed is executed. [His Honour read the trust contained in the trust deed above set out.] Then it is prescribed how it is to be managed. There is not any provision in the deed for an alienation of the school, and there is certainly no provision that it should not be alienated without the consent of the National Society. I can very well understand that that was probably so considered, but it was not said, and I am unable therefore to find that there is any restriction. Then in the year 1870 this Act of Parliament having passed, some of the parties connected with this school, including the clergyman of the parish, became desirous that this school should be transferred to the London School Board, and accordingly they took the necessary steps to obtain the transfer under the provisions of the Act of 1870, which provides in the 23rd section which has been made the subject of the argument, that “The managers of any elementary school in the district of a school may, in manner provided by this Act, make an arrangement with the School Board for transferring their school to such School Board, and the School Board may assent to such arrangement.” That is the general provision, that the managers of any school may make arrangements to transfer the school to the School Board for the district. That happens in this case to be the School Board for London. Now under what circumstances are they to make this arrangement? There are various clauses inserted for the protection of those who are interested in the schools. One is very material and is a very proper one, I must say, and it is this, that “The Education Department shall consider and have due regard to any objections and representations respecting the proposed transfer which may be made by any person who has contributed to the establishment of such school.” That means a “person” or “body.” Accordingly, the National Society having great objection to the transfer, did appear before the Education Department of the Privy Council, and the Education Department decided not to interfere in any way to restrict the transfer. Therefore, not having succeeded before the Education Department, the next step was not to file this bill, because, before this bill was filed an information at the relation of Henry John Spurling, who it appears is a gentleman residing in the neighbourhood, and who has largely contributed to this school, was filed in the month of July 1872, for the purpose of restraining this transfer. The transfer having been executed, it was thought

proper by the National Society that they should come before the court as plaintiffs and raise the general question, for it is a general and most important question, namely, whether these transfers could be made without their consent. Accordingly they filed their bill on the 16th Nov. 1872. That bill raises the general question. I take it that what I am deciding now will apply to the great bulk or to most of the schools connected with the National Society. I have pointed out that there is no provision in the trust deed of 1867 for alienation whatever. Consequently there is no provision that the consent of any person shall be necessary for the validity of the transfer. Then, what are the circumstances under which the transfer is to be made? First, it is a general power given to the managers of the school to transfer. I assume, for the purposes of my decision, that all the managers of the school did concur in this transfer. Was it necessary for them to obtain any other consent? What is mainly relied upon are the various restrictions of the 23rd section. I have already read the general provision that the managers may make an arrangement with the School Board for transferring to that School Board a certain school, and the School Board may assent to such an arrangement. Then the first subclause of sect. 23 says, that such arrangement may be made “Where there is any instrument declaring the trusts of the school” (which there is here), “and such instrument provides any manner in which, or any assent with which a resolution or act binding the managers is to be passed or done, then in accordance with the provisions of such instrument” (there are no such provisions, or at all events there are not any applicable to this subject in the present instance). Then subsection 2 says, “Where there is no such instrument, or such instrument contains no such provisions, then in the manner and with the assent, if any, in and with which it may be shown to the Education Department to have been usual for a resolution or act binding such managers to be passed or done.” That would no doubt generally mean with the consent of a large proportion of the subscribers, but then comes this: “If no manner or assent can be shown to have been usual, then by a resolution passed by a majority of not less than two-thirds of those members of their body who are present at a meeting of the body summoned for the purpose, and vote on the question, and with the assent of any other person whose assent under the circumstances appears to the Education Department to be requisite, and in every case such arrangement shall be made only with the consent of the Education Department, and if there are annual subscribers to such school with the consent of a majority, not being less than two-thirds in number of those of the annual subscribers who are present at a meeting duly summoned for the purpose, and vote on the question.” That, down to this point has been complied with, but what the plaintiffs rely upon is this proviso upon which the matter really turns: “Provided that where there is any instrument declaring the trusts of the school” (there is a trust here), “and such instrument contains any provision for the alienation of the school by any persons, or in any manner, or subject to any consent, any arrangement under this section shall be made by the persons in the manner and with

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the consent so provided." The answer to that is that although there is a deed here declaring the trusts of the school, such instrument contains no provision "for the alienation of the school by any person, or in any manner, or subject to any consent." And then there being no such provision, and no such consent being required, the proviso is totally inapplicable. When you refer to the deed, do you find any clause which contains a provision for the alienation of the school? No, it contains no provision such as is here considered necessary, namely, "by any persons, or in any manner, or subject to any consent." There is no such provision, and no comment is required upon that. Therefore, the complete answer to that is that it has no application, because it does not contain that which is required to make the concurrence necessary. Then Mr. Cotton says, and says it with great force, "I have no doubt that all persons connected with the National Society, if they had been asked whether these bodies could alienate a school without their consent, seeing by the constitution of the society they were so inseparably connected, they would have been surprised to find that this Act of Parliament raised this question, namely, that they are to have no voice in the alienation of the school houses which have been established in a great degree by means of their own funds, and which are so nearly connected with them that they may be considered the patrons and supporters of them," and certainly it is an extraordinary circumstance to find that the Act of Parliament, according to my view of it at all events, gives this power to the managers of a school to alienate without the National Society having any voice in it whatever. They are not altogether excluded. Far from it, because there is the clause I have already read, and the next one, which is this: "The Education Department shall consider, and have due regard to any objections and representations respecting the proposed transfer which may be made by any person who has contributed to the establishment of such school." That gave them a *locus standi* to appear before the Education Department, and they availed themselves of that, and other persons taking the same view availed themselves of it also, and the Education Department, whose decision is final, decided against them, and that tribunal was established by Act of Parliament for the purpose of deciding this sort of question, and I think that the decision of the Education Department is final upon the subject. I may further say that this 23rd section seems to me to be framed with regard to the best interests of all persons, for here is another clause which has been much relied and commented upon. "Nothing in this section shall authorise the managers to transfer any property which is not vested in them, or a trustee for them, or held in trust for the school, and where any person has any right given him by the trusts of the school to use the school for any particular purpose, independently of such managers, nothing in this section shall authorise any interference with such right except with the consent of such person." That is, where any person over and above the managers has any interest in the school, without the consent of such person the transfer shall not take place. This is again an instance in which vested interests are protected by the Act of Parliament. It seems to me to be impossible to come to any other conclusion than the

one I come to, that the consent of the National Society is not necessary, much as they are connected with these schools and much as the schools owe to it, and greatly as the society's wishes are entitled to be respected and favourably regarded, and that this Act of Parliament does not give them the power of vetoing these transactions. The result is that I come to the conclusion that the bill cannot be sustained, and it must be dismissed, but I think it a very proper case in which each party should pay its own costs.

Solicitors for plaintiffs, *G. A. Crawley and Arnold.*

Solicitors for defendants, *Sydney Gedge and Co.*

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROOPE and H. PRAT, Esqrs.,
Barristers-at-Law.

Thursday, July 2, 1874.

(Before the LORDS JUSTICES.)

THE CORPORATION OF HALIFAX v. THE LOCAL
BOARD OF SOOTHILL UPPER.

Private Act—Obligation to sell water to a township—Sale by the township of water compulsorily acquired—Demurrer.

A corporation obtained Parliamentary power to collect all the water from the gathering grounds of a district, but were bound to supply to a certain township not less than 25,000 gallons, nor more than 75,000 gallons of water per day, at the price of 6d. per 1000 gallons, and the amount to be supplied between the maximum and minimum limits was to be at the option of the township. The township took more than the 25,000 gallons, and sold part of it at a profit to a neighbouring township:

Held (affirming the decision of Bacon, V.C.) that there was nothing to prevent them from doing so.

THIS was an appeal from a decision of Bacon, V.C.

The hearing in the court below is reported in ante p. 62, where the facts of the case are sufficiently set forth.

The Vice-Chancellor allowed a demurrer to a bill, seeking a declaration that the plaintiffs could not be required to supply the defendants with water, for the purpose of enabling them to resell it to any other township, but only with such water within the maximum limits as should be needed for the consumption of the defendants' own township. From this decision the plaintiffs appealed.

Kay, Q.C. and *W. Barber*, for the appellants, contended that the defendants could not sell water purchased under compulsory powers, any more than a railway company could exercise its powers of compulsory purchase, in order to resell land so acquired.

Without calling upon

Jackson, Q.C. and *Ince*, who appeared for the defendants' local board,

Lord Justice JAMES said that this was as plain a case as ever came into court. He entirely agreed with every word of the Vice-Chancellor's judgment. The plaintiffs' case was as idle in point of law as it was dishonest in point of fact. The appeal must therefore be dismissed with costs.

Lord Justice MELLISH was of the same opinion. The defendant, Mr. Saville, was tenant for life of a large estate, upon which it was likely that there would be a great deal of building, from its proximity to Halifax. That estate appeared to be

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suitable for the collection of water, and he might have made reservoirs himself, and sold the water. The corporation of Halifax applied to Parliament for powers to appropriate the waters on his estate for their waterworks. If no agreement had been come to they would have been obliged to compensate him for depriving him of the power of collecting the water on his moors and selling it. But an agreement was made, by the terms of which he was to be compensated by being supplied with a certain quantity of water per day, at a certain fixed rate. That agreement was incorporated in the Act of Parliament, and the question was, what was the construction of the provisions of the Act relating to that? The agreement must be treated as an agreement by him to sell the water on his estate, and the provisions of the Act must be construed in accordance with that view. There was nothing to show that the water which he was to have under the agreement was to be used strictly to supply the townships on his estate. The provisions for the future increase of the minimum supply were wholly irrespective of the needs of the townships on his estate. The whole scheme of the Act was to give Mr. Saville a supply of water as a compensation for the use of his moors by the corporation, to collect water for their waterworks. There is no restriction in the Act, and it would be very wrong to import any. The plaintiffs' case, therefore, wholly failed.

Appeal accordingly dismissed with costs.

Solicitors for appellants, *Williamson, Hill, and Co.*; solicitors for respondents, *Edwards, Taylor, and Jaques*, agents for *Scholefield and Taylor, Batley*.

EXCHEQUER CHAMBER.

Reported by H. LEIGH, Esq., Barrister-at-Law.

Tuesday, June 23, 1874.

APPEAL FROM THE COURT OF EXCHEQUER.

(Before BLACKBURN, KEATING, MELLOR, LUSH, and ARCHIBALD, JJ.)

TELFORD AND ANOTHER v. LOWS.

Indictment for "forcible entry"—Action for—"Reasonable and probable cause"—"Malice"—What is sufficient evidence of right of one in possession to resist attempt to turn him out—Amount of force to be used—Complete possession. The plaintiffs were in possession as tenants, under an agreement with the owner, of an empty house, which they used as a warehouse for goods, and which it was their custom to leave locked up every night with no one inside it until the next day. The defendant having, as mortgagee in fee, a legal right to, and being desirous of obtaining possession of the premises, went to the house when no one was in it at 6 a.m. one morning, in company with two or three others, and, having forced open the door and broken off the plaintiff's lock, the defendant and his men were in the act of barricading the door by putting a padlock upon it, when the plaintiffs, who had been informed of what was going on, came up, and, with a certain amount of force, interrupted the defendant's proceedings, and after a slight struggle, succeeded in preventing the completion of his act of taking possession, and in resuming possession of the premises themselves. Subsequently the defendant, without any previous intimation to the plaintiffs, procured a bench warrant against the plaintiffs, to

which they put in bail; and at the ensuing quarter sessions he preferred an indictment against them for a forcible entry, a riot, an affray, and an assault, upon the trial of which they were acquitted.

At the trial before Mellor, J., of an action against the defendant for "maliciously and without reasonable or probable cause," preferring the said indictment, the defendant's counsel objected that on the facts there was no sufficient evidence of malice, or of want of reasonable and probable cause, but the learned judge ruled that the defendants had made out a case to go to the jury, and a verdict was entered for the plaintiffs. A rule to set that verdict aside and to enter it for the defendant, on the grounds above mentioned was afterwards, in Trinity Term 1872, made absolute by the Court of Exchequer, and on appeal from that decision it was

Held by the Court of Exchequer Chamber (Blackburn, Keating, Mellor, Lush, and (though not without doubt) Archibald, JJ.) reversing the judgment of the court below, that there was sufficient evidence of want of reasonable and probable cause for preferring the indictment; and sufficient evidence of malice for the question to be left to the jury.

By Blackburn, J.—Forcible entry consists in taking possession of land, whether with or without legal right to the possession of it, accompanied by such a degree of violence as to amount to a breach of the peace, and to be an offence against the public. Where A. is fairly and reasonably in possession of premises, whether his claim to the possession be legally right or wrong, and B., who may perhaps have a legal right to the possession, comes to turn him out, A. would not as a rule be liable to any punishment for treating B. as a trespasser, and resisting his attempt to turn A. out, unless in resisting he uses an excess or undue amount of force and more than is sufficient to maintain his own possession.

By Keating, J.—Had the facts shown that the defendant, having the undoubted right to the possession, had taken possession, and having taken it, that the plaintiffs had entered on that possession, there would then, I think, have been reasonable and probable cause for the indictment, but, in order to constitute "possession," it must be a complete possession, and exclusive of the possession of any other person.

THIS is an appeal by the plaintiffs, under the Common Law Procedure Act 1854, against the judgment of the Court of Exchequer, making absolute a rule directing that the verdict entered for the plaintiffs at the trial should be set aside, and a verdict be entered for the defendant.

CASE.

1. The action was commenced on the 18th Jan. 1871. The declaration, which was delivered on the 1st Feb. 1871, alleged that the defendant, "falsely, maliciously, and without any reasonable or probable cause, appeared before the grand jury at the Carlisle Quarter Sessions, on the 3rd Jan. 1871, and caused the plaintiffs (together with five other persons), to be indicted for—First, that they, on the 14th July 1870, forcibly entered the defendant's premises, No. 26, Bank-street, Carlisle; and, secondly, that the plaintiffs and the said other persons committed a riot on the said day; and, thirdly, that they committed an affray; and, fourthly, that they assaulted the defendant; on

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which said several indictments the plaintiffs were afterwards duly acquitted.

The defendant pleaded, first, not guilty; and, secondly, denied the determination of the prosecution as alleged. A copy of the pleadings accompanies and is part of this case.

2. The cause was heard before Mellor, J., at the Manchester Spring Assizes 1872, when a verdict was entered for the plaintiffs for 55*l.*, leave being reserved to the defendant to move to enter the verdict for him.

3. The following facts were proved:—One Alfred Tweddle, being seised of the said premises (26, Bank-street, Carlisle), by deed of the 15th Aug. 1868, conveyed the same to the defendant by way of mortgage for 250*l.* and interest. The title deeds of the property were, about that time, handed over to the defendant. A copy of such mortgage deed forms part of this case.

4. On the 19th Oct. 1868, the said Alfred Tweddle, who had before that time acquired very intemperate habits, executed a deed of settlement to his brothers, William John Tweddle and John Tweddle, as trustees, upon the trusts therein mentioned for the benefit of his family.

5. On the 31st Dec. 1868, the said Alfred Tweddle executed another deed, by way of mortgage, giving to the defendant a first charge for 200*l.* on the said premises. The said Alfred Tweddle remained in occupation of the said premises until July 1869.

6. The plaintiff, Edward Telford, about Nov. 1869, made an arrangement with Alfred Tweddle to pay him 20*l.* for the year's use of the premises in question. The circumstances and character of the arrangement appear in the evidence herein-after set forth.

7. On the 14th July 1870, the transaction took place out of which the indictment and the present action arose.

8. The plaintiff, Robert Westray, was called, and his evidence, so far as it is material to the matter now in question in this appeal, was as follows:—

Robert Westray.—On the morning of the 14th July 1870, I remember seeing a person named Bradley, and in consequence of what I heard from him I went to this house in Bank-street, which adjoins my shop. I saw the defendant there. This was about six o'clock in the morning. As I came up the joiner was boring a hole in the door. The house in question consisted of business premises only. No one lived there, and I had looked it up myself the night before. The name of the joiner was Carruthers. The door was half open, and he had one half of the door in his hand, and was boring with the other on the outside, and about a foot below the lock. I told him to stop. Mr. Lows said "No, go on." I said, "You have no right to break into these premises in this manner." Mr. Lows said, "I shall not have anything to say to you." About the same time a man named Harnett came out of the house. Mr. Lows and he came up together in front of me to prevent my going near the door. I turned away, and went for my brother-in-law, Mr. Telford. We returned together, and Mr. Telford asked Lows to come away from the door; he refused, and Telford asked me to go for a policeman. I went, but not finding one I came back. Mr. Telford and I went towards the door, and got it about four inches open. A man was standing against it on the inside. Just about that time a lad named Shields came up with a ladder and got into the premises. I got in by the same window, and found a man with a piece of wood propped against the door we had been trying to open. One end of the piece of wood was against the door and the other end was on the floor, so as to make a kind of wedge. He was holding it himself. I told him to remove it, and some conversation passed between us; the man was

Carruthers. He removed the piece of wood, and the door came open; Mr. Telford and some others came in. On looking at the door I found that the old lock had been taken off and was laid on the ground, twisted and bent, as if force had been applied to it; about a foot below, a place had been cut out for a new lock to be put; it had not been put on. They were in the act of cutting when I first came up. I put the old lock up again, and had the door shut up and fastened. The key had all along been in the possession of Mr. Telford. After the October sessions I met a friend on the platform of the railway station who told me that a bill had been preferred against Telford, myself, and others for a forcible entry, amongst other things. I had no previous intimation that any such bill was going to be preferred. I did not then learn that there was a Bench warrant against me. A policeman came to me with some sort of warrant, and I went and put in bail for my appearance, and Telford went with me. The trial came on in the following January 1871, and Mr. Lows, the prosecutor, and his witnesses were examined. At the close of the case for the prosecution the jury returned a verdict of acquittal. Mr. Telford and I defended jointly, and the amount of our expenses was about 98*l.* or 99*l.*

Cross-examined.—

On the morning of the 14th July my workman, John Bradley, told me that Mr. Lows was "breaking the door." I found Lows standing on the doorstep; the man was behind him boring holes in the door. There was also at least one other man in possession further in. I did not, when I first came up say, "I see you have got possession at last." Telford did not say, "You have got possession at last, have you?" Seeing these men there in some force I went away to tell Telford, and he came with some help. Telford and others, with my assistance, succeeded in putting out the persons in the house and resuming possession. The witness was then asked whether Lows, having got possession in the way the witness had described, he did not show fight to resist the witness taking possession. A.—Certainly he did. They resisted as far as they could my taking possession. There was not a violent tussle to get Lows away from the door. Lows is not very active. I did not see him caught by the collar, but I saw him take Telford by the hair while he was standing on the doorstep. At the time Shields got through the window I should say there were about fifteen persons in the street standing there. There were workmen passing to and fro who were attracted to what was going on, and wanted to see the fun. We had none beside myself and Telford that took part in the matter. We had bystanders. I cannot say how many there were. Of Lows' party I only saw Lows, Harnett, and the joiner. When I came back from fetching the policeman there were three or four men in the shop. I, with Telford, dragged Lows from the door, and we succeeded several times. I did not try to knock out the staples of the door. I saw Telford push Lows by the shoulders. Q.—And the scrimmage, or row, or whatever it was, continued until the policeman came up? A.—The policeman was either there or just coming at that moment. I heard of the true bill being found the day it was found. About a fortnight before the following sessions the policeman called, and some one with him, which was the only intimation I had. The policeman came to tell me I should have to give bail, and I did. I was not at any time in custody, and at the trial we were acquitted.

Re-examined:

After Alfred Tweddle had ceased to occupy the premises, I occupied them for my business, and kept goods in them by Alfred Tweddle's permission. I had goods in the premises on the 14th July.

Edward Telford examined:

I am the other plaintiff in the case, and am an auctioneer and cattle salesman, and have carried on business for twelve years in Carlisle. In Nov. 1869 I agreed verbally with Alfred Tweddle to take the premises, which were then standing empty, as an experiment to hold sales in, and to allow him £20 a year. Westray has used the upper floor for painting large articles for the purpose of his business, with my permission, ever since the agreement. I have paid the stipulated rent to Alfred Tweddle; have taken his receipts for it, and have kept the key. I have been in court during Westray's evidence, and have heard detailed

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what happened. Substantially that account is correct. I was attempting to prevent the lock being put on the door. Q.—We hear that you endeavoured to get Lows from the front door, and that he wished to stay there and you pushed him away; did you use more violence than was necessary to do that? A.—No. Q.—Was there any tumult, or a number of people collected around? A.—Yes. Q.—Did they take part in the row? A.—No, I pulled him from the door. While this was going on there were persons standing round, and among them the chairman of the watch committee, standing there most of the time at the opposite side of the street. The policeman was there too at the door, but took no part in the affair. What was said about the bill of indictment and its coming on at the sessions was quite correct.

This witness was cross-examined chiefly as to the arrangement between him and Tweddle under which the plaintiffs had possession of the premises as tenants.

9. The record of the proceedings at the Carlisle quarter sessions was put in; and a copy thereof which accompanies, may be read as part of this case.

10. It was proved that the plaintiffs defended themselves by the same attorney, whose bill of charges for their defence amounted to 55*l.*; and that sum was agreed upon as the amount of the joint expense properly incurred by him in defending them on the said indictment.

11. Defendant's counsel submitted to the learned judge at the trial that, on the facts proved the plaintiffs had made out no case against the defendant, on the grounds that there was no sufficient evidence of malice, and no sufficient evidence of want of reasonable and probable cause. He also contended that there was no joint cause of action.

12. The learned judge ruled that the plaintiffs had made out a case; but reserved leave to the defendant to move to enter the verdict for him, and on the terms that there should be no appeal from the Court of Exchequer without leave of that court; and the court to have power to draw inferences of fact.

13. A verdict was entered accordingly for the plaintiffs for 55*l.*, subject to leave to move.

14. A rule was afterwards obtained in Easter Term 1872 to set aside the verdict for the plaintiffs and to enter it for the defendant, pursuant to leave, on the grounds that, on the facts proved, the plaintiffs made out no joint or any cause of action; and that on such facts there was no evidence of malice, and no evidence of want of reasonable and probable cause; or to arrest the judgment on the ground that there was no joint cause of action—the court to be at liberty to draw inferences of fact; which rule was subsequently, in Trinity Term 1872, after argument on both sides, made absolute to enter the verdict for the defendant, and leave was given to appeal.

On appeal, the question for the opinion of the court of Exchequer Chamber is, whether the judgment of the Court of Exchequer in making the said rule absolute is right.

Points of argument for the plaintiffs (appellants): First, that there was sufficient evidence of want of reasonable and probable cause for the defendant's indicting the plaintiffs; secondly, that there was evidence of the defendant's malice in indicting the plaintiffs; thirdly, that the plaintiffs had a joint cause of action against the defendant, they having incurred a joint expense in defending the indictment by the same attorney, whose bill of charges against them exceeded 55*l.*

The defendant's points—First, that on the facts stated, the defendant is shown to have been the owner of the legal estate in, and entitled to, the possession of the premises in question; secondly, that having exercised his right to the possession of such premises, the plaintiffs were trespassers in that they endeavoured to resist the defendant in the exercise of such right of possession; thirdly, that the facts stated disclosed a riot and assault by the plaintiffs and others; fourthly that the facts disclosed no joint or any cause of action; fifthly, that the plaintiffs failed to show a want of reasonable and probable cause; sixthly, that the plaintiffs failed to prove malice; seventhly, that the judgment of the Court of Exchequer was right, and ought to be affirmed.

Herschell, Q.C. (with him was *Holker*, Q.C., Solicitor General), for the plaintiffs (appellants), contended that the decision of the court below, in making absolute the defendant's rule to enter a verdict for the defendant, was wrong, and should be reversed. The defendant, no doubt, had the legal estate of the premises in him as the mortgagee in fee of them, but he had no right to take or to attempt to take possession of them in the forcible manner in which he was doing so on the morning in question, the plaintiffs being at the time in actual and lawful possession, and the whole controversy or dispute took place between him and the plaintiffs whilst the defendant was so attempting, unlawfully, to take possession. The crime of "forcible entry" is defined or described in 1 Russell on Crimes, p. 421, 4th edit., but the definition does not throw much light on the facts of this particular case. It is submitted, on the part of the plaintiffs, that the defendant's getting in by breaking the plaintiffs' lock off the door was an unlawful act, and that the plaintiffs, finding what the defendant was doing, were justified in preventing him from accomplishing his entry in that way; and that what they did, in so preventing him, furnished no ground whatever for the indictment subsequently preferred against them by the defendant. [*KEATING*, J.—Reverse the position of the parties, and suppose that the plaintiffs had indicted the defendant for a forcible entry? I apprehend that they could have maintained such a proceeding. [*BLACKBURN*, J.—It is curious, but on the facts as here stated it would seem that the plaintiffs might have indicted the defendant for a forcible entry, and the defendant might have indicted the plaintiffs for a forcible detainer.]

C. Russell, Q.C. (with whom were *Foard*, *H. A. Hills*, and *R. Braunfeld*), for the defendant (respondent), *contra*.—The decision of the Court of Exchequer was right, and should be affirmed. The defendant, who was the mortgagee in fee of the premises, was endeavouring to get that to which he had a valid legal right, namely, the possession of the premises. He was in the house at the time the plaintiffs came up, and it is submitted that there was then a complete possession in him. [*BLACKBURN*, J.—It turns mainly, as it seems to me, on the one fact whether or not the possession of Lows was complete before the act of the plaintiffs began.] As between himself and the plaintiffs, he had the legal right, and the possession, if not "complete" possession. [*BLACKBURN*, J.—Is it so clear that the plaintiff Telford had not possession? The defendant, it is not controverted on the other side, was, without doubt

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entitled to the possession; and in the case of *Jones v. Chapman and others*, in error on a bill of exceptions to the ruling at Nisi Prius of Parke, B. (2 Ex. 803; 18 L. J. 456, Ex.), it was held by the court of error that, under the plea, to a declaration in trespass *quare clausum fregit*, that the close was not at the time when, &c., the plaintiffs' close, the defendant may show a lawful right to the possession, either in himself or some other under whose authority he claims to have acted. In delivering his judgment in that case (p. 821 of 2 Ex. and p. 460 of 18 L. J.) Maule, J. says: "If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and one of them is actually in possession, and the other is not; if the question is, which of those two is in actual possession, the answer is that the person who has the title is in actual possession, and the other person is a trespasser." That case is a very strong authority in favour of the defendant here. [BLACKBURN, J. referred to *Newton and wife v. Harland* (1 Man. & Gr. 442; 1 Sc. N. R. 474) where it was held that a landlord, in order to regain possession, was not justified in using force to expel a tenant who remains on in possession of apartments after the expiration of his term. [KEATING, J.—*Jones v. Chapman* was a civil action. There is a distinction between that and an indictment. A distinction which is well taken by Parke, B., in *Harvey v. Brydges and others* (14 M. & W. 437; 14 L. J., N. S., 272, Ex.), in his judgment (at p. 442 of 14 M. & W.), where he says, alluding to the case of *Newton and wife v. Harland*, to which Blackburn, J., has just referred: "If it were necessary to decide the point raised in that case, I should have no difficulty in saying that where a breach of the peace is committed by a freeholder who, in order to get into possession of his land, assaults a person wrongfully holding the possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party." ARCHIBALD, J.—In *Hawkins' Pleas of the Crown*, enumerating what shall be esteemed a "forcible entry," and who shall be deemed to have committed the offence, it is said: "So also shall those who, having an estate in land by a defeasible title, continue with force in possession thereof, after a claim made by one who had a right of entry thereto" (Book 1, c. 64, sect. 23).] In Addison on Torts (p. 613 of the 4th edit.), the rule as to reasonable and probable cause for preferring such an indictment is well and lucidly stated; and it is there shown that "the substantiating the charge is not essential to exonerate the accuser from liability to an action, for he may have good reason to make the charge and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible where malice is combined with want of probable cause" (per Tindal, C.J., in *Willans v. Taylor* (6 Bing. 183, at p. 186; 3 M. & P. 350, at p. 359; same case affirmed in error 2 B. & Ad. 845; 1 L. J., N. S., 17, K. B.); *Turner v. Ambler* (10 Q. B. 257; 16 L. J. 153, Q. B.)). [MELLOR, J., referred to 1 Russ on Crimes (4th edit. p. 426), showing what amount of violence, and of what character, is necessary to constitute an entry a forcible one in a criminal point of view.] If the defendant went to the

premises, as it is contended, and indeed is evident on the facts of the case that he did, in the assertion of his legal right, and in furtherance of that assertion he got possession, then he was justified in treating the plaintiffs as trespassers and wrongdoers, and the onus is on them to show an absence of reasonable and probable cause, and that they have not shown. With respect to the question of malice, there is not a particle of evidence of the existence of any beyond the mere act itself.

Herschell, Q. C. in reply.—If there was evidence of a want of reasonable and probable cause, then the jury may well and reasonably infer malice therefrom. On behalf of the plaintiffs, special stress is to be laid on this, that they, on arriving at the spot, find the defendant in the very fact of doing an unlawful act, and therefore they interpose and endeavour to prevent its being done.

Cur. adv. vult.

The court retired for a short time, and on their return the following judgments were delivered:—

BLACKBURN, J.—In this case we have all come to the conclusion that the decision of the court below is not correct, and that it must, therefore, be reversed. We consider that there was sufficient evidence of want of reasonable and probable cause for preferring the indictment, and also sufficient evidence of malice for the question to be left to the jury. Now it must be remembered that in an action for preferring an indictment without reasonable and probable cause, what is to be considered is, whether the state of facts, if they were brought to the notice and knowledge of the party preferring the indictment, were such as to give him reasonable and probable cause to suppose that an indictment could be legally supported. Upon that point it has been decided by a long series of cases that the question, whether or not there is reasonable and probable cause, is a matter of law which the judge at the trial has to decide, subject to an appeal to the Exchequer Chamber. The indictment preferred in the present case against the plaintiffs was for a forcible entry. The offence consists in taking possession of land whether with or without legal right to the possession of it, accompanied by such a degree of violence as to amount to a breach of the peace, and so to be an offence against the public. Where a person is in possession, I mean really, fairly, and reasonably, in possession of premises, he is not as a rule liable to any punishment for resisting those who come to turn him out. If the right of possession is disputed, and though the person in possession may legally speaking be right or wrong in his claim to the possession, yet it is not a crime in him to resist a trespasser on that possession, unless in doing so he uses an excess and undue amount of force. The statute of Henry VI. in cases where there has been a forcible entry, or a forcible detention of land, provides means by which justices of the peace may award restitution. As far as regards restitution of lands forcibly entered on, or forcibly detained, the remedy may be considered, and the decisions in most of the cases which have been cited will bear me out in the statement, in the nature of a civil remedy. There is no reason whatever why ejectment should not be brought for recovering the possession; but when a person is charged with a crime, we have to see whether there was under the circumstances such a degree of force and violence used as to constitute the

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crime charged. But where a person is in possession of a house, and another person who may perhaps have a legal right to the possession of it and might maintain ejectment for it, comes to turn the person in possession out, I cannot persuade myself that the man who is in possession commits a crime if he meets force with force, and resists the attempted forcible entry of the other person with such an amount of force, and no more, as is sufficient to enable him to maintain his own possession, and to prevent the other person from getting in, even though that person may have a legal right to the possession. Now the facts of the present case appear to be these: The plaintiffs were in possession of a house—not a dwelling-house—but a house which they opened and used as a warehouse for keeping their goods in, locking it at night and leaving it till the next day with no person inside it. The defendant Lows, who probably had a right to, and might have brought ejectment to recover, the possession of the house, went, accompanied by several people—I do not say that he knew he was going to commit a forcible entry at the moment, but that he rather wished to take possession of the property by surprise, when nobody was in the house—but he went with these people in the early morning, and having forced open the door and broken off the lock which the plaintiffs had upon it, he or some of the people he had with him were in the act of barricading the door by putting a padlock upon it, when the plaintiffs, who had been informed of what was going on, came up, and with a certain degree and amount of force interrupted the defendant's proceedings and intercepted the completion of his act of taking possession. Now comes the question, Is that user of force on the plaintiffs' part an indictable offence? I by no means wish to say that any amount of force could be justified. I think that an excess of force would make the person using it liable to punishment, but if the plaintiffs used no more force than appears to have been used by them on the present occasion, they would not in my opinion be indictable. Whatever was done in defending the supposed right, I cannot see myself that it makes any difference that the defendant Lows was almost actually in the house and that the plaintiff Telford came up as quickly as he possibly could come, and found the defendant and his men red handed as it were, and attempted at once to take possession, and pushed the defendant and his men out, as they attempted to push him out as he was trying to come in. I cannot think that the degree of force used on the occasion could make it an indictable offence at all. Then comes the question, was there reasonable and probable cause for the present defendant's preferring the indictment against the plaintiffs. He was aware of all the circumstances, and I think he was ill advised as to the law. No doubt he thought that by preferring an indictment at the quarter sessions he might get restitution quicker than if he had brought an action of ejectment. But, though he was ill advised, he did take a course in preferring an indictment for a forcible entry which the facts would not at all support. There was, therefore, a want of reasonable and probable cause for preferring the indictment. The question of malice we need not enter into. No one seems to have supposed that there was any actual active wicked

malice on the defendant's part, but the mere fact of his using a bench warrant was evidence that could not be withdrawn from the jury to show that he was proceeding in an angry mood, and not simply to get justice; and also the fact of the want of reasonable and probable cause was some evidence of malice. It seems to me that the decision of the learned judge at the trial, when he ruled that the case must go to the jury was right, and that the decision of the Court of Exchequer, when they held there was no evidence of want of reasonable and probable cause was wrong, and, therefore, that the judgment below should be reversed.

KEATING, J.—I am of the same opinion. If in this case the facts had shown that the defendant, having the right which he unquestionably had to the possession, had taken possession, and having taken possession that the plaintiffs had entered on that possession, why then I should have said that there would have been reasonable and probable cause for indicting the plaintiffs for a forcible entry. That brings the question to a question of fact—had the defendant taken possession? Now, it seems to me that, in order to constitute possession, it must be a complete possession—a possession exclusive of the possession of any other person; and here the facts, I think, show that there was no such possession taken. All that occurred seems to have occurred at one and the same moment, and to have been one entire act. The transaction was this: the defendant was endeavouring to take possession of a house, which was actually, if not by legal right, in the possession of the plaintiffs, and the plaintiffs were resisting him. That seems to me to furnish no foundation for an indictment for a forcible entry against the plaintiffs, who were merely defending a possession which they had had, at all events, for a considerable time. I think that the judgment of the Court of Exchequer was wrong, and that it ought to be reversed.

LUSH, J.—I am entirely of the same opinion.

ARCHIBALD, J.—I confess that I have not been without some doubt during the argument as to the absence of reasonable and probable cause; but, upon a fuller and more deliberate consideration of the case, I have come to the same conclusion as the rest of the court, and I think that the judgment below should be reversed.

MELLOR, J.—I remain of the same opinion that I held and expressed at the trial.

Judgment below reversed. (a)

Attorneys for the plaintiffs (apps.), *Phelps and Sidgwick*, agents for *D. McAlpin*, Carlisle.

Attorney for the defendant, *G. Mayor Cooke*, agent for *Andrew and Sons*, Carlisle.

ELECTION PETITIONS.

Reported by F. O. CAUMPT, Esq., Barrister-at-Law.

THE BOROUGH OF HACKNEY.

April 15 and 16, 1874.

(Before GROVE, J.)

Parliamentary election—Irregularities of polling—Booths not opened—Inability of voters to vote—The Ballot Act 1872.

It was proved that in one district of the borough, containing 4838 voters and two polling stations,

(a) The defendant will carry the case on appeal from this decision to the House of Lords

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the stations were closed during the whole day of the election, so that none of the 4838 voters could record their votes.

It was further proved that at four other stations in the borough for a certain period during the day of election voters were prepared to record their votes, but were unable to do so, owing to the polling stations being closed.

Positive evidence was given that upwards of 5000 voters were prevented from recording their votes.

Held, that there had been no valid election, either at common law or under the statute (*The Ballot Act 1872, 35 & 36 Vict. c. 33*).

By sect. 13 of the *Ballot Act*, it is enacted that "No election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake had not affected the result of the election."

Held, that two of the principles of the *Ballot Act* being that the voting at an election should be secret, and that all voters should have an opportunity of recording their votes, it was impossible to inquire how the voters who were unable to vote would have voted, and consequently that it was impossible to say positively that the irregularities complained of had or had not affected the result of the election; but the conclusion from the facts was that the irregularities had such a bearing upon the result as to affect the election within the meaning of the Act.

Seemle, that the result of an election is affected if the majority of the successful candidate is less than it would have been. It is not necessary to satisfy the terms of the Act that another candidate would have been elected.

Held also, that an election is not conducted in accordance with the principles laid down in the *Ballot Act* if any considerable proportion of a constituency are prevented from recording their votes, or have impediments placed in their way calculated to prevent them from voting.

Irregularities to upset an election must be substantial, and not mere informalities. The judge must look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect upon the election.

The petitioner being the defeated candidate, no order was made as to the costs of the petition, the parties being left to any remedies which they might have for the miscarriage of the election.

This was a petition against the return of Messrs. Reed and Holmes, on grounds which are fully stated in the judgment, in which the arguments of counsel are also discussed, so as to render a report of them unnecessary.

Patchett was counsel for the petitioner, the defeated candidate.

Hon. E. C. Leigh and C. Bowen were counsel for the sitting members; and

W. T. Barnard for Mr. Child, the returning officer.

GROVE, J.—In this case Mr. William John Gill, who was a candidate at the election for the borough of Hackney, which election took place on the 4th Feb., has petitioned against the election of Mr. John Holmes and Mr. Charles Reed, now

Sir Charles Reed, on the following grounds: First of all the petition sets out the return of the returning officer, which states the following facts: "That on the receipt of the writ, I gave all the notices required by the statute, and proceeded to the election in due course, according to law. That three candidates having been nominated, I gave due notice of taking the poll, and appointed nineteen polling places. In consequence of the partial failure of the person who contracted to deliver the requisite ballot boxes, paper, stamps, and other materials, no poll was taken at two of the polling places, and in some others the polling was somewhat delayed. Subject to these facts, I hereby certify that the members elected for the borough of Hackney are John Holmes and Charles Reed, Esqrs." The petition further states that no poll was in fact taken at divers polling places in the said borough. That at divers other polling places the polling did not commence at eight o'clock in the forenoon and continue and keep open during the day, and that by reason of the matters aforesaid many voters of the borough were prevented from voting at the election, by reason of which premises the petition alleges the said election was and is void. It has been proved before me, and is not in any way contravened, that at two of the polling stations, namely, those which have been called Homerton and Percy-road, which were stations within two polling places, and also in two polling districts, in which two districts there were respectively 1127 voters and 3711 voters, making a total of 4838 voters, during the whole of the day of the 4th Feb. there was no possibility of any voter polling at either of those stations. Whether the fault were that of the returning officer, of the presiding officer, or of any other persons, certain it is, as far as the evidence goes, and that uncontroverted, that at those two polling stations no one voter could on that day have recorded his vote, for, after a certain time, somewhere between nine and ten o'clock, I think, at both places (the exact time is not material) the places were closed up, the door was shut, a chain put across the door at one of the places, and virtually and in reality the two stations were closed for the day, so that not one of those 4838 voters could have voted. It is further proved that at four other stations an opportunity of recording their votes was not given to the electors, for, speaking generally (I need not go into detail) it appears upon the evidence that for certainly more than an hour at each place, or at any rate for a considerable time at each place, voters were ready and prepared and anxious to give their votes—that at all events at some of those places voters went away unable to give their votes, and that therefore a considerable number (it is impossible to say what number) had no reasonable opportunity given to them of voting on this occasion. It is utterly impossible for any person to guess what number of voters were prevented from voting on this occasion, because in order to ascertain that, it would be necessary to know the business time, the occupations, and the necessities of each voter. It would be necessary also to know what information was given by voters who found that they could not vote, or by other persons to voters who might be anxious to vote, and in consequence of which information, and in reliance upon which information, persons who might otherwise have voted did not go and

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tender their votes. I think it is not unreasonable to suppose that a large number of voters actually went away without being able to vote. One of the witnesses said that from one station in his judgment, 200, I think, went away without being able to vote; and further, it is not unreasonable to suppose that in consequence of information received from them a great many others who would have gone and tendered their votes did not tender their votes. We therefore have it in evidence uncontroverted that nearly 5000 people were utterly unable to vote, and that a large number of other people were either prevented, or might reasonably have supposed that they were prevented from voting, and the question is whether, under those circumstances, this was really an election for the Borough of Hackney. The learned counsel for the sitting members, Mr. Bowen, who has, I think I may fairly say, said everything which could possibly be urged in support of the election, and who certainly has presented a most ingenious and able argument upon the words of the statute, still is bound to admit that, if quoting his words (not that I seek to take advantage of his words at all or of any admission, but his admission is that which in my judgment he is bound by law to admit) the irregularity was so great as to prevent the election being a real election, it would avoid it even at common law. I certainly should not here take advantage of any admission of counsel upon which to found my judgment; but I am perfectly certain, so far as my judgment goes, that an election which is conducted in such a way, and which, whether by accident or by design, does not afford to a very large mass of the electors an opportunity of voting, cannot be a true election of members; and, therefore, for the moment, leaving the statute out of the question, it appears to me that there was no real election here which was in any sense a fair representation of the views of the electors of the Borough of Hackney. Then does the Ballot Act in any way alter it? The section of the Ballot Act upon which the learned counsel relied was the 13th section, which is this: "No election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election." The learned counsel for the sitting members contends that those two conditions must both be fulfilled, and that the election judge or the tribunal having cognisance of the question, must be satisfied that the mistake did not affect the result of the election in this sense, that he must be satisfied that but for such mistake another candidate would have been elected. I have turned the matter over in my mind in every conceivable way, or at least in every way conceivable to me, and I cannot see, assuming that argument to express the meaning of the statute, how the tribunal can by possibility say what would or might have taken place under different circumstances. It seems to me a problem which the human mind has not yet been able, and possibly never may be able, to resolve, namely, if things had been different at a certain period, what would

have been the result of the concatenation of events upon that supposed change of circumstances? I am unable at all events to express an opinion upon what would have been the result viewed in that sense, as to who would have been elected provided certain matters had been complied with here which were not complied with. It is contended that I might hear evidence on both sides as to how an elector thought now he would have voted at such an election. That might possibly induce a person not sitting judicially to form some sort of vague guess, but that would be far short of evidence which ought to satisfy the mind of a judge of what any individual who might express that opinion would really do under what might have been entirely changed circumstances. All that an individual would now say is, From what I now think I am of opinion that on the 4th Feb. last I should have voted for Mr. Reed, or for Mr. Holms, or for Mr. Gill, as the case might be. But the Ballot Act, if I understand it at all, and if there be anything that can be called the principle of an Act (a most difficult thing no doubt to decide), one of the principles of the Ballot Act is that the voting shall be secret, and therefore whatever opinion a voter may have expressed, whatever promise he may have made, whatever speech he may have made in public, the Ballot Act gives him an opportunity, if he is an honest man, to change his mind at the last moment, and I am afraid I must say it gives him an opportunity, if he be a dishonest man, to vote at the last moment against that which he has professed to be his belief. Such are the powers given by this Act, and not only given, but to a great extent enforced by it. Voters are not to be compelled to disclose how they voted, and even the Election Judge himself, if I read the section rightly, cannot ascertain how a person voted except upon a scrutiny where the vote has been declared invalid, and where it is necessary to ascertain off which side the vote is to be struck. I may be wrong in my reading of that section, but at all events I can safely go this length, that that and the other sections, show that careful provision is made by the Act against the divulging of the vote of an individual. Notwithstanding that I am asked here, assuming the construction for which the learned counsel contends to be correct, to ascertain how either those 41,000 electors of the Borough of Hackney, or any number of them (a number which it is utterly impossible to find out) might have wished to vote, and whether they might therefore by their votes have carried the election. I am to find out either how the majority of the 41,000 would have voted, or who would have been the persons who would have voted, or who would have been the persons whose business did not prevent them, or would not have prevented them, from voting, and what would have been the majority of that possible contingent of the 41,000, 6000, or 7000, or 10,000, or whatever the number might be, who might have voted upon that occasion. It seems to me that such an inquiry would not only be entirely contrary to the spirit of the Act, but it would be a simple impossibility—it would be at best a guess of the vaguest possible description. I should therefore say that even if the wording of the Act, taking it literally and grammatically, required me to put such a construction upon it, it would lead to such a manifest absurdity (using now the judicial term which has

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been generally used with reference to the construction of statutes) that unless I were in some way imperatively obliged, and unless the Act could by no possibility admit of any other construction, I should not put a construction which really reduced the matter to a practical impossibility. But it does not appear to me that the section of the statute does require that construction. Such a construction would practically render it necessary that in the case of any miscarriage at an election, however great the miscarriage might be, if only a small number of people had voted, and all the rest of the borough had been entirely unable to vote in consequence of there not being machinery at any, or at any but one of the polling booths, I should have inquired as to how the election would have gone. As I ventured to drop in the course of the argument, where a miscarriage of this sort took place it would be virtually placing the election, not in the hands of the constituency, but in the hands of the Election Judge, who is not to exercise a judgment as to who is to be the member, but who has only to see whether the election has been properly conducted according to law. Let us see whether the statute does not fairly and reasonably admit of a different construction. The words are, "no election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act." Now, no doubt nothing can be more difficult than for a judge, or for a metaphysician, or for anybody, to say what are the principles of a statute comprehending, together with the schedules, I think upwards of 100 clauses, the Act itself containing 33 sections. I am somehow or other I suppose by this section required to form an opinion of what is the principle, or what are the principles of the Act, for doubtless there are more than one. One principle of the Act as I have said, doubtless is that the voting should be secret. When I look at the provisions for districts, for polling places, and for polling stations, my impression is that another principle of the Act which, indeed, must be a principle of all Acts for the Representation of the People, is that the electors should have a fair opportunity of recording their votes. If that be not the principle of the Act, one can hardly understand the Act being suitable for the purpose of recording the votes of those upon whom the Legislature has thought fit to confer the franchise. Then is it in accordance with the principles of the Act that a large portion, amounting to several thousands of the electors, should be absolutely deprived of the power of voting, and that a large and indefinite number, which we cannot ascertain, should also have impediments presented to their voting, which may have, and doubtless did, prevent a very considerable number of them from voting at all? It seems to me that such a matter is not in accordance with the principle of this Act. Among the principles of the Act is one that there should be districts arranged for the convenience of the electors at which they might have on the polling day suitable machinery for giving their votes to the candidates to whom they chose at the last moment to give their votes, and when as the Legislature has now

done (although not by this Act), the time for polling has been reduced to one day instead of the lengthened period formerly allowed, with frequently the extreme inconvenience and collateral disadvantages of a long continued election, which I need not go into, it is more important that there should be means taken fairly to give to the electors an opportunity of voting with as little trouble as possible. When elections lasted a fortnight many matters could be remedied. If people did not vote one day they might reasonably vote upon another; but when it is crowded into one day, no doubt greatly to the advantage in other respects of the voting community, it is still more important that there should be proper opportunities for the voters to record their votes without unnecessary trouble. Can I say that it is in accordance with the principles of this Act that such a vast number of voters should in some cases be absolutely unable, and that others in all probability, considering their business avocations and other matters, should be practically rendered unable to tender their votes? It therefore rests apparently upon me to say, and I therefore say, that this election was not conducted in accordance with the principles laid down in the body of the Act. The Act further says that the election is not to be declared invalid if it appears to the tribunal that the non-compliance or mistake did not affect the result of the election. I am by no means satisfied that in this case the non-compliance or mistake did not affect the result; but in saying that I am very strongly inclined to think that the expression "the result of the election," does not in this Act necessarily mean the result as to another candidate having been elected at the poll. The result may be of various kinds. The result of the election would in my judgment be affected, if, instead of a majority of 500, there was a majority of only 10 or even of 100. Upon a scrutiny the matter might, be very different. Other causes which I will not surmise might produce a very considerable change of relation between the parties, and might have a very important effect upon the ultimate, if not upon the then present representation in Parliament, that effect depending upon the magnitude of the majority. It will be observed that the words here are not "if such non-compliance or mistake did not alter the result of the election," but "did not affect the result of the election." Does not the word "affect" mean substantially "bear upon the result?" Fairly and substantially viewed by the tribunal having cognizance of law and of fact, was it fairly and reasonably calculated to affect that election? In my judgment it was. I myself cannot say, nor so far as I am aware can any human being say as I have already, in fact, remarked, whether it altered or would have altered the result of the election, if, instead of the number who were polled on this occasion, the whole 41,000 had been polled. I see no reasonable possibility of fairly pronouncing an opinion upon that point; and therefore if I were required to construe the statute in that way, which I do not feel by any means obliged to do, I should say that it really demanded an impossibility, that it demanded of me to know what no human being could really know, that is to say, to know what would be the course of events under changed conditions and altered circumstances. It seems to me that I am here giving a fair rational construction to the Act, the leading words being, "If it appears to the

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tribunal that the election was conducted in accordance with the principles laid down in the body of the Act" (as I am of opinion that it was not), and secondly, that it did not "affect the result of the election." I cannot say that I am at all satisfied that it did not affect the result of the election, and in one sense I may say that I feel a strong opinion that it did, more or less in a substantial degree affect the election, so that the result might have been changed had the whole of the electors been able to vote. I may add that not only does this appear to me to consist with the grammatical construction of the statute, not only does it appear to avoid the manifest absurdity which would arise (using the word "absurdity" now in the legal sense of the term, and in the way in which it is generally used in reference to statutes, as implying a practical impossibility or something which could not be rationally managed) not only does it so affect the matter, but if I look to the whole paragraph and to the sense of it as a whole, it seems to me that the object of the Legislature in this provision is to say this: An election is not to be upset for an informality or for a triviality. It is not to be upset because the clock at one of the polling booths was five minutes too late, or because some of the voting papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated really to affect the result of the election. I think that is a way of viewing it which is consistent with the terms of the section. So far as it appears to me the rational and fair meaning of the section is to prevent an election from becoming void by trifling objections on the ground of informality; but the judge is to look to the substance of the case and to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect upon the election. That being my construction of the section, I cannot say considering the very large number of electors who have been disabled from voting upon the present occasion, that under those circumstances it has been an election which may be fairly taken to represent the voices of the electors of Hackney; and therefore, although no doubt it is a matter which one cannot view without some regret, that innocent parties who have expended time, trouble, and money in this election should have been put to all this inconvenience, and that the election should now turn out to be a nullity, still I cannot look to the consequences. I am here to the best of my judgment to pronounce the law, and in my judgment the law fairly applied both at common law and according to this statute is, that the late election for the Borough of Hackney is void. I should wish to advert to the point raised by Mr. Patchett as to the rules contained in the first schedule to this Act. My impression is that the evidence in this case certainly does fit the expression in the statute, "non-compliance with the rules in the first schedule to the Act." At the same time I think that the words used in the section, "non-compliance with the rules" or "any mistake" rather mean what I have already alluded to, that is to say, something in the nature of mere informalities or mere non-compliance with the rules. It is unnecessary to my decision, and I am far from saying that it is not open to argument whether the entire absence of accommodation for

voters of whole districts was intended by the Legislature when they used the expression "non-compliance with the rules." I think that the mistakes here committed do fall within the terms of the 13th section, but I am inclined to think that the object of the 13th section was to guard against mere informalities or irregularities as to the rules, and not to apply of course to that which would amount to a substantial disfranchisement of whole districts of the borough. But it is not necessary that I should pronounce an opinion as to whether that is included or not, because, as I have said already, I am of opinion that whichever way it is, whether it applies to non-compliance with the rules or not, it is clear, in my judgment, that if it is to apply, and apply exclusively to the rules contained in the first schedule, this is not such a non-compliance as still leaves the election conducted in accordance with the principles of the Act, or leaves it in such a state that it would appear to me that its result was not affected by the non-compliance. Therefore *quacunqve via* that particular argument is not necessary to the judgment which I am now pronouncing. For my own part, I should certainly have preferred (not from any chance of there being any change in my mind, because I feel quite clear and decided upon the subject) to have prepared a more elaborate judgment; but my judicial engagements are such that that must have been postponed for a considerable time, and I think, therefore, that it would not have been fair, as my mind was quite made up, to have kept the parties waiting merely in order that I should pronounce probably more accurately and with greater care views upon which there would have been no chance of my mind undergoing any change. Therefore upon the main point, I pronounce that the election for the Borough of Hackney on the 4th Feb. was null and void, and I shall report to the Speaker of the House of Commons to that effect. There remains now only one other point for me to allude to, and that is the question of costs. I should have had no difficulty on that matter in this case provided that there had been only the petitioner and the sitting members, for I think that both petitioner and sitting members are so perfectly exempt from blame in the matter, that although they must incur expenses with reference to this petition, which it may be their lot to bear, still of all cases that I have read or seen, this is certainly a case in which neither of those parties should be called upon to pay the costs of the other. But then a third question intervenes, and that is, by whose fault has this been occasioned? If I had clearly seen my way to a jurisdiction in this matter, I might have pronounced an opinion upon that question, but having since the adjournment considered the words of the statute I am by no means clear that I have such a jurisdiction as would bear upon that particular matter, and moreover I am by no means sure that if I had such a jurisdiction, and exercised that jurisdiction, I might not perhaps wrong one or other of the parties by injuring any remedy to which they might conceive that they are entitled. In saying this I must not be taken as expressing an opinion as to whether they have a remedy, or whether they ought to have one; but upon the whole, I think, it is the best decision that I can come to with regard to costs in this matter. I will not venture to express any opinion upon the relative responsibility of the

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returning officer, or upon what his liability is, because I should not do that unless I were going to give a judgment upon it. It seems to me better to leave that without expressing an opinion, for I think it is always desirable for a judge to do as little as he well can in the way of expressing extra-judicial opinions. The parties so far as they have remedies, will have their respective remedies, and, therefore, I think that the best thing I can do in this matter, is to make no order as to costs.

Friday, April 24, 1874.

THE BOROUGH OF WINDSOR.

HERBERT AND ANOTHER V. GARDINER.

Agency—Acting on committee—Evidence—Charitable gifts by intending candidate—Nursing the constituency—Inferences as to effect upon election—Eviction of tenants by landlord for having voted against him—Effect upon subsequent election—Undue influence.

To constitute an agent whose acts will affect the candidate, it is not sufficient that the alleged agent was on the committee of the candidate; and where he does acts inconsistent with the intentions and determination expressed by the candidate in communications with the electors, the inference is that the acts were not authorised by the candidate, and he therefore is not responsible for them.

A candidate is not bound to refrain from doing a particular thing from a legitimate motive because he may be also actuated by a motive which, if it stood alone, would be illegitimate.

Where, therefore, a candidate, on the occasion of a flood which affected a number of poor cottagers, gave coals and food to voters and non-voters among them, although he declined to say at the hearing of a petition against him, that when he made the gifts he had not in view the election for the borough:

Held, that such practices were not corrupt.

A candidate evicted tenants for having voted against him at one election:

Held, not to amount to undue influence so as to affect a subsequent election.

Secus, if a threat to evict made at one election were alive, so as to be likely to operate at the time of a subsequent election.

If it can be shown that a voter voted under the influence of a threat, it matters not when such threat was made.

THIS was a petition against the return of Mr. Gardiner, member for Windsor, the allegations being bribery, treating, and undue influence, tried before Bramwell, B., at Windsor.

The facts, as well as the arguments based upon them, are sufficiently referred to in the judgment given below.

Murphy, Q.C., R. J. Biron, and Nash were counsel in support of the petition; and

Giffard, Q.C., and Julian Robins for the respondent.

BRAMWELL, B.—I am much obliged to Mr. Murphy and Mr. Giffard, and the learned juniors on both sides, for the way in which you have assisted me, and the way in which this case has been conducted, which, to my mind, has been eminently satisfactory. A good many charges have been made, and I do not say that they were unduly made. Some of them were abandoned at a comparatively early part of the case, others

have been abandoned since, but there still remain several to deal with, and I think the first which I will address myself to is the last to which Mr. Murphy has called attention. But before doing so I think it right to say, as regards this particular election (I say nothing at present about the years 1868 and 1869, as to which I shall have a good deal to say before I have finished), which took place after the dissolution of Parliament, both before the election day, and, as far as I can see, since, as far as any evidence goes, I think it right to observe, not by way of praising the respondent in this case, but by way of showing the manner of understanding the evidence which has been given, that, as Mr. Giffard said, the election seems to have been conducted with perfect legality. There really is no reason to suppose that there was bribery which has not been traced or discovered; there was no charge of riot, or intimidation of that character, and no great number of houses kept open and drink distributed. I think it right to say that, in what one may call the immediate neighbourhood of the time when the election took place, there seems to have been nothing that anybody would have a right to complain of as having been done on the part of the respondent to unduly affect the votes of those who were to elect a member to represent this borough in Parliament. I think it is important to bear that in mind when one comes to consider what Mr. Murphy says on matters which ought to be decided in his favour, though Mr. Giffard says otherwise, and which, therefore, may be said to be doubtful. First of all as to Inniper's case; there is no doubt that an offer was made, and I will assume it was an offer which, if made by the respondent or his agent, would have unseated him. The question is whether this man who made it, Pantling, was shown to be an agent in this matter. I cannot help agreeing with Mr. Giffard, and I had made the identical remark to myself before I heard him make it, that if one was to hold this man to be an agent it would make the law of agency, as applicable to candidates, positively hateful and ludicrous. Because what does one see? Two letters are produced; respectable witnesses are called (and I cannot distrust the *bona fides* of their evidence), who say they got these letters. They are written by the respondent himself, and in them he expressly says, I cannot offer anything to you, and I cannot pay you your travelling expenses, because it is contrary to law. And then, in spite of that which we know took place in two cases, and which no doubt took place in other cases, for the letters seem to be copies of each other or taken from one source, we are invited to believe that in some way or another, a man who has given no description of himself, except that he was on a committee, was an agent. Who put him there, or how he got there; what he did; what were his duties, is left in doubt. He says he understood that his duties were to do the best he could for the respondent, and I am called upon to say that that man was an agent, so that his act in writing these letters should unseat the member. It appears to me to be really impossible to hold that he was an agent; I think, according to the authorities, and according to the good sense of the matter, he was not an agent. He has given us his own account of how he came to write this letter to Inniper, he having told him where he had

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gone to, and having told him to write upon the occasion of their being an election. I really do think I cannot use any other word but the one Mr. Giffard used, that to hold that Pantling was an agent in this matter, so as to unseat the respondent, would be outrageous. Therefore, so far, I decide this point in favour of the respondent. Then I think the next cases I had better deal with are the gifts of coals, beef, and tea. Now the respondent was asked, and wisely hesitated to answer, what there can be no doubt about in the world; he was asked whether, when he made those gifts, he had in view the election for the borough of Windsor. Why, it is certain that it must have been present to his mind: a man cannot suppose that a thing of this sort is a matter of indifference, that it operates in no way at all; he cannot suppose that it operates unfavourably to him; therefore he must suppose that in some way or other it will, to a certain extent, operate favourably. But there is no harm in it if a man has a legitimate motive for doing a thing, although, in addition to that, he has a motive which, if it stood alone, would be an illegitimate one; he is not to refrain from doing that which he might legitimately have done, on account of the existence of this motive, which, by itself, would have been an illegitimate motive. If the respondent had not been an intending candidate for Windsor, and yet would have done as he has done in respect of these orders and gifts, notwithstanding that he did not represent Windsor, the fact that he did intend to represent Windsor, and thought good would be done to him, and that he would gain great popularity by this, does not make that corrupt, which otherwise would not be corrupt at all. Then Mr. Murphy says you cannot draw any such favourable conclusion as that with regard to him, because he is not a man whose conduct towards his tenantry has shown him to be a person actuated by legitimate motives, that he did it in an illegitimate sense to influence his election. I shall have something to say about his conduct presently, which certainly will not be of as favourable character as those who represent him, or himself, might desire. But there are a great many considerations that induce me to think I ought not to draw the conclusion Mr. Murphy invites me to draw. In the first place it must be borne in mind, that when these gifts began, he had pretty well culled his tenantry; he had got a set of tenants who were such as he desired to have, as regards their political opinion; therefore it might be very well for two things; first, that he was under no necessity for influencing them, because they were safe already; and in the next place, that they being of the same opinion as himself, he might have had a more friendly feeling towards them than if they had been of a mixed character. I do not see, therefore, admitting that he dealt harshly with his tenants, or with some of them whom he turned out because of their politics, that one is driven to conclude, more especially when you remember the different explanations that were given, that those orders and gifts were given corruptly. Just see what the amount of them is. I am a little surprised that tenants paying such rents as these can condescend to accept so small a present; but it seems to make a week and a half's rent on an average for each cottage. It is 3 per cent. on his net income from them, and his net income is 3000*l.* a

year; it is about 100*l.*, a little more than 3 per cent. That is a very small matter, and is a very small amount of the rent, not nearly equal in value to letting it stand over twenty weeks at a time, as he has done in many cases; and when we bear in mind the way in which these things originated, which is sworn to, and not contradicted, and confirmed by the respondent, and the witnesses of the petitioners themselves, I think it would be very hard to draw the unfavourable conclusion which Mr. Murphy invites me to draw. The way in which these three matters, to which I am calling attention, arose is this: the coal gifts arose, at first, out of a flood which affected certain cottages, and one ought to observe that they were made equally to non-voters, to persons whose politics are not known, to widows and women who never can vote at all. It is positively proved that the origin of these coal gifts was from the circumstance I mentioned, namely, that a flood took place; and it was suggested that it would be an act of charity, together with advantage to the property, that the respondent should give a small amount of coals to his tenants. I rather think that at the time when the gifts were originally given they were trifling in value; not only was coal a great deal cheaper than it is now, but the number of cottagers to whom he sent it was much smaller. In the first instance, I suppose it would have been a trifling amount. I should think, perhaps, not more than 20*l.* in value a year. The thing having had its origin in that way, all his tenants did that which I quite agree with Mr. Giffard, one might to a certainty expect they would do; they said, "Oh, you gave your other tenants a present, treat us in the same way." It would be in vain to reason with them. His argument would have been "Your case is different to theirs. They have been flooded, and you have not been flooded." You cannot get people in their class of life to be reasonable, and take reasonable views of things where a few shillings will be put in their pockets where unusual views are adopted; and they cannot see why a rich man should not put his hands into his pockets if there is a pretence for doing it. I think, therefore, that he would, in all probability, if he had not given the same gifts to the tenants whose houses had not been flooded as he did to the others, have had, what is commonly called, a hornet's nest about his ears. It is perfectly intelligible, therefore. He had a discussion with people whose minds and habits of thought were unreasoning, and he thought it was better that he should give these coals in the way he did. At all events, I cannot affirmatively find that it was corrupt. [His Lordship then dealt at length with other cases of alleged bribery and treating, which he found to have failed, and proceeded:] Now we come to the last head of complaint that I have to deal with, and that is the allegation that the respondent's tenants were evicted by him for having voted against him. I do not think that is enough as to a future election, I may say, although he evicted them for having voted against him. It might subject him to the penalty under the clause which says, "On account of such person having voted or refrained from voting." Yet I do not think that undue influence in consequence of what had been done, would be undue influence. "If any candidate at any election shall be declared by any election committee guilty by himself or his agents of bribery, treating or undue influence, such candi-

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date shall be incapable of being elected or of sitting in Parliament during the Parliament then in existence." I think it is wholly impossible to say that that which has been done, and is gone, can avoid his seat at a future election. Supposing he had been returned in 1868, and had turned these people out, and a petition had been presented against him, it is possible that he might have been turned out himself; but in respect of the voters whom he had turned out, and as to whom he had subjected himself to the penalty, I do not think it extends to avoid his seat at a future election, because it cannot be said it was undue influence at that future election. But there still remains this question which Mr. Murphy has put forward; and although Mr. Giffard has said, and very ingeniously argued, that if such a thing as that were maintained, there is no knowing where it would stop, the only answer I can make is, that when the time arrives—although one cannot say where the line is to be drawn—we can say whether the case is upon one side of it or the other. As to this Mr. Murphy contended, and contended correctly in point of law, that if a person is threatened with being turned out unless he will vote in a certain way at a future election, it matters not when the threat was made or how long afterwards the election took place. If the threat was then in operation I think he would lose his seat; and therefore, I think that if it could be shown that any voter was under the influence of a threat, that if he did not vote for the respondent at his election of 1874, although that threat had been made, tendered, or given in the year 1869, the respondent would be subject to be unseated. Now let us see what the facts are. That he turned these men out because they had voted against him, I have no more doubt than that I am sitting here. Their cases came one after another, a great many of them being most respectable persons; and I declare as they gave their evidence, representing the way in which they had been treated for having exercised their undoubted privilege, for having voted as they did, it excited one's indignation. I have not the least doubt that those men were turned out because they had done what they had a perfect right to do, and had done what they would have been wrong in not doing, not only the men who were called before us, but all the twenty. It is enough that he turned them out. That he thought it was desirable to get rid of them because they had an honest opinion of their own and acted upon it, I have not a doubt. The thing tells its own tale. The respondent got into the box and endeavoured to represent that that was not the reason for doing it. I must say that it would have been much more creditable if he had said, "I think I was wrong in what I did, but I tell you the truth now." He tells a shuffling story about his not recollecting a great deal; that his reason for turning them out was because they booed him and misbehaved themselves towards him. Not a question about that was put to the men when they were in the box; there is not a word about it in the letters. There is a story about one man, Rolfe, misconducting himself, but not a particle of evidence that these men had misbehaved themselves towards him till he gets into the box to excuse himself. I do not believe a word of it. He has endeavoured to justify what he has done by calling all the Liberals Radicals, which he supposes to be rougher kind of Liberals,

and then treats them as if they were rough persons, and had a right to be so treated. There is no doubt that they were turned out because they were decent men, and obeyed the dictates of their consciences, and voted accordingly. I find that fact against the respondent, and if it were enough to unseat him I would do so gladly, but I do not think it is. It is not the way in which they were treated that affects the case, but it is the question whether that treatment operated on the mind of others. An attempt has been made to show that the others did not know of it; that he endeavoured to keep it secret; that he did not intend the others should be influenced by it. I do not agree with the argument at all; it is impossible that they could not know of it. Why had twenty men been turned out? Why had these men gone? Why had these men, who were not in arrear, or who were only in arrear four or five weeks, all been turned out? I should have thought the Conservatives would have desired to keep them out of sight when the Conservative voters, who appeared to have got into twenty weeks' arrear, are kept in their place. What conclusion can anyone arrive at from that? What conclusion could Brown draw? What conclusion could anyone who spoke with Brown about the way in which Brown had been dealt with draw, except that these men were turned out on account of the way in which they had voted? And what conclusion do they draw? Practically, a threat was held out that if the new tenants on a future occasion exercised their franchise, or, as they had a right to do, acted against Mr. Gardner, they would be turned out also. In my opinion it was a threat, and could I but have found, not that I wish to find it, because there is one thing which I am going to say presently, which makes me hope he has thought better of it—but could I have found that that threat had been in operation at the time of this election, I should have said that it was a threat to influence the voters at this election, and that it was a corrupt practice. But the idea occurred to me, which Mr. Giffard has put so plainly, and which Mr. Murphy has dealt with as it is well susceptible of being dealt with, but which scarcely admits of an answer, and I think the argument is a correct one. As I have endeavoured to explain, I do not think these considerations will be intelligible to any but lawyers. To my mind a threat must be an operative threat at the time of the election. I think if it were a bribe it must be an operative bribe at the time of the election. An offence might be committed, although the bribe were not operative at that time. Supposing it were known that there would be a dissolution of Parliament, and he threatened that if they did not vote for him he would turn them away, it would be a threat at the time of the election. That is an extreme case, to show that the threat need not be made at the very time the election is going on. On the other hand, one may put a case to show that it must be a threat or a bribe continuing in operation. Supposing, for instance, a man were bribed to vote at the election, and he died five years after, and an election took place, it is imaginable that the election would be avoided on account of bribery at the election? It cannot be. Supposing, next, that a man was bribed to vote at an election, and both the briber and the voter repented, and the voter returned the money, would that be bribery at the election? I think not. Unless you can show that the bribery

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or threat is one, the force of which is in existence, continuing till the time of the election, although the bribe or threat when given, or made, may have subjected the parties to penalties, is not a bribe or threat to avoid the election. Assuming, as I do, that these tenants were threatened at the time of the evictions; assuming some of them continued to be voters at the time of this last election, I think the effect of the Ballot Act, combined with the non-enforcement of the promise (if I may use such an expression) by the respondent, has the effect of preventing the threat being one operative at the time of this last election. I think so, because the effect of the Ballot Act is that a man can vote with safety; he can vote according to his conscience with safety, and the threat can have no operation upon him, unless you suppose he is going to be asked afterwards how he voted, which is an offence—a misdemeanor. But if it had been intended that the threat should be continued operative, what would have been the way in which it could have been done? Suppose a plain case, which is not very likely, because it would be so far fatal to it. If the respondent had gone to the tenants and said, "Do you remember those voting against me the last time were turned out?" "Yes, I do, very well." "Unless you promise me you will vote for me you will be turned out." I think that would be a threat, and a continuance of the old threat, not that I think it would be within the wording of the Act of Parliament; but I think if any equivalent conduct had taken place, I think if he had not exacted a promise that he should vote for him, but had said, "I want you to promise me," any man would say, "I know what it means, out I go if I don't vote for you." That would be a continuance of the old threat, because although he might have gone and broken his word, yet a man having promised would have felt himself bound to vote, and then would have voted under the influence of such a threat as this. I do not know whether that is too recondite a consideration; if ever a case should arise, possibly it may be that those who decide it may take a different view from the one I suggest. But what I have to say is, whether a corrupt practice has been made out at this election, and although I may be wrong, and, indeed, I am not advancing the opinion, but although it may not be right to say, this would have been a continuance of the threat, and consequently a corrupt practice in the way I suggest, I think I am compelled to say that there is no evidence, and that a case is not made out of a corrupt practice by an undue influence at this last election. Although I have come to this conclusion, it must not be supposed for a moment that I hold the respondent blameless in this matter. I never wish to go out of my way. I have been too long upon the Bench to take any pleasure in scolding people. I know by so doing a judge for certain makes an enemy, and no one in particular thanks him for it. But with reference to the decision I have to come to upon this part of the case, I think it right to say that the conduct of the respondent ought to be severely condemned. Turning out those men in the way he has, he has acted as no just man and no gentleman would have behaved. I cannot understand how a man, who let his tenants in on the implied terms, that if they conducted themselves well and paid their rent, they would be continued in their possession, can enforce a further term upon them, saying, "You must do this, that,

and the other, to oblige me." But when in addition to that, he says, "Disregard the dictates of your own conscience, give up the rights you have as Englishmen to express your own opinion and vote, not according to your own opinion, but mine," I think it most disgraceful and most mischievous, and I am surprised how anybody who tries to get into Parliament, can get in by such means. I find no fault with a man wishing to become a person of influence in a borough by acquiring property when he may fairly do it; he may say, "If I become the owner of such a quantity of property, and come in contact with a great number of people, who find I behave myself in my dealings with them, they will think I am a proper person to be returned to Parliament." I think that is a legitimate mode of influence; and I will go further: if there is a choice between two tenants, and one agrees with him in politics and the other does not, I think he can take the tenant who agrees with him; I do not think it wrong, and if I did, I would not say so, because it is calling upon a man to be better than human nature will let him be. But that a man should not only do that, but that he should endeavour to coerce their opinions, and make them give up their rights, contrary to their inclinations, I will not repeat what I said, but I think it deserves the epithets I applied to it. It is most mischievous, it causes dissatisfaction with the institutions of property, and many people are prone to find fault with it already. I cannot understand how a candidate can have recourse to it, as it makes him not a representative of the people, which every member ought to be. I should not have said this, although I should have deemed it my duty to express my disapprobation of this, as every right-minded man should, if he has occasion to speak of it. I should not have said anything about it, if it had not a most important bearing upon the only remaining matter that I now have to dispose of, and that is the costs. I certainly think the respondent has brought upon himself this inquiry; and, therefore, although I feel bound to declare he is duly elected, I shall leave him to pay his own costs in this inquiry.

Attorneys for the petitioner, *Darvill, Darvill, and Last*, Windsor.

Attorney for the respondent, *C. T. Phillips*, Windsor.

EXCHEQUER CHAMBER.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

Feb. 4 and May 13, 1874.

APPEAL FROM THE COURT OF COMMON PLEAS.

WINCH v. THE CONSERVATORS OF THE RIVER THAMES.

Negligence—Towing path—Taking toll—Liability to repair.

The defendants were incorporated under private Acts of Parliament, for the purpose of maintaining, and protecting the navigation of the River Thames. They had power to acquire, for the public use, the towing paths along the river, and also to maintain and repair the same. In exercise of their powers, they had provided a towing path for the use of the public, they invited the public to use it, and took toll, as they were authorised to do by their Acts, for the use of it:

Held (affirming the judgment of the court below), that the defendants were bound to take reasonable

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care that the towing path was in a reasonably fit condition to be used as a towing path, and that an action lay against them for neglecting this duty, whereby the horses of the plaintiff, who was lawfully using the towing path with his horses, and had paid them toll in respect thereof, fell into the river and were drowned.

Cleasby, B., dissentients.

APPEAL from a decision of the Court of Common Pleas.

The facts sufficiently appear from the head-note, and will be found stated in the report of the case below: (*ante*, vol. 7, 582.)

Prentice, Q.C. (with him Joyce) for the defendants.—First, assuming the place at which the accident happened to form part of the towing path, still there was no duty on the defendants to keep that part repaired. There are, no doubt, many cases, as for instance when a statute empowers the making of docks and receipt of tolls, by trustees, where it may be fairly inferred that they are bound to use reasonable care to keep the docks in a proper state of repair. But those are all cases of artificial works, such as a canal, docks, or a bridge; here, however, is a public navigable river, and the only duty imposed by the statutes on the defendants is to exercise a discretion in doing what they think fit to improve the navigation of the river. [BRAMWELL, B.—They might say, we will have no towing path at all, for it does not pay.] Precisely; there is no absolute duty to keep up the towing path. (He then went through the acts in question, the material parts of which will be found in the judgment below of Bovill, C.J.) These commissioners have certain discretionary powers given to them for the benefit of the public. They may improve the navigation, but have not to repair the towing path. In conferring those powers it was never supposed that the defendants would make the navigation perfect, or contemplated that they would be bound to remove anything dangerous that might be in the river. [BRAMWELL, B.—But they take tolls.] In *Rex v. The Inhabitants of Netherthong* (2 B. & Ald. 179), where a local Turnpike Act, after empowering the trustees under it to take tolls, directed that the roads should from time to time be repaired by the trustees out of the money arising by virtue of the Act, it was held that this only made the tolls an auxiliary fund in the hands of the trustees, and that the inhabitants of the township where the road was situate, who by prescription were bound to repair all roads within it, were nevertheless liable to be indicted for non-repair of the road; and Abbott, C.J., said, p. 183, “the provisions in the local Turnpike Act expressly says, that nothing therein contained shall exempt them from the liability which belongs to them.” Then, can the clause which binds the trustee, to repair make any difference? [QUAIN, J.—It is not found in this case that the towing path was a public highway, so how can that decision apply?] The public would have a right to pass over it on paying the tolls. [BRAMWELL, B.—Could they do so but for the Act?] No. The case relied on for the plaintiff no doubt will be *The Mersey Docks and Harbour Board v. Gibbs* (14 L. T. Rep. N. S. 677; 30 L. J. 225, Ex.) in the House of Lords. But that is plainly distinguishable; for the trustees, who were there held liable for injury caused to a ship by a mud bank in their dock, knew of the existence of the accumulation of mud. Moreover, there is a difference between

docks maintained for profit, and a navigable river kept in order by trustees for the benefit of the public only. [BLACKBURN, J.—But in *Penhallow's case* (*ibid*) no question of the knowledge of the trustees arose or could arise. BRAMWELL, B.—The point reserved is the liability to repair.] In *Parnaby v. The Lancaster Canal Company* (11 Ad. & E. 223) the defendants were indeed held liable for not raising a sunken boat, whereby the plaintiff's boat, navigating the canal, ran foul of the sunken boat and was damaged. But that is distinguishable. [BRAMWELL, B.—Yes; for the canal was an artificial construction.] So in *Coe v. Wise* (14 L. T. Rep. N. S. 891; L. Rep. 1 Q. B. 711), drainage commissioners were held liable for negligence in maintaining a sluice, which was also artificial. But the path in the present case was not so. It was a natural beaten track; and, secondly, the spot in question, where the horse fell into the river, was not part of the towing path.

McCloud (*English Harrison* with him), for the respondents.—[BRAMWELL, B.—We will not trouble you to argue the last point, for we are all of opinion that supposing there was a general obligation on the Conservators to repair, it would extend to the whole space of the river edge and bank; and even if not so, that if this place, which was in the way of being used, was left in a dangerous state, that the defendants would be liable in respect of this particular spot. But on the point as to whether there is any liability on the Conservators to repair and keep in a safe condition, I will not say the spot, but the bank, we wish to hear your argument.] First, it is indisputable that a private individual or body doing this work and taking tolls, would be bound to repair before inviting the public to come. [BLACKBURN, J.—That is not disputed, as to an artificial canal; but here it is said, on the other hand, this is a solid natural path by a navigable river. BRETT, J.—Suppose you say, “May I cross your field?” and I reply, “Yes; if you pay me sixpence.” You cross and tumble into a ditch; I am not liable.] That distinction between an artificial canal and navigable river shall be dealt with in the course of the argument. *Parnaby v. The Lancaster Canal Company* (11 Ad. & E. 223) is conclusive of the first point. Secondly, does that apply to a public body? Yes; *Gibbs v. The Mersey Docks* (14 L. T. Rep. N. S. 677; 35 L. J. 225, Ex.). Thirdly, the two classes of things are on the same footing, unless the Act of Parliament makes a difference. [BLACKBURN, J.—The only point is, do those cases apply to the defendants keeping open this way over natural soil. ARCHIBALD, J.—You have to show that the principle of *Parnaby v. The Lancaster Canal Company* (11 Ad. & E. 223) applies to that.] The defendants were empowered to give the benefit of a towing path throughout the whole length of navigation. [BLACKBURN, J.—Can you cite a case where the structure was not artificial?] No; in the nature of things it generally would be so. Yet, can it be said that a man is to be liable for an artificial shop, and not for ground which he has inclosed, but left in a dangerous state and invited the public into it. Could the defendants be heard to say that if they but drove in piles, and rendered this path artificial, they might be liable; but that they are not so because they have left it in a natural, though dangerous state? They may make an order on the owners to repair. There is no distinction between the towing path of the river and that of a canal. [BLACKBURN, J.—Suppose two

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bridges, only ten yards apart, does not the intervening ten yards become part of the bridges? The very navigation of this river is artificial; 50-ton barges could not go up but for the locks which raise the water. So also the process of towing is quite artificial. BRAMWELL, B.—Is then all right taken from the proprietors to levy tolls? By 35 Geo. 3, c. 166, they charge an aggregate toll at Teddington Lock. [CLEASBY, B.—My difficulty is this: suppose this was originally taken under a license from the owners of the land, who were not bound to repair. Then came the statute which seems to give power to make towing paths, but where is there any obligation to repair them? They may not be bound to buy the fee, but are bound to acquire the towing path; and the Act of Geo. 3 was intended to get rid of the vexation of paying tolls to private owners. They take tolls for the whole distance. I cannot be allowed to say that any one part is not a part of the navigation which they are bound to take care of.]

Prentice, Q.C. replied, citing *Nicholl v. Allen* (1 B. & S. 934).

Cur. adv. vult.

May 13.—The judgment of Bramwell, B., Blackburn, Quain, and Archibald, J.J., was now read by CLEASBY, B., who, dissenting, delivered a separate judgment.—The defendants' rule in this case was to enter a verdict for them on the ground "that they were bound to repair the spot where the accident happened." If this were the question in the case, it might be difficult to answer it adversely to the defendants, and to say they were bound to repair the spot in question. For, undoubtedly, when the towing paths and the tolls for them were taken by private owners, there was no such obligation, and none is imposed by the statutes in express terms on the defendants. And it may be that if the defendants, as a matter of judicious use of their funds, might think it inexpedient to be at what might be the enormous and unprofitable expenses of repairing long extents of towing path, where there was scarcely any traffic, there is no power of compelling them, or they would not be compelled to such enormous outlay. We do not go further into this question, as we think it is not the question; but we refer to the judgment of Cleasby, B. But we think it is enough to support this verdict if the defendants were—so long as they kept the towing path open and took toll for its use—under an obligation to those whom they invited to use it, to take reasonable care to see that the towing path was in such a state as not to expose those using it to undue danger. If the dangerous state of the path at this spot was latent, so that the defendants, though using reasonable care, remained ignorant of it, or if, having found it out, they had warned the plaintiffs of it, they would not have neglected their duty; but, as it is, if such was the duty of the defendants, the finding of the jury (which we must here take to be correct) is that they have neglected it. We agree with the court below in thinking that, since the case of the *Mersey Docks* (L. Rep. 1 H. of L. Cas. 93), we must hold the funds of this corporation (though established for public purposes) liable to make good the damages sustained by a private person from any breach of duty on their part; and that there is nothing in the statutes which the common law would cast upon a private person or trading corporation who maintained a similar towing path along a public navigation, or levied tolls for its use.

And we think that *Parnaby v. Lancaster Canal Company* (11 Ad. & E. 230), and *The Mersey Docks case* (*ubi sup.*), established that such a duty is, by common law, cast upon those who invite persons to use a towing path like this, and receive pay for the use of it. It was argued that those cases were not applicable, because the part of the towing path where the accident happened, was on the natural soil, only worn into a track made by the horses' feet, leading from a bridge over one ditch to a bridge over another; and it was argued that the common law had only imposed this duty on those who maintained artificial works, such as canals, or docks, or bridges. We wish to guard against being supposed to decide that, in every case where a license is given for money, to go over land in its natural state, this obligation produces results which may depend on the circumstances of each case. But we think that in this case, where persons pay one toll for the use of one entire towing path, parts of which are artificial and parts not, there can be no distinction made as to the duty of those who maintain the path to take reasonable care of the artificial and the natural parts, or at least warn those who use them of the defects in them. The defendants can, in future, if they think fit, announce to those who pay the tolls, that they must take the paths as they find them. If this is done, there would be no liability for a defective state of repair, even though wilful. Whether if they gave such notice and left the banks unrepaired they could be compelled to repair them, is a question that would then be directly raised and decided. CLEASBY, B., now proceeded to deliver his own judgment: This is an appeal from a decision of the Common Pleas, discharging a rule to enter a nonsuit or verdict for the defendant. The rule, which was granted by leave reserved, was to enter the verdict on the ground that there had not been shown any liability on the defendants' part to repair, or keep in proper condition, the spot where the bank gave way. The question, therefore, is one of great importance, both to the defendants and the public, involving as it does the responsibility of the defendants for the safe and proper condition of many miles of towing path (it may be 100 miles, or more) of which we know parts are periodically covered by floods, and other parts encroached upon by the action of the stream. It appears to me that the liability of the defendants depends wholly upon the proper construction of the various Acts of Parliament under which they exercised their powers for the improved navigation of the river. I quite agree that if certain duties are imposed upon the defendants, the circumstance of their being a public body, receiving their power for public purposes only, does not protect them from the consequences of the neglect of those duties, if danger arises to any person by that neglect. This is settled by the *Mersey Board* case. I also think that, if the defendants could be regarded as having the towing paths all along the river under their control and management, and inviting the public to make use of them upon payment of tolls taken, if this was done with knowledge that the towing path was insecure, or with the means of knowledge not attended to, there would still be responsibility: (*Parnaby v. Lancaster Canal Company*, 11 A. & E. 223). But the question in the present case is, whether the Conservators occupy this position at all? Because if the public use the towing path, not by the permission of the defendants, who could either

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grant or withhold it (except in certain portions of it, where they have purchased the ground and constructed works requiring reparation), but in the same right as they did originally and before the commissioners existed, then there is no responsibility—the public went on the path at their peril. It is necessary, therefore, to examine the Acts of Parliament. It will no doubt be found that the defendants have certain powers connected with the towing path, and that they have power to purchase land, and construct towing paths and other works, in such parts as they in their discretion think necessary for the purposes of the navigation. And whenever they have constructed a towing path or works for the use of the public, they would be under an obligation to take care that they were not in a dangerous state. There is nothing in the case to show to what extent this has been done, indeed the case, as it is called, is so imperfect, merely setting out a quantity of evidence that, in my opinion, it ought to go back to be properly stated; but, taking the case as it is, there can be little doubt that the towing path and other works, the property of the defendants, would occupy a very insignificant part of the great distance between Staines and Cricklade. In other parts of the line of navigation, the powers of the defendants extended to take care that the public had the undisputed use of the existing towing paths, without payment to the owners of the land (which had formerly led to great exactions); and as in the present case it is not disputed that, at the place where the injury was sustained from the defective state of the towing path, the defendants had not constructed the towing path or in any way interfered with it, except by agreeing with the owner for a price to be paid for the privilege of towing over it, the question which arises is what is their position and responsibility as regards the portion of the towing path? The defendants are Conservators of the upper part of the river, by virtue of 29 & 30 Vict. c. 89. That Act transfers to them the property and power of the former commissioners. Two sections of the Act were particularly referred to in the argument, sects. 43 and 48. The first directs that the Conservators shall repair the locks, weirs, and dams (no mention being made of towing paths); and the latter one enacts that the moneys raised by the Conservators shall be applied (*inter alia*) in the maintenance and repair of the works vested in them, or required or constructed under the Act. This it was contended would extend to all cases in which they had purchased land and constructed towing paths, but not to the miles of towing paths along the river in which they had no interest. All that can be said of this Act of Parliament is, that it treats the works of the Conservators as repairable by them, but not the whole length of towing paths. It cannot be regarded as a legislative declaration that the towing path is not repairable, or it would be conclusive of the present case, but it affords a strong argument in favour of that view. The earlier Acts must therefore be referred to, and in examining them we find that the earliest Act (24 Geo. 2), after reciting, amongst other things, that abuses are committed by the owners of the towing paths, and by reason of such exactions the expense of water carriage is increased, authorises certain commissioners to settle the rates to be taken by the tenants of the land for the use of the towing paths (sect. 2), and also prevents any alterations of the towing paths without the consent of the proprietors of the land.

Under this Act it seems quite clear the commissioners appointed by it were under no liability as regards the condition of the towing paths. The 11 Geo. 3, c. 45, after reciting, amongst other things, that exactions by the owners of the towing paths still continue, enacts that, for completing the navigation and for preventing abuses and exactions, all the principal inhabitants of all the counties through which the river passes, and the members for all the counties, and mayors for all the boroughs, shall be commissioners for putting the Act in execution. These commissioners, who may be said to represent the public interested in the navigation, are (by sect. 7) authorised to purchase lands, and purchase and make towing paths, bridges, and ways for the towing and hauling of barges, and to fix rates to be paid for the use of towing paths, regard being had to the expense of purchasing the land and making and maintaining the said towing paths. It seems clear that this clause enables the commissioners to construct such work as bridges, carrying the towing path over brooks and ditches, and also to construct towing paths on land purchased where they considered this necessary for the use of the navigation. And as to all those works belonging to them, there would be a duty to maintain them, but it does not apply to the great length of towing path in which they have no interest, and which they consider that they may have as before. In like manner sect. 19, which was much relied on by the plaintiff, and which enables the commissioners to view the towing paths, and the conditions, reparations, and circumstances thereof, does not impose upon the commissioners any obligation as to the towing paths, but enables them to ascertain where it may be necessary to construct bridges or towing paths, and to make certain orders upon the owners relating to the tolls, and also, perhaps, as to the towing paths, but certainly not so as to call upon them to repair them. Sect. 31 shows that this Act relates to the making of new towing paths. The next Act bearing upon the question is 28 Geo. 3, c. 51, which after reciting that a certain sum has been spent for making horse towing paths, enacts (sect. 2) that all towing paths, hedges, &c., made on the said navigation, and the ground or soil whereon the same are made, provided the same have been purchased by the commissioners for the use of the navigation, shall be vested in the commissioners. As far as I can see, the commissioners have no interest in the other towing paths all along the river from Staines to Cricklade, and no power to deal with them as their property. And it appears by paragraph 16 of the case, that the owners of the land and their tenants continued to occupy and use the land between the fence and the water, by cutting the grass or turning sheep upon it, though they let the right to pass along it. By the 7th and 19th sections of the Act already referred to (11 Geo. 3, c. 45), there is an authority given to the commissioners to make orders relating to the towing paths, giving compensation to the owners for the loss which they may sustain. And this authority has been acted upon, as appears by the evidence of Mr. Leech, the engineer, at paragraph 36, who says, "If I find a towing path too narrow, I apply to the owners to set the fence back." There is no power to compel the owners to repair the towing paths, nor any authority to the defendants to repair them themselves. And they never appear to have done so,

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though, as regards the bridges and works of that description belonging to the commissioners, they appear to have repaired them regularly. Much reliance was placed upon the 6th section of the 28 Geo. 3, by which the commissioners are authorised to take tolls for the use of, among other things, the towing paths already made or hereafter to be made, purchased, and hired for the purpose of the navigation; and it was argued, with some apparent force, that as the public were to pay tolls to the commissioners for the towing paths hired by them, as well as for those purchased and made by them, it followed that the commissioners were as much bound to see to the repairs and conditions of those hired as of those made. And if the proper meaning of the word "hired" was "leased," so as to give an interest in it, this might be so; but it is plain that the meaning of the word "hired" here is that the right of passage is hired only, so as to relieve the barge owners from paying to the several landowners, as was done in the present case: (see paragraph 16, where Mr. Evans says, "No part of my land was ever sold or let to the commissioners, but only the right of passing over.") It appears to me that the section referred to has not the effect contended for. In the first place it was not intended by the section to give any additional right to the public, as against the commissioners, and so heavy a responsibility as the repair of the whole length of the towing paths ought not to be imposed indirectly, but by clear words. The owners of the land were not liable to the public in respect of the condition of the towing paths, and the commissioners by merely hiring the right of passage, cannot be properly held to create and take upon themselves a new responsibility. Besides the commissioners, by hiring the right of passage, acquire no rights upon the adjoining lands, so as to go upon them and use them for the purpose of repairing the towing paths. I cannot see why the licence granted to the commissioners to use the towing path might not be revoked, and then how would the liability in respect of the condition of these continue? The only other clause in the Acts of Parliament referred to as bearing on the present question was the 35 Geo. 3, c. 106, s. 93. That section is, after reciting that it would greatly conduce to the benefit and advantage of the said navigation if a free, continued, uninterrupted, and public horse towing path were made and established throughout the whole navigation, enacts that it shall be lawful for the commissioners to purchase and take any such horse towing paths as the commissioners shall think consistent and necessary for the navigation. This is merely an enabling clause, and leaves it to the discretion of the commissioners to make new towing paths; but as regards the old towing paths, which they deem sufficient and do not interfere with, it leaves their responsibility as it was before. For the reasons given, I think the commissioners were under no responsibility for the condition of the whole length of the towing path. It was argued that there was an inconsistency in holding that they are responsible for some parts, but not for the rest, but I do not think so. In so far as they have constructed bridges, towing paths, and other works to be used by the public, they are responsible for their being in a fit condition for use, but there appears no sound reason for holding that because they have purchased land, and have constructed certain works—a bridge, for instance,

over a brook of the length of ten yards, for which they are responsible—they are therefore responsible for miles of towing path adjoining in which they have no interest. Bearing in mind that portions of the towing paths are at certain seasons covered with floods, the responsibility is a very serious one, and ought to be imposed by much clearer words than are found in the Acts of Parliament; and the payment of one toll for the use of the navigation, and liberty to pass over the towing path, without separate payment, is only a convenient arrangement for the public, and ought not in any way to affect the question of liability. The question may be further illustrated, thus—When the floods are out, and the towing path covered, is it the duty of the Conservators to give notice of this, or must the public look out for themselves? And so when the floods are subsiding, or when they have just subsided, and the ground has not regained the firmness and consistency for use as a towing path, are the Conservators to give notice of this, or stop the use of the towing paths? I think not. The judgment of the court not only decides the present case, but imposes a charge upon the defendants if decided in favour of the plaintiff. On that account, having satisfied myself that the charge ought not to be imposed, I feel bound to say so, though hesitating and unwilling to differ from so many of my learned brethren.

Judgment for the appellant.

Attorney for the appellants, *Hall*, for *Frere and Co.*

Attorneys for the respondent, *Wilkinson and Howlett.*

APPEAL FROM THE COURT OF COMMON PLEAS.

June 30, 1873, and May 13, 1874.

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Criminal lunatic—Maintenance by guardians—Order of justices—3 & 4 Vict. c. 54, ss. 1, 2.

The 3 & 4 Vict. c. 54, ss. 1, 2, enacts that if any person imprisoned in any prison shall appear to be insane, it shall be lawful for one of Her Majesty's principal Secretaries of State to direct such person to be removed to a county lunatic asylum, or other proper receptacle for insane persons, until such person has become of sound mind, and has been certified to be so by two physicians or surgeons. Sect. 2 enacts that it shall be lawful for two justices of the peace to inquire into the place of last legal settlement of such insane person; and if it does not appear that he or she is possessed of any property which can be applied to his or her maintenance, they may direct the board of guardians to pay all reasonable charges for the weekly maintenance of such lunatic.

The defendants had paid, from the year 1855, a weekly sum of 16s. to the plaintiff, for the maintenance of a criminal lunatic. On the 19th Oct. 1869 the defendants wrote to the plaintiff, to say that they in future should pay no more than 11s. 1d. a week for the care of the lunatic. The plaintiff continued to keep the lunatic, and on the defendants still refusing to pay more than 11s. 1d. per week, brought his action to recover the difference. There was no evidence to prove that the plaintiff had ever procured a justice's order to be made on the guardians under the 2nd section of 3 & 4 Vict. c. 54.

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Held (reversing the judgment below (ante, vol. 7, p. 612), that the case did not warrant an inference that the guardians had contracted to pay 16s. a week for the pauper's maintenance until they had obtained an order from the justices to alter the rate of payment, nor even the presumption that there was, in fact, an order of justices to pay after that rate; and that, therefore, as there was no contract by the defendants, and no legal liability independent of contract, the action failed.

APPEAL from a decision of the Court of Common Pleas. The pleadings, facts, and statutes are set out in the report below (*ante*, vol. 7, p. 612), and sufficiently appear from the judgment herein-after given.

June 20, 1873.—*Kingdon*, Q.C. (with him *Kinglake*) for the appellants.—There was no obligation on the plaintiff to receive the lunatic under the Secretary of State's order, unless the justices also order that a weekly sum should be paid; but, having taken her, he must keep her until such latter order is made. He might have applied to the justices himself, and they would be bound to make the order. The court, in exercising the power to draw inferences here, would surely not infer that there was, in fact, an agreement between the guardians and the plaintiff to pay 16s. a week, so long as the lunatic was maintained by him. They are a fluctuating body, and would have no power to enter into such a contract as would bind their successors in office. And although the guardians have, from time to time continued to pay this sum, yet, as such payment was unauthorised by an order of justices, it was but voluntary, and they can at any time discontinue it. Secondly, If they had made such a contract as that relied upon, it would be invalid for want of a seal. He referred to

Shadwell v. Shadwell, 9 C. B. N. S., 159;

Nicholson v. The Bradford Union, L. Rep. 1 Q. B. 620.

Sir Henry James, Q.C. and Collyer, for the plaintiff.—There is abundant evidence of a contract to pay 16s., in the fact that the sum has for many years been paid. Moreover, there is a statutory obligation upon the guardians to pay for the maintenance by 3 & 4 Vict. c. 54, ss. 1, 2, and were either the settlement of the pauper, or the amount fairly payable for her maintenance in dispute, then an order of justices might be required to settle the same. Not so if the parish, by its guardians, do not dispute the settlements, and undertake the payment of a reasonable sum, fixed at 16s., and they must continue to pay that amount until the contract is legally determined in one of three ways, viz., first, by the Secretary of State removing the lunatic; secondly, by her death; thirdly, by the parties mutually consenting to dissolve the agreement. [KELLY, C.B.—As the parties agreed to waive the order of justices, why should they not also be presumed to have agreed to vary the amount, as the justices would have power to do?] By going to the justices; but the plaintiff is not bound to take the initiative. Secondly. If the amount had been fixed by justices, and the guardians had been ordered to pay, no seal would have been necessary. Nor is there any needed as the case stands, for the consideration of the contract is executed. The plaintiff has kept the lunatic. They cannot remove her. Arranging for payment was within the ordinary functions of the guardians.

Kingdon, Q.C., replied.

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May 13, 1874.—CLEASBY, B., delivered the judgment of Blackburn, J., Cleasby, B., Quain and Archibald, JJ.—This is an appeal from a judgment of the Court of Common Pleas. The case was tried before Bramwell, at Bristol, when the following facts were admitted or proved. A woman called Mary Hughes was indicted for murder at the Carmarthen Summer Assizes 1847, and upon arraignment was found insane. Upon the 16th Oct. 1856, the then Secretary of State made an order authorising and requiring the superintendent of the Vernon House Lunatic Asylum, at Briton Ferry, to receive her in custody at the said lunatic asylum, there to remain until further orders. At that time Mr. Leach was the proprietor of the asylum, but in 1864 the plaintiff became so. She was a pauper, and chargeable to the Lampeter Union. From the time she was admitted, down to autumn 1869, the guardians of the union (the defendants) regularly paid for her care and maintenance in the asylum at the rate of 16s. a week. On the 19th Oct. 1869 the defendants caused a letter to be written to the plaintiff, to the effect that they would not therefrom pay for her care and maintenance more than 11s. 1d. per week, such being the rates which they were then paid for the maintenance of lunatics at the Joint Counties' Asylum at Carmarthen. The plaintiff replied on the 22nd Oct. that his terms for pauper lunatics were 16s. a week. In Feb. 1870 the defendants wrote to the plaintiff that they had been advised to resist this payment, and were prepared to defend any action for a claim beyond 11s. 1d. per week. The action is brought to recover 40l. 14s. 4d. for the care and maintenance from Dec. 1870 to 1871. The plaintiff admitted that, as to 10l. 8s. 9d., being for the period from Dec. 1870 to March 1871, the second plea was an answer; but he insisted upon his right to recover 31l. 6s. 6d. for the period between March 1871 to Dec. 1871, being at the rate of 16s. per week. The defendants paid 21l. 12s. 3d. into court, being at the rate of 11s. 1d. for the same period. The plaintiffs claimed the difference, 9l. 17s. 1d. It was admitted by the defendants that 16s. a week was a reasonable sum to be paid to the plaintiff for the care and maintenance of the pauper lunatics. No order of justices, as required by the 3 & 4 Vict. c. 54, was produced in evidence by the plaintiff. The learned judge directed a verdict to be entered for the defendants, with leave to the plaintiff to move to enter a verdict for the sum of 9l. 14s. 1d. A rule to show cause was obtained in the Court of Common Pleas, which was afterwards made absolute, and this appeal is against that judgment. It will be found in the L. Rep. 7 C. P. 366. The legal and proper mode of payment for a pauper lunatic is prescribed by the statute 3 & 4 Vict. c. 54, ss. 2, 3. It is thereby provided that two justices should, by order under their hands, amongst other things, order that the guardians of a union shall pay such sum as they shall from time to time direct for the maintenance of the lunatic in the asylum in which he or she shall be confined. Upon this state of facts the Court of Common Pleas made the rule absolute, and they appeared to consider that it was either a proper inference, from the facts stated, that the guardians had entered into a contract to pay 16s. a week for the pauper's maintenance, to continue until they had obtained an order from the justices to alter the rate of payment, or that the facts even warranted the conclu-

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sion or presumption that there was, in point of fact, an order of justices to pay after that rate. With respect to the latter, it appears to us that no such conclusion or presumption could be properly arrived at with respect to a matter so recent and capable of proof as the supposed order of justices. The payment of 16s. a week during the period named was completely accounted for by the liability of the defendants to pay something, and by the fact that 16s. was a reasonable sum for them to pay, and the sums which the plaintiff demanded, and which the defendants assented to until the letter of the 19th Oct. 1869. And further, the plaintiff, by his letter of the 22nd Oct., rests his claim, not upon any order of justices, but upon his terms being 16s. per week. With respect to the inference of the particular contract first mentioned, it appears to us that there is no sufficient ground for making it. The guardians had no legal right to enter into such a contract; it was their duty to act upon the statute, and no inference or presumption should be drawn that they acted contrary to law. In our opinion, the just and reasonable inference from the facts stated, is that the guardians, knowing that they were liable to pay for the maintenance of the lunatic, paid the sum of 16s. per week, being a reasonable and proper sum, without any order of justices at all, and that it was competent for them at any time to put an end to their liability for that payment, and put upon the plaintiff the necessity of obtaining an order of the justices. The guardians did not place the pauper lunatic in the asylum of the plaintiff, or of his predecessor. The plaintiff fails in making out a case for 16s. a week, because he cannot rest it upon contract, as the defendants did not agree to it; and he cannot rest it upon legal liability, independent of contract, because the order of justices, which is the proper foundation for such liability, is wanting. A second objection was made on behalf of the defendants, that, assuming the inference to be a proper one, that the defendants had contracted to pay 16s. a week until they obtained an order of justices to vary the amount, such contract should have been under seal, to be binding upon the corporation. After what has been said, it is unnecessary to give any decision upon this objection. The result is that, in our opinion, the judgment of the court below must be reversed.

His Lordship then read the judgment of KELLY, C.B.—I agree so far in the judgment of the Court of Common Pleas, that it was competent to the defendants to waive the order by the magistrates, specifying the amount to be paid to the plaintiff for the maintenance of the pauper lunatic in question; and that they did so waive that order, and agree to pay 16s. a week to the plaintiff. But I am likewise of opinion that they were entitled to put an end to that agreement upon a notice given, and that they have done so by their letter of the 9th Oct. 1869. It appears to me that it then became incumbent on the plaintiff to obtain an order under the statute, that the defendants should pay such sum as the magistrates might determine to be a proper sum, and that until such orders should be obtained, the defendants were not nor are under any liability to pay more than the 11s. 1d. which they have proposed to pay. No point was made as to whether the defendants might not have been bound to continue the payment of 16s. a week, in case the plaintiff had applied for an order of the magistrates, until they should have had time to

make the necessary inquiries; and as the plaintiff has never applied to any magistrates for any such order, or given notice to the defendants of any intention to do so, I am of opinion that the agreement is at an end, and that the plaintiff is not entitled to more than the 11s. 1d. a week. The judgment of the Court of Common Pleas must therefore be reversed.

Judgment reversed. (a)

Attorney for the plaintiff, J. N. Wrensmore, agent for A. Curtis, of Neath.

Attorneys for the defendants, Humphreys and Morgan, agents for D. Lloyd, of Lampeter.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROCHES and H. PRAT, Esqrs.,
Barristers-at-Law.

June 9, 10, 11, 23 and 24, and July 14, 1874.

SALVIN v. THE NORTH BRANCEPETH COAL COMPANY.

Nuisance to property—Noxious vapour—Substantial damage—Injunction.

To induce the court to grant a mandatory injunction to restrain the carrying on of works alleged to be injurious to a neighbouring property, the plaintiff must prove that his property has sustained actual substantial damage, which is apparent to an ordinary person, and not merely such damage as can only be perceived by means of scientific or microscopic investigation.

Decision of the Master of the Rolls affirmed.

THIS was an appeal from a decision of the Master of the Rolls.

The bill was filed by Mr. M. C. Salvin, who resided at Burnhill, near Durham, complaining of the effluvia issuing from the coke ovens of the defendant company, and praying for an injunction.

The coke ovens of the defendant company, over 250 in number, were situated at Littleburn, about 1000 yards from the plaintiff's house, and only 400 yards from the nearest plantation on his estate; and the bill alleged that the smoke and sulphuric acid given off during the process of coke-burning were killing the trees in this plantation and injuriously affecting the vegetation on the greater part of the estate.

The defendant company's case was that coke ovens were not to any extent injurious to vegetation, and certainly not when constructed on the plan adopted by them of passing the smoke under the engine boilers, and then up a tall chimney; and they denied that they had in any appreciable degree added to the normal condition of impurity, to which the atmosphere of the district had attained when they commenced their works in 1871, laying stress on the fact that there were no less than twenty-seven collieries, iron works, &c. in full operation within a radius of five miles from the plaintiff's house.

In delivering his judgment, Sir George Jessel, M. R. said: This case has been so long before me, and occupied, not unnecessarily or in any way improperly, so long a time, and I have had so often occasion to read and re-read the evidence both in court and out of court that I do not think I should be able to form any other or better conclusion than I have formed, by taking further time

(a) It is understood that Martin, B., who was a member of the Court of Exchequer Chamber when this case was argued, but retired from the Bench before the decision was pronounced, agreed in this judgment.

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to consider and read over the evidence again. The plaintiff is the owner of a mansion house and valuable estate in the county of Durham; the defendants are a coal company who have sunk a pit for the purpose of obtaining coal from a colliery, and have erected at or near the mouth of that pit a very large number of ovens, which they are using in accordance with the custom of that part of the country in making coke. The plaintiff alleges and the defendants deny that the result of those operations is to cause an emission of a considerable amount of smoke and gases, which produce a substantial injury to the plaintiff's property situate in their neighbourhood. The real question, which I have to decide, is whether or not that allegation is proved to my satisfaction. For the law of the case is plain. Counsel on both sides have referred with equal confidence to the case of *Tipping v. The St. Helen's Smelting Company* (11 H. L. Cas 642), as laying down the law on the subject; and I agree that a better case could not have been referred to, or one which in some respects has more bearing on the questions which I have to try, and I will only cite one or two passages from the judgment there, or rather from the speeches of the various members of the House of Lords who decided that case, to show what the law is. The judge who tried the case was Mr. Justice Mellor, and he told the jury that "an actionable injury was one producing sensible discomfort" to the person bringing the action. Then he went on: "In an action for nuisance to property, arising from noxious vapours, the injury to be actionable must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it." In order to be actionable the injury must be such as "visibly to diminish the value of the property." Then he told them further: "That when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in counties where great works had been erected and carried on, persons must not stand on their extreme rights, and bring actions in respect of every matter of annoyance, for if so the business of the whole country would be seriously interfered with." That ruling was upheld by the House of Lords. I take it that two points are established by it: first, that the injury must be visible, by which I understand visible to ordinary persons conversant with the subject matter. I do not think that is satisfied by getting a scientific man to say that by the use of scientific appliances, microscopic or otherwise, he can state that there will be in future time an injury. I do not think that would be sufficient. I take it there must be a present injury visible, as I have said before, to ordinary persons conversant with the subject matter, and such an injury as would entitle a jury to give substantial, as distinguished from nominal, damages. I consider that to be the meaning and ruling of the learned judge. That meaning is very much confirmed by what was said by the learned Lords in deciding that case, especially by some passages in the judgments, or rather speeches, of Lord Cranworth and Lord Wensleydale. Lord Cranworth, adopting the words of Mr. Justice Mellor, says: "It must be plain that persons using a limekiln, or other works which emit noxious vapours, may not do an actionable injury to another, and that any place, where such an operation is carried on, so that it does occasion an actionable

injury to another, is not in the meaning of the law, a convenient place. I always understood that to be so; but in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property." Therefore it must be a serious injury of some kind. Then he refers to a case of his own, and he says he thinks that Mr. Justice Mellor could not have possibly stated the law better. Then Lord Wensleydale says: "In these few sentences I think everything is included. The defendants say, 'If you do not mind you will stop the progress of works of this description.' I agree that it is so, because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights, and allow a person to say, 'I will bring an action against you for this and that, and so on.' Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected." I do not think there is any contest between the learned counsel on both sides as to the law. They have both stated to me, as the Solicitor General said in his concluding sentence, that the real question I have to try is, whether a substantial injury, meaning an injury for which a jury would give substantial damages, has been inflicted on the plaintiff. The case may be fairly divided into two complaints. The first complaint is an injury to personal comfort, and as to that there are two observations to be made; first of all, is the injury of such a nature as substantially to interfere with the comfort and enjoyment of the plaintiff as owner of the mansion house, and grounds in question? Secondly, if it is so, does it come from the defendants' works? As regards the first point, I have no doubt whatever. As regards the second, I think it must be answered in this way, that it does not all come from the defendants' works; and I think it does not, even as to the major part, come from the defendants' works. I think that the state of things, so far as regards this part of the case, was not substantially altered by the defendants' works.

His Honour read extracts from the evidence of the plaintiff himself, and of other witnesses on the same side and then proceeded:

I think we have it admitted by the plaintiff himself, that both the Brandon and the Browney Collieries send smoke, and, I take it, no considerable portion of smoke, over his property. I am quite satisfied that some of the smoke in the Valley, which produces this feeling of discomfort, dissatisfaction, or annoyance, and some considerable portion of it, is to be attributed to these other collieries. When I say "smoke," of course I particularly allude to the black or coloured smoke, as distinguished from light or grey smoke. Therefore if I were asked for an injunction on this ground only, I should certainly refuse it; but the Solicitor General has not ventured to ask it upon this ground. What he has relied upon is this—and

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really the whole contest in the case has been upon this point—does or does not the emanation of sulphurous or sulphuric acid from the coke ovens in question seriously injure and damage the trees of the plaintiff, the herbage of the plaintiff, the fruit trees and other vegetable productions of the plaintiff, either in his gardens or in the woods which are in the neighbourhood of the house, and which no doubt are of importance as regards the amenities of the house. As regards the house and gardens, the state of affairs is this: The house is surrounded by collieries. They are extremely numerous.

His Honour specified nine different collieries at distances varying from one to three miles from the plaintiff's house, and then continued:

Anyone who looks at the map of the district, and sees the way in which those collieries are placed, must see at once that the plaintiff's estate is situate in an atmosphere loaded with coal smoke. That, I may say, is the evidence on both sides. Indeed upon that point the plaintiff's own evidence is very strong. He tells us, speaking of this very property, what sort of a country he is living in. Of course there cannot be better evidence against him than his own, when it is in the shape of an admission; and what he says is: "I should say that there were sufficient collieries to call it a black country, though we have not yet given it that name." So that it is clear that this is a case in which pure atmosphere cannot be expected, and where, if you take away Littleburn Colliery, the subject of this suit, there would still be an atmosphere very impure, and so charged with smoke at various times as to produce, as it certainly does produce, a very sensible effect in blackening the trees. The next point to consider is whether the Littleburn Colliery has changed the state of the country in that respect, or has "introduced a new state of things," to use the words which I think were used in *Tipping v. The St. Helens Smelting Company* (11 H. L. Cas.). As regards black coal smoke, I must say I have no doubt it did not. In the first place, the quantity of black coal smoke before was very considerable, so considerable, as has been described by the plaintiff, as to be very troublesome to him; and so it is also described by a great number of witnesses, who knew the place for years, and who have been called by the defendants—oddly enough, not by the plaintiff, but by the defendants. They say that the place is no worse now than it was many years ago. They are not one witness or two, but six or seven, who have known the place for a very long time, who have been employed upon it as gardeners, and in other offices about the house and grounds, and knew it well, and who all agree that the state of blackness, the state of smokiness of the place and grounds is very much the same now as it has been for a very great number of years. On the other hand we have really nothing which can be called contradictory evidence, and I am of opinion that the addition to the quantity of black smoke—for there is some black smoke in some considerable quantities at times from the Littleburn Colliery—has not produced that alteration in the state of things which previously existed which would warrant this court in interfering on behalf of the plaintiff. Whether if none of the other collieries had ever existed, the Littleburn Colliery would alone have produced that state of the atmosphere is a question I am not now called upon

to decide; but I think upon the evidence that it would not, even had the atmosphere been pure. The quantity of black smoke, which appears reduced to a *minimum*, issuing from that colliery, would not have been sufficient for that purpose. It only remains to consider the real and most important point, and the most contested question in the cause. Do the gaseous emanations, not being black smoke, which arise from the colliery, including in that expression any acid, injure the trees in a substantial manner, so as to entitle the plaintiff, if he had brought an action, to substantial damages? It must not be forgotten that in the *St. Helen's Smelting Company's Case*, the jury awarded 361l. damages, as the actual damage sustained, which was a very substantial sum indeed, because it was only the damage up to the time of the action brought. What I have to consider is whether such a case is made out here. I must say that I think the plaintiff has come before that damage has been sustained. I am not sufficiently acquainted with the sciences of botany and chemistry to be able to say whether the damage will ever be sustained; but I have great doubts about that. It is quite sufficient for me to say that when I look at the evidence I am of opinion that it has not yet been sustained.

His Honour made some further comments upon the evidence and continued:

For these reasons I think the plaintiff has not made out his case, and that as he comes here strictly upon legal grounds to ask for an injunction upon the ground of substantial injury, the only course I can take is to dismiss the bill, and of course the costs must follow.

From this decision the plaintiff appealed.

Henry Matthews, Q.C., and Edmund James and Trevelyan (of the Common Law Bar), for the appellant.

Sir Henry James, Q.C., Waller, Q.C., and Mac-lachlan, for the respondent company.

The nature of the arguments, which chiefly turned upon the evidence, is sufficiently indicated in the judgments of the court.

Their Lordships took time to consider their judgments.

July 14.—Lord Justice JAMES now delivered the following judgment: In this case the Master of the Rolls dismissed the bill of the plaintiff with costs. The bill in substance sought, by a mandatory injunction to prevent the defendants, who are a great colliery company, from erecting or working any coke ovens or other ovens to the nuisance of the plaintiff, the nuisance alleged being from smoke and deleterious vapours. The Master of the Rolls thought it right to lay down what he conceived to be the principle of law applicable to a case of this kind, which principle he found expressed in the great case of *Tipping v. The St. Helen's Smelting Company* (12 L. T. Rep. N. S. 776; 11 H. of L. Cas. 642), in which Mellor, J., gave a very elaborate charge to the jury, which was afterwards the subject of very elaborate discussion and consideration in the House of Lords. The Master of the Rolls derived from the case this principle: that in any case of this kind, where the plaintiff is seeking to interfere with a great work, carried on, so far as the work itself is concerned, in the normal and usual manner, the plaintiff must show substantial, or, to use the expression of the Master of the Rolls, visible damage. The term "visible" was very much quarrelled with before us as not

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being an accurate statement of the law. It was said that the word used in the judgment of the House of Lords (in *Tipping v. The St. Helen's Smelting Company*), was "sensible." I do not think there is much difference between the two expressions. When the Master of the Rolls said that the damage must be visible, it appears to me that he was quite right, and, as I understand it, it amounts to this: that although, when you once establish the fact of actual substantial damage, it is quite right and legitimate to have recourse to scientific evidence upon the question of the causes to which that damage is to be referred, yet if you are obliged to start with scientific evidence, such as that procured by the microscope of the naturalist, or the tests of the chemist, for the purpose of establishing the damage itself, that will not suffice. It must be an actual damage capable of being shown by a plain witness to a plain common jurymen. The damage must also be substantial, and it must be, in my view, actual; that is to say, the court has no right whatever in dealing with questions of this kind to have regard to contingent, prospective, or remote damage. I would illustrate this by analogy. The law does not take notice of the imperceptible accretions to a river bank or to the sea shore, although after the lapse of years they become perfectly measurable and ascertainable; but if, in the course of nature, the thing itself is so imperceptible, so slow, so gradual, that it requires a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation. So, if it were made out that every minute a millionth of a grain of poison were absorbed by a tree, or a millionth of a grain of dust deposited upon a tree, that would not do, although after the lapse of a million minutes the grain of poison or the grain of dust could be easily detected. It would never have done, as it seems to me, for this court, in the reign of Henry the Sixth, to have interfered with the further extension of the use of sea coal in London, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that, by the reign of Queen Victoria, roses both white and red would have ceased to blow in the Temple Gardens. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and shipbuilding town, which would drive the dryads and their masters from their loved solitudes. With respect to this particular property before us, I observe that the defendants have established themselves on a peninsula which comes cranking far into the very heart of the ornamental and picturesque grounds of the plaintiff. If, instead of erecting coke ovens at that spot, they had been minded, as apparently some persons in the neighbourhood on the other side have done, to import iron stone and erect smelting furnaces, forges and mills, and had filled the whole peninsula with a mining and manufacturing village, with beershops and pigsties and dog kennels, with pigs, dogs, and children, which would utterly have destroyed the beauty and amenity of the plaintiff's grounds, this court could not, in my judgment, have interfered. A man to whom Providence has given an estate, under which there are veins of coal worth perhaps hundreds or thousands of pounds per acre, must take the gift with the consequences

and concomitants of the mineral wealth in which he is a participant. But in this particular case the bill itself did not allege any sentimental case; it did not allege any prospective case; it did not allege any contingent or remote case. On the bill as it stood, and on the evidence in support of that bill, there was a case of absolute nuisance of a startling magnitude. As the volume was opened and the affidavits were read one after another, it really seemed to me scarcely possible to conceive that any answer or any avoidance could have been successfully made by the defendants. But when the case on the part of the defendants came to be heard, and when the evidence came, affidavit after affidavit, to be read, every observed fact and every scientific conclusion from the fact was directly traversed—directly, absolutely, and completely traversed. The only thing which, to my mind, was unmistakably established in this case by the evidence on both sides, was the utter worthlessness of affidavit evidence in such a case as this. That was made out unmistakably to my satisfaction. The affidavits were before the Master of the Rolls, who not only had the affidavits on one side and the affidavits on the other side read to him, but they were evidently very carefully considered by him, for I happened to have the copy of the evidence which he had before him. The witnesses who were selected on each side as the proper sample witnesses for cross-examination were cross-examined before him, and to some not inconsiderable extent cross-examined by him. One of the witnesses, who was a great witness for the plaintiff, Mr. Gorrie, from Edinburgh, was called back to assist him; and he himself carefully examined with a microscope, I believe, or with a glass, every specimen that was produced to him from the woods of the plaintiff, and after a hearing of several days, and an examination so carefully conducted as that, he came to the conclusion that the plaintiff had utterly failed to make out his case, and that there was no case proved to him of a single tree killed, of a single tree substantially injured, or of a single blade of grass—to use his expression—burnt or destroyed. That was the conclusion he came to upon the question of fact. It appears to me that whatever conclusion I might have arrived at myself upon the evidence, if it had come before me in the first instance and I had nothing but the papers before me, I cannot overrule a decision so arrived at, with such advantages and after such opportunities. Indeed, we were hardly pressed to overrule that decision *simpliciter*. It was, indeed, suggested to us that we might to some extent take judicial cognisance of the fact that there are one hundred thousand tons of coal, with all the sulphur in it burnt, and throwing its products into the air every year. It was said, "You must know that such a thing as that cannot take place within a few hundred yards of a man's woods without injuring them." I, speaking for myself, was not startled at the amount. One hundred thousand tons of coal converted into coke did not appear to me to be anything very startling in point of amount. I believe there are great numbers of ironworks and other works in this country in which a great deal more than that are, not partially consumed by being converted into coke, but wholly consumed, so as to throw the whole products of combustion into the air. I believe that within no very great distance of the room (Lords Justices' Court, Lincoln's Inn) in

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which I am sitting now, or at all events within the Metropolis, as much as seven millions of tons of coal are burnt every year, and load the atmosphere with the products of combustion. Therefore, certainly, I could not take cognisance of the fact that one hundred thousand tons of coal converted into coke must necessarily be substantially a nuisance to woods within four or five hundred yards of it. One thing which I ought to have noticed with reference to the contradiction between the evidence of the plaintiff and that of the defendants is, that whereas the plaintiff started his case with a description of the loads of dust, smoke, and soot that came from the coke ovens of the defendants, the defendants meet that with a statement which appears, so far as I can see, to be absolutely verified, that they never practically produce any black smoke, or soot, or dust at all, but that the whole of the matter in their coke ovens is absolutely converted into a thing which is almost invisible. However, we were pressed with this, that further time had elapsed, another year had gone, and that we might send down a scientific witness, or scientific witnesses, who should go and inspect the property, and report to us either as witnesses or referees. To my mind that would not be a satisfactory mode of dealing with such a case as this. I am unable to find any question or questions which I could dictate to those witnesses upon which their answers would enable me to determine the case. They would not merely have to ascertain what there is, but what is the cause, and how much of one particular cause operates in combination with other causes; and, in truth, it would be giving a new trial upon new evidence, based upon the present state of things. Therefore, I could not give my voice for any such attempt as that to solve the question between the parties. In truth, speaking for myself, I should be very loath to stop a great work of this kind, especially where there is conflicting evidence between the parties, except upon the evidence of a jury, which jury would have had the opportunity of personally visiting and seeing the *locus in quo* and the surrounding district, and before whom witnesses would give their evidence *viva voce* in open court, and with the knowledge that they were giving it to persons who had the opportunity themselves of knowing something of what they were deposing to. Then the question presented itself as to whether an issue should be directed to try the question of nuisance. An issue would, however, hardly be a just or proper mode of trying the case. The bill was filed in Feb. last year. An issue could hardly be satisfactorily disposed of by a jury as to what was the state of things at that time when the plaintiff invoked the protection of this court, and I therefore am not altogether uninfluenced by this consideration, by a desire that the whole of this mass of rubbish should be swept away and buried for ever, and the whole thing tried *de novo*, without any prejudice from what has gone before in this court. Of this I am satisfied, that if with the experience of the year 1873, if with the experience of the year 1874, and if with the experience of the beginning of the year 1875, the plaintiff is able to make out that there has been a substantial wrong done to him, and a substantial wrong being continued to be done to him, which is properly the subject of an action, there is no imminent danger of irremediable mischief—there is no danger of any mischief for which he will not be able to get ample

compensation up to the time of the verdict, whether that is reckoned in scores, or hundreds, or thousands of pounds; and if as the result of that verdict, and of the evidence adduced in that trial, it should then appear to the court or judge that it is a fit case to follow up by a mandatory injunction, that mandatory injunction would be quite in time to arrest the further progress of mischief. For I am satisfied that if as the result of such proceedings such an injunction were granted in the year 1875, by the year 1876 no landscape painter or landscape gardener would be able to trace in the woods and forests of this estate the slightest evidence of the peril to which they had been in the mean time exposed. I think the plaintiff ought to be in the position of a man who has been nonsuited at law for want of sufficient evidence at the time. If he can make out, with new materials and with better evidence, a better case to satisfy the court, he is at liberty to do so. The decision of the Master of the Rolls affirmed, as I think it should be affirmed by us, will not prejudice him any more than to this effect: that he had not, up to the 22nd Feb. 1873, sustained sufficient damage to warrant a verdict in an action on the case, or to warrant this court in interfering. Further than that, he is not prejudiced except, of course, that like every other unsuccessful litigant, he has to pay the costs of his unsuccessful litigation. I am of opinion that the decree of the Master of the Rolls ought to be affirmed, and that this appeal should be dismissed with costs.

Lord Justice MELLISH.—There is no real difficulty as to the principles on which the court should proceed in determining this case. The question to be determined is, whether the plaintiff has made out that in an action at law he could recover substantial damages for the nuisance alleged in the bill. The only real difficulty about that is the mode of distinguishing how much of that proposition depends upon questions of fact, and how much upon questions of law. There is a difficulty, to my mind, in distinguishing precisely what is a question of fact from what is a question of law in these proceedings about nuisances. Indeed, when certain inferences of fact have been established by a number of cases, they become to a great extent very nearly of the same authority as if they were propositions of law. For instance, it is of course not correct to say, as a strict proposition of law, that if the plaintiff has not sustained, or cannot prove that he has sustained substantial damage, this court will give no relief, because, of course, if it could really be proved that the plaintiff was about certainly to sustain most substantial damage by what the defendant was doing, and there was no doubt about it, this court would stop the defendant at once, and would not wait until the substantial damage had been sustained. But in nuisances of this particular kind, it is known by experience that it is impossible to be certain that substantial damage ever will be sustained unless substantial damage actually has been sustained, and therefore with reference to this particular description of nuisance, it becomes perfectly correct to lay down the principle that, unless substantial damage is proved to have been sustained, this court will not interfere. And so, in my opinion, with reference to the observations of the Master of the Rolls about the damage being visible. That is not correct, of course, as a strict proposition of law, as if it is made out that there is substantia

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damage by legal evidence, it does not matter how it is made out, whether it is made out by the eye, or whether it is made out by the nose, or whether it is made out by the eye of a scientific person or by the eye of anybody else. But, as a matter of fact, in cases of a nuisance of this particular description, unless the damage is proved to have been sustained so that, I will not say every ignorant eye, but every fairly instructed eye can really see it in the woods itself—unless that is the case, it is impossible to be certain that the substantial damage really has been sustained. Therefore, those propositions are, to my mind, perfectly accurate, and I do not think that it is material here to distinguish how much of them ought now to be considered as inferences of fact which the court draws from experience in former cases, or how much of them are to be considered strictly as questions of law. On account of the great importance of this case to the parties; and, certainly, from the great contradiction in the evidence, it was not satisfactory in my mind to decide the case without in a great measure going through the evidence in the book before me. The result of it is, that I am persuaded that this case was thoroughly investigated in the court below, that is to say, it was as thoroughly investigated as the defective procedure renders it possible that a case of this kind should be investigated. It is quite obvious that the Master of the Rolls, in coming to the conclusion to which he did come, had very great advantages over what we possibly can have. All the witnesses, the scientific witnesses and the other witnesses who were cross-examined, were cross-examined before him. He put numerous questions to them himself, to satisfy his own mind as to the particular points on which he required to be satisfied, and, no doubt, he obtained that information which he particularly wanted. We have not that advantage, and deciding on what I consider to be a pure question of fact—this being the first appeal, perhaps it would be wrong to go quite so far as to say, that the decision in point of fact, must be what in a court of law would be called a verdict against the weight of evidence to entitle us to interfere; but I think great weight must in cases of this kind be given to the decision of the court below; and unless we can see plainly to our minds that there is a wrong inference drawn on a point of fact, we ought not to interfere with the decision. And having read through all the evidence, I cannot say that on the evidence, as it stands, I differ from the conclusion that the Master of the Rolls came to. I entirely agree with what the Lord Justice has said, that the cross examination of the witnesses who were cross-examined, if it proves anything, does certainly make out this, that the affidavit evidence of those who were not cross-examined is necessarily most untrustworthy. I suppose, when the parties assented for the purpose of saving expense—and I do not say that it was at all an improper agreement—that only certain selected witnesses should be cross-examined, they, of course, must have run the chance of such an inference as that being drawn, and when I see the very large modifications in the evidence of all the important witnesses both on one side and on the other—for there are several of the defendant's witnesses who to a great extent admit things very strongly against their case when they come to be pressed in cross-examination—when I see the great difference that is made in the result of the

evidence of those who are cross-examined and those who are not, it is utterly impossible to give decision in favour of the plaintiff on the testimony of his witnesses who were not cross-examined, and who gave their evidence solely on affidavit. The evidence in favour of the plaintiff that certainly struck my mind most, when the evidence was first read, was that of the numerous foresters who were examined, and who apparently gave very conclusive opinions, but I think they are open to the criticism which the Master of the Rolls made upon them, namely, that they do for the most part only state their opinions. They say that they looked at the trees, and that, in their opinion, they were greatly damaged; that they came up six months afterwards, and that, in their opinion, the damage had greatly increased. That shows what the value of affidavit evidence is. They state their opinions, and they do not state facts. They do not detail to the court what they actually observed with their eyes, so that the court might from that come to a conclusion as to what the actual damage would be. Therefore, on the whole, I have no doubt at all that it is impossible, on this evidence as it stands, to do anything else than affirm the judgment of the Master of the Rolls. The question on which I did certainly, at the close of the argument, entertain a doubt, was whether it was our duty to have this case further investigated, and simply to affirm the judgment of the Master of the Rolls. Now I agree with what the Lord Justice has said, that it would have been very difficult for us to have sent down any persons on whose evidence we could satisfactorily have relied, to examine the state of the woods at present. We should practically, if we had done that, have been giving up our judgment to their judgment, for, after having done that, it would have been very difficult for us to have differed from what they said. Then I considered, and that is what I had mere doubt about, whether it was our duty to order an issue to be tried at Durham. But I have come to the conclusion that that is not our duty. In the first place, the plaintiff at the outset had the choice of the tribunal which he would select. He could have brought his action at law, and tried it by a jury of the county of Durham, if he had been so minded, or he might have instituted his suit in this court. He chose to institute his suit in this court, and, in my opinion, it is very important for us to see, though of course we must administer equal justice to both parties, that plaintiffs do not get the power of stopping very important commercial works by proceedings in this court when they have not got a case which they could practically present to a jury. And then it is impossible not to be influenced by this consideration. Here an enormous expense has been incurred by a trial in this court, bringing up all the witnesses to London. The Master of the Rolls has properly come to the conclusion on the evidence, as it stands, that the plaintiff has not made out his case, and therefore he has dismissed his bill. Will it be just and right, if that is the state of the evidence on the case as it stands, that we should begin a totally new investigation, at an enormous expense also to the defendants who have been brought here by the plaintiff, and who say that it is not their fault that there has been no trial by a jury, because the plaintiff did not choose to bring an action and did not choose to ask for a jury in the court below? It appears to me that it would be

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unjust to the defendants to order that there should be an issue tried in this matter, particularly when one considers that the case is not finally decided. If a real damage does go on being sustained, and is made plain and manifest so that no one who sees the woods can doubt it—if that does occur the plaintiff will not be without his remedy. He still may bring his action, and, in my opinion, on the evidence, I have no doubt that he may bring his action in time to stop any real serious damage to his property. On the whole, therefore, I am of opinion that the judgment of the Master of the Rolls must be affirmed, and the appeal dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Rogerson and Ford*; for the respondents, *Ward, Mills, and Witham*.

ELECTION PETITIONS.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

THE BOROUGH OF POOLE.

(Before GROVE, J.)

May 4, 5, 6, 7, 8, and 9, 1874.

Parliamentary election—Bribery—Corrupt promises—Influencing wives of voters—Treating—Payment of publicans' bills at previous election—Supply of beer at subsequent election—Intention of candidate—Sequence of events—Remoteness—Costs.

A solicitor employed as the election agent of the respondent, called upon the wives of voters with the view to obtain their husbands' votes, and in so doing held out to the wives expectations of payment of money, or money's worth, ex. gr., by payment of rates, relief from difficulties, or new dresses for themselves.

Held that such a proceeding was a corrupt practice, going to the very root of electoral corruption, and avoided the election.

At a previous election in 1868 upwards of 200l. was paid by the present respondent, then a candidate, for beer supplied. Such payments were not returned in the election expenses. At the election in 1874 large quantities of beer were supplied by the publicans, but the bills sent in to the respondent were dated the day after the polling and purported to charge only for beer supplied subsequently to the election. When such bills were sent in they were not objected to by the respondent's agent, nor did he make any remonstrance concerning them.

Held that the treating at the election in 1874 was sufficiently connected with that in 1868, to justify the anticipation that a considerable sum of money would be allowed for beer, and to make the treating at the latter corrupt, as tending to influence voters, or as being a reward for having voted.

Semle, lavish treating by publicans themselves, without any ground for expecting payment, would be sufficient to avoid the election.

The ruling of Lush, J., in the Brecon petition, approved and followed.

The petitioners being persons put forward by others unable to pay costs beyond the deposit in the event of defeat, and there being no evidence that their object was to purify the electoral condition of the borough:

Held, that each side should pay their own costs.

THIS was a petition against the return of Mr. Waring in 1874, which was impugned on the ground

of general bribery, treating, and undue influence before and after the election.

H. Giffard, Q.C. and W. G. Harrison were counsel for the petitioners.

Ballantine, Serjt., McIntyre, Q.C., and Bowen, for the respondent.

This report is confined to the allegations proved, namely, of bribery by corrupt promises and treating. The facts are fully stated in the judgment.

On the question of treating *Ballantine, Serjt.*, for the respondent, addressed his Lordship. He said:—On the present occasion your Lordship will have, I venture to think, first of all to define what is the meaning of treating. Of course there is no difficulty in understanding that treating in the ordinary sense of the term means that provisions or wines are furnished to another at some one else's expense. So far there is no difficulty in dealing with the word, but the question is what is treating that will invalidate an election, and for the purpose of invalidating an election treating must be corrupt. There again we meet with another term of very doubtful signification. The word corrupt is governed when used in these statutes by matters of a purely Parliamentary kind, and adapted to elections alone, and not by the ordinary meaning of the term. I apprehend that what is meant to be corrupt in the statutes governing these inquiries is something done intentionally, with a view to influence the election; to influence a single vote, or a greater number of votes; a giving away of provisions with the view to affect the mind of the person to whom it is given; and to induce him to give his vote in the quarter the donor desires it to be given. Another application of the term corrupt is when there is provision or treating, with a view to reward a person for the vote that he has so given. There again very probably is another limitation, because inasmuch as before the vote was given there was some undertaking implied or real which would have an effect on the mind of the voter. I apprehend that under no circumstances would the treating in this case be such as to disqualify the elected candidate. I believe I have not incorrectly stated the admitted definitions of that word, and the mode in which the facts must be applied for the purpose of bringing out the conclusion sought to be obtained in order to unseat the member. He cited

The Brecon Petition (unreported; see Leigh and Le Marchant's Election Law, p. 27);

The Wallingford Petition, 19 L. T. Rep. N. S. 766; O. M. & H. 58.

[GROVE, J., observed that Blackburn, J., considered the quantity of drink to be an ingredient in the corruption.] He put it as to the intention to affect the election. A small quantity only differs from a large one inasmuch as a large one would be more likely to produce the effect, and if the possibility of producing the effect is excluded it is immaterial whether the amount is large or small. With reference to the operation of the proceedings at the election in 1868 the learned serjeant said:—I think I may take it as a fact that treating after an election, independent of any promise, implied or direct, made during the election or before the polling, independent of its acceptance or its giving being by way of reward for voting, whether judicious or not, is perfectly legal. If I am right in that proposition, I must consider what the facts of the case are, and ask your Lord-

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ship whether any of them warrant you in coming to the conclusion that in any of the incidents of the last election, or, as I understand my learned friend to say, in the election of 1868, there was treating during the election and subsequent to it—treating, as I think it is in evidence before your Lordship, on both sides—at all events, by the evidence, it is not confined to one side. I have a right, in arguing these matters, to take the favourable alternative, inasmuch as it is not imputed to Mr. Waring, or I should rather say his supporters, that they alone treated in the borough, and I have a perfect right to assume that the treating was general, independently of the fact that my learned friend has never suggested by his evidence, or by a single observation, that it was otherwise. There are two ways of looking at the question—one is upon a principle well known to our law, and the other, though extremely difficult to be defined, is allowed to have its bearing in all cases in civil courts; I mean the remoteness of an act. A man who meets with a railway accident has a paralytic stroke two years afterwards. The difficulty is that there is no sequence of events; it is too remote, though possibly the result of the accident. This is a case in which certain things were done in an election four or five years ago, and, standing by themselves, are they not abstractedly too remote? But it may be said they are not too remote, supposing you continue to use them—that is to say, supposing you continue to keep the remembrance of the borough alive with a view ultimately to affect the success of the election. I think in saying this I put it as strongly against my client as I am able to do. Of course, before your Lordship introduces that element into your decision, you will come to the certain conclusion that that was the intention, and that it has been kept alive. But what is the evidence of anything of the kind? My learned friend will rely upon certain payments being made in the borough since that time as indicating that Mr. Waring had an eye to coming forward on a future occasion, and that will be argued by my learned friend, as he argues everything, with great ability and great force. I must answer as best I can, and submit to your Lordship whether it is reasonable. I am speaking of the subscriptions to charities, the registration, and the municipal elections. I shall pass over the charities without a word, and address myself to other matters. [GROVE, J.—I know they subscribe to charities, perhaps not always from a charitable motive.] Mr. Waring declares that he left matters to be disposed of by his agent, making no inquiry, and that, owing to the influence of the Guest family, he never intended to stand for Poole again, until lately, he speculated on the Ballot Bill being carried, and he thought his principles would enable him to go in, provided the voters were allowed to be independent. He had a strong reason for this because 115 who promised to vote for him at the former election did not, and of these 78 voted for Mr. Guest. I think it is quite a fair argument that the Guest influence obtained out of his promises a sufficient number of people to return him at the head of the poll. It is not unreasonable, under such circumstances, that he should determine not to stand for Poole again, and I submit, taking his word, that no payments can be shown to be made with a view to the subsequent election. The value, if there is any, in this argument is that if he had been shown

to be privy to the treating in 1868, he did not mean that it should have an effect on the election that subsequently occurred. [GROVE, J.—I have no reason to doubt that he intended not to put up again, but he says he had a shrewd idea that the ballot would become law.] I wish to show that he had no improper motive for the treating in 1868. Having disposed as far as I am able of that election, we must see what was the course of the last election of 1874, and what was done then that could render illegal that which, according to the argument I have addressed to your Lordship, would be a perfectly legal thing. No promises are proved, with one single exception. I admit there is a letter, which I do not propose to comment upon. People may do at some time or another indiscreet things, and probably if Mr. Aldridge had thought a little more about the matter he would not have written the letter to Gill. But, at the same time, Mr. Aldridge was firmly convinced that there was no harm in treating after the election. If he knew there had been a promise before the election, and that, in point of fact, acts had been done which he must know constituted bribery, the smallest exercise of common sense would have prevented his writing a letter which would have been at all events a clue to something of the kind. I contend that the openness of that letter, having relation to something expended after the election, showed he had no consciousness that treating after the election was an improper act. The case of Mrs. Morris is the only one in which there is any promise of treating. [GROVE, J.—Are you not putting it rather too much upon a wicked, or, in a popular sense, a corrupt act? Is it necessary that a person should be exceedingly corrupt and wicked? Is it not enough that acts were done, not from a bad and corrupt motive, in the common sense, but which the law declares illegal and which were done with the idea of influencing the election?] I used the word corrupt within the meaning which the learned judges have given to it. I can quite understand that though a man may be innocent in mind, yet if any promise was made of a reward for the election, and which promise is carried out or intended to be carried out after the election, which would invalidate it, I am not able to extricate myself from that which is constituted to be the law. [GROVE, J.—Lush, J., in the *Brecon* case, held that an invitation to an entertainment to take place afterwards, or a promise to invite, or a practice of giving an entertainment which voters may calculate upon, would, if followed up by the treat, give it the character of being corrupt.] I put it that there is no evidence, except in a single instance, of any such promise. [GROVE, J.—Take the case of Mr. Harker, who pays the sum of 200*l.* for beer after the last election, and then there comes a fresh election, and no public measure was apparently taken to prevent drink being given, but bills are sent, all of which he keeps. I am not imputing to him a bad motive; perhaps he thought he was acting for the best for his client, but I think this seems almost the very thing that Lush, J. referred to.] What I mean is that there is no evidence of any promise. It must not be supposed that I have not reason to feel the weight of matters of this kind and the difficulty of dealing with them, but I think that though these are matters that have a colouring that is dark at first, yet when one comes to investigate them it is

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quite possible that their results may be different from those which at first present themselves.

Giffard, Q.C. in reply.—It was not immaterial to consider what his learned friend was about when he wanted to keep Mr. Harker back. Here was an experienced agent making returns which he knew not to be true, and he would state this in the broadest terms. He was guilty of a misdemeanor, and he knew it in making a return of the expenses of 1868, which he knew not to be true, and he therefore came before his Lordship under circumstances which did not entitle him to credit. Mr. Harker was the ascertained and recognised agent of Mr. Waring in 1868, and therefore he called attention to the conduct which he pursued. He would take Mr. Waring's statement to be accurate that when disappointed in 1868, though he had sat for the borough, he determined not to contest it again; but it was obvious that he soon changed his mind, for he continued his subscriptions to the charities of the town, and advanced money from time to time for the registration of the borough. With reference to the treating, it was admitted to be the day after the polling-day, and supposing there to be no more in the case than that the admitted agents of Mr. Waring had extensively deluged the borough in beer on that day, he should have thought it would have been a fact upon which a learned judge would have drawn the conclusion that it was corrupt treating. This was a system which had been disclosed by the facts of the case, the total expenses in 1868 being 1360*l.* 6*s.* 7*d.*, and the returned amount only being 470*l.* 9*s.* 10*d.* His learned friend had said that this had gone on on both sides, but assuming for the purpose that it had been, though there was no proof of it, it showed that no person returned under such an election could be duly elected. Mr. Harker admitted that there was from 150*l.* to 200*l.* spent in beer, and not one single item of it returned. It was impossible to see the effect, all this beer, or beer and refreshments, being omitted from the account must have had. If in truth Mr. Harker had determined, so to speak, to turn over a new leaf, and had determined that upon this occasion there should be no corrupt treating, would not he have gone round to all the persons who sent in bills the last time and told them not to do so this time? The learned counsel then spoke of John Wills having given away, as he stated, on his own responsibility, beer, &c., to the value of 20*l.* 5*s.* 3*d.*, whilst his year's rent was only 18*l.*, and he, like many others, was unable to state why he sent in his bill to Mr. Harker. If there was the faintest truth in the giving of that amount of beer, what did it come to but a bribe to the publican for his vote? The impression of Mr. Aldridge had gone through the borough, and the publicans thought that if they could date their bills on the procession day it would be all right. Had Mr. Harker refused to pay the bills sent in to him the witness box would have been crowded with persons ready to disclose everything. Had this inquiry not been held the bills would have been paid, he knowing that they were expenses incurred on Mr. Waring's behalf. He could not tell how his learned friend could attempt to say that the seat could stand after admitting that Mr. Waring would have paid the bills had they been sent to him. *Giffard* then referred to the orders given by Mr. Western, and said no one could doubt his agency. He was

the Vice-President of the Liberal Association, and one of the deputation who went from the public meeting to request Mr. Waring to stand, and also an active canvasser. Mr. Western had presented himself as a candid witness, but his opinion of his candour was very much altered when he found that he had been paid so much in 1868, and that he had been paying some one else's money to win his own battle. The mayor of the borough was proved to have been paid 7*l.* for voters' expenses and beer in 1868, and there was another 7*l.* which was unexplained. [*Grove*, J. asked how the case would stand supposing the publicans of the town, as a body, gave away free beer, even on their own account.] *Giffard* said that by analogy he should think the result would be of the same character as if there had been general intimidation. The general treating, he contended, would be an obstruction to the free voting of the constituency, and therefore would render the seat void. [*Grove*, J. said it might be that a large number of men had an interest of their own to serve, such as in reference to a Licensing Act, and he asked what would be the result supposing, to further their cause, they treated the voters generally.] *Giffard* said a somewhat similar condition of things to that referred to by his Lordship occurred at Galway, when Keogh, J. delivered his famous judgment. The case of 1868 showed that Mr. Styring's manager, a very energetic supporter of Mr. Waring, received no less a sum than 80*l.* in payment of beer corruptly expended, and which was not returned in the expenses. Mr. Styring was proved to have been active on this occasion, but neither Mr. Styring nor Mr. Andrews was put into the box. Publicans upon publicans had applied to Mr. Harker, and unless the sitting member and his agent could dissociate themselves and prove to his Lordship's satisfaction that they had given reasonable orders that such things should not be done, then the inference was that these bills would be paid. He asked his Lordship to come to a conclusion adverse to Mr. Waring.

May 9.—*Grove*, J.—This case is one that certainly has presented to my mind more difficulty—not only than any election case I have tried—and within this year I have tried several cases—but I may say, with the exception of very serious criminal cases, which are naturally grounds of great anxiety to any judge who may have to try them; it has presented to me more difficulty than any within the two years and a half that I have had the honour of a seat on the bench, speaking with reference to civil cases. I have considered much about it each day as well as I could, and have given it my utmost attention, and to the arguments of the learned counsel—I won't say all the arguments, but substantially the body of them. I have looked carefully at the evidence on both sides, and at the probabilities of this case which might present themselves to the mind of a tribunal which acts as judge both of law and of fact. I see no chance of any change taking place in the decision arrived at, and therefore no object will be gained by postponing my judgment. This case is presented as against the sitting member upon various grounds. Yesterday evening I thought it better, for the sake of directing the attention of the learned counsel to the points which really present difficulties, to mention those portions of the case that my mind is quite clear upon; but if anything had been presented to my mind by the

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learned counsel for the petitioners which I set aside, or upon which I had come to an improper conclusion, I should have been perfectly willing to abandon it without any hesitation. The counsel for the petitioners, however, have accepted what I said as if it were a decision, although it was not one, and he has not addressed me on that part of the case. I mentioned why as to those portions no case has been made out against the sitting member. The case as against the sitting member was that he had paid on one occasion the sum of 2*l*. for firing off a gun and seeing some exercises which took place on the Thursday before the election day, and it was said at that time probably some information had reached Mr. Waring on the possible dissolution, and therefore this was something which might be said to be a bribe to encourage men—not all of whom were voters—to vote for him. There has been a correction in that, and Friday has been substituted in Mr. Waring's evidence for Thursday. The dissolution, or rather the speech announcing the impending dissolution, was on the Saturday; and Mr. Waring has said—and I entirely believe him—that he had no notion before he came down to Poole until the Saturday that there was to be an immediate dissolution, though he believed there would be one before the close of the session. Not only is that unanswered, but it is what one could not help believing, for the dissolution could not possibly have been known except to Mr. Gladstone, or to some few in his immediate confidence. That payment, therefore, to be distributed among some forty odd men, was as if Mr. Waring had come at any time to Poole, having no doubt in his mind of the possibility of becoming a candidate; or, putting it farther, intending to become a candidate, and that he had gone out and given this sum, which was very little, in order to obtain something like general popularity. I don't say that this is a desirable system; I should like to see the whole election system changed; I should like to see the term candidate abolished if I could, and that members of Parliament should be elected, not by their own seeking, but, if possible, by the voice of the constituency, untrammelled by any unfair influences whatever. But, however, it is no use talking of a thing, which, if it come, will come at a distant day. Such has not been the system in this country for a long time past, and will not be for a long time to come. It is a thing which, in the present state of affairs, one can hardly expect. [His Lordship referred to several allegations which he found unsupported, and proceeded.] Now I come to two cases which present a very different aspect; one is the case of Mr. Aldridge with regard to four women, and the other is the case of treating. The treating is to be looked at in two different aspects—by the sitting member and by election partisans. As regards the first case, that of Mr. Aldridge, I do not know that I ever felt a greater amount of anxiety to wish to decide rightly than in that case. On the one hand he is a gentleman who appears to have borne the position of a highly respectable solicitor in this town, and he is charged with making certain promises for the purposes of the election. Against him several witnesses are called, substantially to support a case—that to four different women he has made or hinted a promise of payment of money or money's worth to their husbands if they would vote. They appear to be people against whose

character there is no imputation. They are Mrs. Stokes, Mrs. Mathews, Mrs. Russell, and Mrs. Morris. It is not because there are four to one—because we cannot assume it to be true, simply on account of the number of witnesses—but they all say something of the same sort, that Mr. Aldridge came and canvassed their husband's vote and held out promises, either of payment of rates, a new dress, relief from difficulties, or a supply of beer, and undoubtedly, if their evidence was true, tried to tempt them by these promises. I have looked at the matter in every possible light, and from many years' practice at the Bar, and many years as a judge, I am accustomed to consider evidence, and I have come with pain to the conclusion that I believe the evidence against Mr. Aldridge. I believe Mrs. Morris implicitly, but I might have a doubt of Mrs. Mathews and Mrs. Russell, especially as the latter spoke of her husband having voted when he had no vote, and introduced the word "privately." I think it far from improbable that the word "privately" was more an expression of her own opinion, which she interpolated into the conversation. There can be very little doubt of the import of the word, and had she stood alone it might have been one of the cases upon which I am not satisfied. With regard to Mrs. Mathews she gave her evidence with great apparent truthfulness. She was not, as far as I could see, in any way shaken in cross-examination, and she was to some extent confirmed by her husband, who gave his evidence with very great fairness. Against her there is the alleged conversation which she had with Cartridge, who appeared to be a respectable witness. Some remark was also made respecting her dress, which had been bought since, but I do not think this would be sufficient to invalidate her testimony. There was no spite, no animosity, no probability of her creating a statement and coming here and perjuring herself for the small benefit of unseating Mr. Waring, even if she knew that result would follow. These and other persons have been got at by some of the agents of the petitioners, and I have no doubt there has been great activity on both sides—even the time between the sittings of the court is occupied in getting up fresh evidence almost *sine fine*. Although there is nothing to show improper conduct, it is extremely probable that there has been great activity on both sides, for we know that active steps have been taken to get up evidence for Mr. Aldridge. As to Mrs. Stokes and her family, and Mrs. Morris, I see nothing with regard to Mrs. Stokes which is invalidated, except by the contradiction of Mr. Aldridge and some small collateral matter, of some glasses of water by Mr. Harker. No doubt but she has some morbid state of mind as well as body, and she thinks, with justice or not, that she has been hardly used; that her friends have deserted her, and that she is allowed to lie on a bed of sickness. She is in a morbid, and possibly bitter frame of mind; but there is no evidence that she has been suborned to tell a most wicked and abominable falsehood. Looking at her demeanour in court, and at her long cross-examination in this court and afterwards, I cannot tell of anything against her character. She admits that when a young girl she used to tell fortunes by looking at the bottom of a tencup or something of that sort, or with a pack of cards that cost a penny; but it is too much to say that she is a fortune-teller on that

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account. Not only must it be imputed to her, but then came her two daughters and husband. I don't think the husband was a satisfactory witness, but of the two daughters I thought differently. It is true the first one made a mistake as to the conversation, and I watched her deportment before I asked her as to what her mother said about being dead, and I could not detect anything unvarnished, as she corrected herself in the most natural way. Then came a young girl, about 13, I believe, and she gave her evidence very well. It is often said young children are the best witnesses, as their minds have not become tampered with or corrupted. Mrs. Stokes, if her evidence was false, must have been actuated by the smallest conceivable motive, amounting to this, that Mr. Aldridge's mother had been kind to her, he had not continued the kindness after her death, and by this she must be supposed to have invented a perfectly gratuitous falsehood and suborned her daughters to come and support it. I cannot see anything to cause me to put so harsh and improbable a construction upon it. Mrs. Morris gave her evidence with perfect straightforwardness, unless she was an actress, and took a part such as none that adorn the stage could have assumed. She was an unwilling witness; she answered the first question asked by Mr. Giffard in a way antagonistic to him. She told her story simply, straightforwardly, and with regret. She states that Mr. Aldridge made an absolute promise to her, and her statement was truthful and natural, so that even Serjeant Ballantine, who is too skilful an advocate to make false points, could not but admit that she gave her evidence very well indeed. One could hardly expect that a woman would come and commit downright perjury for the purpose of injuring a man against whom she could have no reason to show any animosity. It may be said she was got at and bribed, but I cannot enter into these matters. I must take the evidence as it comes, and I see not the slightest reason for imputing to her the slightest mistake. As to the contradictions, Mr. Cox recollects as much of the visit as that Mr. Aldridge did not take her privately away. It is a most singular thing that when people are moving about serving beer, he should recollect this circumstance so accurately, while he cannot remember anything else that took place that day, and said the house was distant three miles from the London Hotel, whilst the cabman, who was one of a class who do not usually underrate distances, said it was only one mile. The cabman and Mowlem also differed very materially one from the other in their evidence. Then comes an awkward matter. Mr. Aldridge, who could not have any more knowledge than that Samuel Morris was scheduled as being bribed, before the petition is heard goes to the cabman and actually asks him questions which apply entirely to the evidence which Mrs. Morris gives. It is a most formidable matter, and I cannot reconcile it to my mind, but that it makes against Mr. Aldridge. [His Lordship here read a portion of Slade's evidence, relating to the interview on Saturday week.] It must be remembered that in this case we are dealing with a gentleman of considerable practice as an attorney, and who may ask certain questions one would not expect to be asked by an ignorant and illiterate person. One would have expected him to show how this came to his knowledge and why this inquiry was made of the

cabman by anticipation before he heard Mrs. Morris's statement. Taking all these facts into consideration I come with great pain to the conclusion that I believe substantially the story of the two witnesses—Mrs. Morris and Slade, but I believe one of them would be enough. This therefore amounts to a corrupt promise, which is a serious and formidable thing. It is not the hasty expression of a person who was a stranger to the candidate, but it is said by one of the firm of solicitors employed by Mr. Waring. They are employed in 1868; bills are made out in their name, Mr. Aldridge has canvass books, he is a solicitor, and ought to know what he is about. I cannot go beyond the case before me; but if it be found that four women unconnected with each other—not concerned in any conspiracy—and against whom there is not a shadow of evidence that they concocted the scheme, and a similar attempt was made to get the husband's vote by playing upon the influence of the wife over the husband, it is a certain evidence of probability which would be accepted both in civil and criminal cases. It looks like a systematic mode of canvassing; for aught I know there may be other women, not willing to come forward, or not able to be got at. It is a most serious thing that a gentleman of this description should get at the votes of husbands by speaking privately to their wives. It is not a matter in which some zealous, unwary agent of the candidate is concerned; in this case he is the agent of the candidate and it goes to the root of electoral corruption. If the case stood alone on the evidence of the four women I should be bound to declare Mr. Waring's election not good. The case of treating is substantially this. [His Lordship read the words of sect. 4, 17 & 18 Vict. c. 102.] The facts broadly stated are these: In the previous election in 1868 large sums of money were not returned in the election accounts, but paid for drink, and perhaps some was for refreshment, which was supplied before or after the election, or both. The sum is 150*l.* or 200*l.*, most probably it is nearer 200*l.*, but I will call it about 175*l.* Here was a matter quite illegal, which the election agents should have returned, otherwise all the objects of the return are avoided. If the election agent makes a return of the expenses, and he excludes a large sum, I see no object in returning expenses. If the agent can return 479*l.* as expenses, and afterwards, by his own admission, spends 1360*l.* which makes altogether three times the original amount, the return of election expenses is an idle farce. It might be said that Mr. Harker did not know that claims were going to be made, and he paid these bills from a sense of honour, but at the next election he should have taken the greatest pains, in justice to Mr. Waring himself, to prevent any possibility of the recurrence of such a state of things; but I cannot find that there was anything in the shape of a public or general warning, or that anything was done to prevent it. It seems to have crept out that there was a promise given to Mrs. Morris of free beer after the election, and the publicans became advised of what they considered to be the law, that although you may not give away drink during the election you may give away as much as you like after the election. It was a curious coincidence that they should all have dated their bills the day after the election. Some of

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them sent in bills for beer, which, if consumed in one or two days, is something extraordinary, and it is impossible, without a high degree of credulity, to believe it was a straightforward matter. There is the statement of Mrs. Morris; and the fact, which is not contradicted, that when the bell-ringers made a claim for work done during the election, Mr. Harker said, "Perhaps I shall be able to do something on the procession day." This was avowedly for services rendered during the election. I only refer to this as showing the system of deferred payments. Then there is the case of Mr. Western. It is admitted by Serjeant Ballantine that what Mr. Western ordered would be paid. He went as a deputation to Mr. Waring, and canvassed actually for him, giving the names of people to be canvassed, and acting as an avowed partisan for Mr. Waring. He ordered a very large quantity of beer immediately the election was over, and no doubt a genuine spontaneous festival given without any preconceived idea may not be payment for voting. But I must view the facts of each case and see whether there was not a tolerably clear understanding that these people were to have a very considerable amount of beer to be given away after the election; but that they would not scrutinise too closely, provided they sent in their bills after the election day. It is a curious thing that my brother Lush, in his judgment at Brecon, anticipated this very case. He there says: "The treating which the Act calls corrupt must be connected with something which preceded the election—must be the complement of something done or existing before, calculated to influence the voter while the vote lies in his power; an invitation given before to an entertainment to take place afterwards, or even a promise to invite, or a practice of giving entertainments after an election, which it may be supposed the voters would calculate on most, if followed up by the treat afterwards, give it the character of corrupt treating." Here there has been an antecedent claim by persons for beer after the election, and as far as one can judge there has been obviously an expectation in the minds of publicans in this borough—at least those who supported Mr. Waring—that there would be large bills allowed and paid if they sent them in afterwards; and when they are sent in to Mr. Harker he does not return or repudiate them, but keeps them without a word of remonstrance. In one case we have an amount of 20*l.* from a man who only pays 18*l.* a year rent. Can any reasonable person doubt that after the petition was ended and the member declared to have been duly elected these bills would have been paid?—and so the matter would have gone on, *toties quoties*, at every election. I have no right to assume what the other side have done, and, if I did, it would not alter my conclusion, but here we have publicans supplying beer without any check on their accounts. Mr. Western does not appear to have taken the slightest means to find out what each did give away in beer. There was virtually no purchase by Mr. Western, there was no dealing as in the ordinary affairs of life, but the 5*l.* was left to their discretion. Can it be said that this large extent of treating was all a sudden, spontaneous case of rejoicing, such as that of the *Brecon* case. It would be impossible I should think for any rational man to come to that conclusion. The consequence would be that at every election, at all events as

soon as ever the polling day was over, an enormous amount of beer would be distributed, and publicans would never be asked as to how much had been given away. It was said that there was no great drunkenness on the election or procession day; but it may be that a large portion of this beer was given away during the progress of the election, and this would make less drunkenness on any particular day. But that is a remote inference, and is not a matter that a judge could decide; the obvious state of the whole matter was that there was expected, and I think I may say it was an understanding, that a large sum of money would be paid for beer, and that a large amount of beer was ordered by Mr. Western immediately after the election; and so it is impossible to say that this was spontaneous. This is a far more important matter, in consequence of the extension of the suffrage. My brother Bramwell, everything that falls from whom is marked by strong sense, has spoken of treating as having become a far more serious thing at the present time. With men well to do in the world—such voters as the Reform Bill gave us—it would not be likely that a dinner or a treat would convert a great number of voters; but when you come to the poor man, to whom a few shillings or a day's beer drinking is one of the great objects of his life, who does not look to the past or to the future; who has not received that development of the faculties which enables him to look far into future times, small sums of money or beer may become enough to turn his vote. Therefore treating becomes far more serious than before the Representation of the People Act. The Legislature has thought fit to confer the franchise upon the people, many of whom are obviously devoid of education. The statute shows that there are provisions made for illiterate men to vote, and everything should be done to give these provisions force. The Legislature thinks that their voice is such that it should have a share in making the laws of the country, and it becomes most important that the franchise should be guarded, or the fact of elections being decided by the quantity of beer given to these illiterate people, becomes a very material question. By these considerations I am led reluctantly, as in the other case—though not with the same pain, as it is not a question of deciding between conflicting evidence—to the conclusion that it is clear there was treating and sufficiently connected with the treating at the previous election. Agreeing entirely with what my brother Lush has said, I hold that it was treating that was corrupt, namely, tending to produce an influence upon the mind of the voters, or offering them a reward for having voted; either by some understanding before, or otherwise there was sufficient treating to taint the election and make it void. I must look at the whole facts to see whether there has been this treating by agents who stand as such in the eye of the law. I have no doubt that Mr. Aldridge and Mr. Western stand as agents; there is quite enough to bring that home to them. As to the question of treating that went on—the lavish treating, even assuming it to be done by publicans themselves—I should be inclined to think that would be enough to avoid the election. It is not necessary that I should decide upon that. [Having disposed of some minor matters his Lordship concluded:] I have some degree of reluctance and regret in one case, and a good deal of

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pain in the other, in coming to the conclusion I have arrived at, but I must act according to my own convictions, and I declare Mr. Waring not duly elected. Strictly speaking, a judge should not have feelings of regret or joy, but one cannot help feeling sorry that a gentleman who himself has not been guilty when a candidate of the actual practices before us, but is extremely liberal and leaves matters to be paid for by other people, should be deprived of his seat. I am convinced, however, according to law, that this case is made out to my reasonable satisfaction. There is but another matter which I would advert to—the question of costs. I am by no means satisfied of the mode in which the case was brought forward. The second petition, I find, was only filed to meet some possible defect of the first, and the other one is lodged by a person who cannot sign his name, and another who could only scrawl it, and is evidently very uneducated. What meaning is there in this but that those who were interested put forward persons who cannot pay the costs beyond the amount of money which was in all probability deposited for them. On the other hand, if they succeeded they would get all the costs out of the pocket of the person they defeated. Generally, it is my practice to give costs to the successful party, but I shall not do so now. If a defeated candidate comes forward in a straightforward way and succeeds, as a general rule I should allow the costs to follow the event; but if persons are put forward who may receive but cannot pay costs it is not right that they should recover them; and I have no evidence that these men came forward from purely constitutional reasons to purify the electoral franchise of Poole, and they have not been put into the box after a challenge by Serjeant Ballantine. I do not approve of this petition, and of the mode by which it was effected; therefore, taking all the circumstances into consideration, and seeing that a great many of the charges have failed, and that this was, to some extent, a fishing petition, each party must pay their own costs.

Attorneys for the petitioners, *C. C. Ellis and Co.*

Attorneys for the respondent, *Cope, Rose, and Pearson.*

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(Before MELLOR, J.)

Tuesday, May 26, 1874.

Parliamentary election—Violating provisions of the Ballot Act—Effect on election—Bribery—Providing railway passes—Conditional promise—Illegal act—Penalty—Systematic and designed violation of the law—Validity of return—Costs—Respondent ordered to pay, although the election held valid.

A violation of the provisions of the Ballot Act which entails a penalty does not necessarily affect the validity of the return.

By sect. 4 of the Ballot Act it is provided that every agent in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorised by law, before the poll is closed, to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper, and no person whosoever shall interfere with or attempt to interfere with a voter

when marking his vote, or otherwise attempt to obtain in the polling station information as to the candidate for whom any voter in such station is about to vote or has voted, or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote or has voted. Every person contravening the provisions of this section is liable on conviction to imprisonment.

At the election the personation agents of the respondent adopted a system whereby the way in which voters voted was ascertained, and this information was communicated to the committee rooms.

Held, that although this was a violation of the Ballot Act, both in its spirit and letter, and rendered the personation agents liable to punishment, it did not affect the validity of the election.

An agent of the respondent immediately previous to the day of polling, addressed a letter to voters enclosing a railway pass; the letter was dated from the committee rooms of the respondent and his colleague, and stated, "We enclose you a railway pass, on presenting which at the station named, you will be provided with a railway ticket to convey you to Bolton and back again." The letter concluded, "We trust you may be able to make it convenient to come over and record your vote for Messrs. Cross (the respondent), and Knollys, the Liberal candidates."

Held, that the letter did not contain a conditional promise, and did not, therefore, amount to bribery. Cooper v. Slade (27 L. J. 451, Q. B.), discussed and applied.

By 21 & 22 Vict. c. 87, s. 1, conveyances may be provided for voters in county elections, but the giving of money or any valuable consideration to a voter for or in respect of his travelling expenses, is made illegal. And by sect. 36 of the Representation of the People Act 1867 (30 & 31 Vict. c. 102), the payment of expenses for carrying voters to the poll in boroughs is made an illegal payment within the meaning of the Corrupt Practices Prevention Act 1854.

Held that these sections do not make the payment of travelling expenses bribery, and consequently do not affect the principle established by Cooper v. Slade.

Semble, a systematic and designed violation by the agents of the candidates of the Acts prohibiting the conveyance of voters to the poll, and the payment of travelling expenses, would not avoid an election. Opinion of Martin, B., in the Salford case (20 L. T. Rep. N. S. 120), dissented from.

The two main illegalities in the case, namely, the conduct of the personation agents, and the issuing of the circulars inclosing railway passes, having invited a petition:

Held that the respondent, notwithstanding his election was declared valid, must pay the petitioners' costs of that part of the case.

The costs relating to the other charges, which also failed, were directed to be paid by the petitioners. This was a petition against the return of Mr. Cross, the Liberal member for Bolton. The charges comprised an alleged violation of the Ballot Act by the personation agents of the respondent, and bribery by means of railway passes and otherwise.

The petition was supported by Herschell, Q.C., Leresche, and J. B. Edge.

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The counsel for the respondent were *Charles Russell, Q.C., and Edwards.*

Herschell, in opening the case which he proposed to prove, said the petition alleged that the return of Mr. Cross was procured by a variety of illegal acts done by him and on his behalf by his agents, which would void the election. The candidates at the election were in the Conservative interest, Mr. Hick, who polled 5987, and Mr. Gray, who polled 5650 votes; in the Liberal interest, Mr. Cross, who polled 5782 votes, and Mr. Knollys who polled 5440. The number of voters on the register was 12,595, and of these 11,565 voted. The Ballot Act distinctly forbids the giving of information as to how voters were voting, or as to the name of any voter applying for a ballot paper, by any person in attendance at the polling booth, and persons thus offending were liable to imprisonment. At this election the personation agents of the Liberal candidates had a copy of the register, and the agents had under each voter's name either a blue line or a red line, according as he was believed to be Liberal or Conservative, and alongside the name of the voter there was gummed in a slip of paper containing a number upon it. As soon as the Liberal voter had voted, this slip was torn off by the agent, who at intervals went out of the booth on some excuse and handed the slips to persons outside, who took them to the committee-room; or people went into the booth under the pretence of supplying the agents with coffee. Between ten and eleven o'clock they went into one booth three or four times to supply the agent with coffee, and took the slips of paper away with them. At the committee-room there were books corresponding with those supplied to the agents, and in this way it was ascertained who had voted. The personation agents were bound to take a declaration of secrecy, and by acting in the manner stated had violated the 4th section of the Act. The Mayor, on visiting the booths early in the morning, had his suspicions aroused, and he went to the central committee-room and remonstrated against what was being done. He was told that steps should be taken to put a stop to it, but, whether any steps were taken or not, the practice went on long afterwards, and at many of the polling booths the greater part or the whole of the day. It was obvious that this would not be done without an object, and he contended that it was an endeavour by a violation of the Act of Parliament to gain an unfair and undue advantage for the Liberal candidates over their opponents. It would be a great assistance to them in fetching up voters to know who had voted, and it would enable them, finding at a certain hour that a person had not voted, to bring certain influence to bear upon him to induce him to vote. There were a great number of voters, in different parts of the county, in such circumstances of life that they would not pay the expenses of going to vote, and railway passes were sent to them wholesale. Upwards of 100 passes were sent out—he believed 107—and upwards of 60 of them were used. Some of the voters came from Crewe, Preston, Warrington, Huddersfield, Liverpool, Carlisle, and others from places near Bolton. The agents of the candidates resolved, in violation of the law, to pay for the conveyance of these out-voters to the poll; it was not done carelessly or incidentally by an agent, but as a system.

His contention was that this was a matter which gave an unfair advantage to one side, and prevented the consent of the constituency being fairly obtained. The next question was whether in reality the sending out of these passes was not bribery. The voters, on reading the papers sent them, and seeing an invitation to call at the committee room, might very well think that something more than the payment of the railway fare was intended. It was a matter which was calculated to induce persons who would not otherwise have done so to go and vote. He was happy to say, on behalf of the petitioner, that he did not propose to make any charges against the respondent or his agents of bribery or of treating beyond such bribery as he had called attention to. The questions which his Lordship would have to determine would be—1, the question of law with reference to the effect upon the election of the breach of the Ballot Act; 2, the effect upon the election of the violation of the law with respect to the bringing of voters to the poll from a distance, apart from the question of whether it was bribery; 3, whether bribery was established; and 4, whether any or all the promises to pay expenses, in addition to the passes, were established.

The effect of the evidence and the arguments of counsel are fully stated in the following judgment.

MELLOR, J.—This case has certainly been presented to me and argued on both sides with considerable ability and with very great propriety. I am bound to say that the arguments which have been addressed to me have been *ad rem*, and have afforded me considerable confidence in the decision to which I have arrived, and which I am about to deliver.

With regard to those cases which I may call the cases of individuals who were specifically named by Mr. Herschell in his opening, and one other which I think was supplemented, there is no doubt that Mr. Leresche very prudently, and certainly he lost nothing by doing so, gave up the maintenance of those cases as cases which had failed. They failed, as it appeared to me, both as regards the *corpus delicti* itself, and entirely failed as to any proof of agency; therefore, with regard to those cases I say no more: they fail from their inherent weakness.

But I agree that the other two points are points of no inconsiderable importance. There is no doubt that the Legislature, when it passed the Ballot Act, did intend that that should be a perfectly secret mode of voting, so far as any instrumentality or machinery which it could provide could make it so. It was new in English law; it was new in the law of elections. Nothing of the kind had existed before; therefore, when the Legislature for the first time enacted that the voting should take place by ballot, and prescribed in very careful language and terms, as far as they could, the precise machinery by which it should be carried into effect, they did intend that that should be an operative part of the Act of Parliament, and that secrecy should be preserved as far as it was possible. But when the Legislature was for the first time creating the machinery of voting by ballot, and there was no then existing machinery which this could supplement, when this was entirely new in its principle, and entirely new in its application, it was for the Legislature to provide the safeguards by which that secrecy should

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be protected and maintained; and if the Legislature have failed in doing that, the misfortune may be the misfortune of the public; but the fault, at all events, lies at the door of the Legislature.

Now, I am satisfied upon the construction of that Act of Parliament that a deliberate violation of the provision with regard to secrecy was attempted to be effected in this borough. I am satisfied that the persons who placed those tickets upon the register, which were seen by the mayor to be stealthily put into the pocket of the personation agent, and conveyed by him manifestly to some persons outside, committed a violation of the statutory declaration which they had made, and committed an offence within the meaning of the provisions of the Ballot Act.

But that is the only protection which the Legislature have provided; they undoubtedly thought that that would be abundantly sufficient to secure the secrecy of the election. If it has failed, it is because it is not possible for any machinery to be invented—at all events, at one and the same time—which shall secure most perfectly the object which the Legislature had in view.

There is almost always a door left open to persons who are willing, as Mr. Leresche has said very pertinently, to run the risk of undergoing any amount of punishment or any amount of penalty, provided they can only gain a benefit in the election. As a rule, I do not think that will happen, and I do not think it would have happened here if the parties themselves had thoroughly understood the consequences which were likely to follow from it. However it was deliberately done, that is clear; because, when Mr. Winder [the respondent's election agent] found that it was proposed to be done, he remonstrated against it and protested, which, under the exigencies of the moment, was probably all he could do, warning them that it was contrary to the provisions of the Ballot Act, and therefore placing them in the condition of transgressing the law intentionally. But, as it seems to me, no foundation for attacking the seat can arise from the act of the personation agent, or any other officer connected with an election. A punishment is specified by the Legislature. It must be found within the four corners of the Act of Parliament, and I have no power, neither has the common law any power to supplement any additional penalty upon either the persons who transgress the law, or the persons for whose sake or in whose favour such an act may be done, although it may be done by their agents; therefore, in point of law, it does not affect the seat, as it appears to me.

Upon that part of the case I entirely concur with what was said by Mr. Baron Martin in his evidence before the Committee of Parliament upon Parliamentary and Municipal Elections, when he was describing what the result would be of a breach of the law in answer to a question which was put by Sir George Grey: "Do you mean if it was proved that a candidate had committed some acts which were illegal and subjected him on conviction to a penalty" (it is "a candidate"—and I agree that we must read it in the same light in this case as if it had been a candidate—assuming it was one of those things which come within the general law of agency), "the judge could take no notice of it unless it was an act which vacates the seat?" In answer to which Mr. Baron Martin says, "I think, certainly, that the mere doing of an act which the

Act of Parliament means to be subject to a penalty, but does not declare to affect the seat, could not by possibility affect the seat—it would be contrary to the Act of Parliament so to hold."

Now, that is the very distinct evidence of that most learned and able judge, Baron Martin, whose disposition, as the disposition of everybody who tries to look straight into things would be, is to give effect, as far as he possibly can, to the provisions of any Act of Parliament; and I take it to be the duty of a judge to take care that he does not fritter away the meaning of Acts of Parliament by any subtle construction, but to give a bold, but at the same time a cautious decision, which shall further, rather than defeat, the object of any Act of Parliament of this character which he has to construe.

But I am quite satisfied, upon the fullest consideration which I have been able to give to this case, that there is nothing in the act, however it may affect individuals, which can affect the seat. I quite grant that it is no great satisfaction to those whose interests may be in some decree affected by acts of this kind to be told that they can prosecute the actors if they like. Anything more odious, or anything more objectionable than throwing it upon private prosecutors to take action in these matters and prosecute the parties who are guilty, I cannot conceive. Nobody who ever hoped to sit as a candidate for a large borough like Bolton, or any other large borough, would act in that way. In the minds of the great majority of people (and people generally act upon grounds which are not strictly founded upon reasons), they would not see an act of pure patriotism in a prosecution of that description—they would regard it in all probability as a vindictive act, and it would have the effect of throwing the greatest odium upon those who should institute any such prosecution. However, that cannot affect the construction which, in my judgment, I must put upon Acts of Parliament, and upon acts which were proved to have been committed upon that occasion. I take this opportunity of saying that I think the mayor, as returning officer, did that which he was bound to do. I think he did the proper thing in the right manner, and I think that nothing could be more correct than his conduct in that respect. It is the duty of the returning officer, if he sees any improper act taking place by the personation agent or any person who is admitted for special purposes to the polling booth, to see that he does not take advantage of his position to violate the law, and therefore he was perfectly justified in what he said and did upon that occasion.

Then comes another branch of the case, as to which I admit that the opening by Mr. Herschell did very much affect my mind. This involves two questions—first of all, did it amount to bribery? Because if it did, the election is a void election. If it did not, was it an act and an illegal act, done, as Mr. Herschell opened it, systematically and intentionally with a view to evade and violate the law, the parties being perfectly indifferent as to its legality, or otherwise, provided that it could only give assistance to the party on whose behalf it was done.

Now the first question is, was it bribery? Because I agree that if it was, there is an end of the case. If it could be brought within the doctrine as laid down by the House of Lords in the case of *Cooper v. Slade* it would be bribery, and would avoid the

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election *ipso facto*. But we must consider what the question of law there was. It was considered a very hard decision at the time. It was a decision by which the House of Lords, upon the opinion of the majority of the judges, undoubtedly did reverse the judgment of the Court of Exchequer Chamber. Although Baron Alderson laid down the law most distinctly as it was afterwards adopted by the House of Lords, in considering what would amount to bribery and what would not; still all the judges in the Court of Exchequer Chamber held upon a bill of exceptions that there was not evidence of any such conduct as to amount to bribery. Now, as regards the House of Lords, although judges of greater eminence could hardly be than those who had given an opinion in the Court of Exchequer Chamber, still, as we all know, hitherto there has been an appeal from the decisions of the Court of Exchequer Chamber in matters arising out of actions at law, and this was an action for penalties for violating the Act of Parliament by bribery, and therefore there lay this appeal to the House of Lords. The judges being summoned in the usual manner to assist the House of Lords, every judge, upon the evidence stated in the bill of exceptions, with one exception—and the exception of a very distinguished judge, namely, my brother Bramwell, who had given judgment in the Court of Exchequer Chamber, and who maintained the opinion which he had stated in the Court of Exchequer Chamber,—came to the conclusion that inasmuch as it amounted to evidence of a conditional contract, namely, to the effect that "If you will come and vote at the Cambridge election for Lord Maidstone and Mr. Slade your expenses will be paid;" therefore the person to whom that letter was addressed could not have brought an action or maintained any case against Mr. Slade or Lord Maidstone unless he had voted. He was there invited to come at his own expense; that is to say, to incur the outlay of coming to Cambridge to vote for Lord Maidstone and Mr. Slade, upon the assurance that his expenses in travelling would be paid—those expenses in this particular case amounting to the very moderate sum of 8s. 6d. But those great judges and the House of Lords, all held, that notwithstanding the insignificance of the amount, if the contract was a conditional contract as they held it was—"If you will come and vote for Lord Maidstone and Mr. Slade"—that was bribery; and if this case is like that, and the *ratio decidendi* of that case applies to this, this must have the same effect; because, being an act of bribery, it comes within the 2nd section of the Corrupt Practices Act, in which there is a very elaborate definition of what shall amount to bribery; and therefore, being bribery, it would upset the election.

Now let us see what the difference here is. The letter in this case, although I think it was a most unwise and most foolish letter to write, and upon the reading of it by Mr. Herschell, after reading the letter in *Cooper v. Slade*, it did appear to me that if it were a question for a jury, a jury would be very apt to find that that was the meaning of the letter; but that is a question of construction for the court. It is to be found in the four corners of this instrument, and therefore it is not a question upon which a jury would have to decide—who take rather larger liberties, and not unwisely or improperly, it being one of the most valuable reasons, probably, why a jury

exists, they take perhaps different and larger views upon such matters than a court of law does—but as a court of law I must consider this document. It was said that the author of this circular was Mr. Cordingley, the agent, for whose action the sitting member is responsible, although he knew no more about it than any man in London who could be named. It seems that Mr. Cross came into the contest at the earnest request of the Liberal party, who finding that they could not get two other gentlemen, then in their extremity applied to Mr. Cross. I have not the pleasure of knowing Mr. Cross, or any parties connected with this matter, but it is said that he is a gentleman of very high consideration and respectability, and very much esteemed in the town; but he came into it as a simple member of the Liberal party, having subscribed his 50*l.* towards the expenses of the contest, not at the time dreaming of becoming a candidate himself, but he came into the contest and was returned. I agree that he had no more intention or notion of doing so originally than any human being could have; yet finding the committee existing of which he was a member, and no fresh committee being appointed, and having adopted Mr. Hall and Mr. Winder as his agents, he became responsible necessarily for the acts which were done by those who were the agents of the committee at that time, and who then became his agents. Therefore if this letter and what took place upon it amounted to bribery, Mr. Cross must be unseated. But I think it does not. I think this is not a conditional promise at all. It was as I have said, an injudicious thing, and a very injudicious thing, to do; in an action for penalties it might have put the persons who sent it in peril of being liable to penalties for bribery. But I am called upon to put a construction upon it as a lawyer and a judge. Now the words are these: "Cross and Knollys' committee-room," and so on, giving the address, "Bowker's-road, Bolton, 2nd Feb. 1874. Dear Sir,—Your name being upon the Parliamentary list of voters for this borough, you are entitled to vote at the forthcoming election; we inclose you a railway pass, on presenting which at the station named you will be provided with a railway ticket to convey you to Bolton and back again." Therefore, inclosed in that very circular was a ticket, which undoubtedly the person who received it might have put in the fire. He might have used it, or he might not—he might have done just what he liked with it—all control over that ticket when the order left the office of Mr. Cordingley, or wherever it was, was gone. Mr. Cordingley had then no further control over what took place; a ticket is obtained by presenting the order at the station. If they had ordinary tickets they gave the voter one; if they had not they gave him a pass. That is how it stands so far as it is in any sense a bargain or could be called a bargain. It is a bargain entirely one-sided I put myself in your power; I send you a pass which will take you to Bolton and back again; and then it adds, "We trust you may be able to make it convenient to come over and record your vote in favour of Messrs. Cross and Knollys, the Liberal candidates." Then it states that the poll will take place on such a day, and is signed apparently by Messrs. Hall and Winder. Now, it is clear that those gentlemen never did sign it either of them. I firmly believe the evidence which has been given

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on the part of the respondent by both Mr. Hall and Mr. Winder, that they had no more knowledge of it than I had. It was an act done by Mr. Cordingley, and as soon as Mr. Winder saw it he was struck with the impropriety of it, and stopped the further sending of any of those circulars. But he still, having consulted a book of authority as he supposes, finds, as he supposes, authority for saying that the conveyance of voters to Bolton who were non-resident, was not an offence in point of law, that it might be done with propriety, or at all events that it might be done legally; and upon that it is done. The chairman himself first of all calls attention to it; he says, "Is that legal?" to which Mr. Winder says, "I have not considered the matter, but I will consider it before anything is done;" that is the fair import of the words. He does consider it, and he comes to the conclusion that it may be legally done, and it is done. Now, can that in any sense be said to be a conditional promise? To make it like the case of *Cooper v. Slade* it should be a conditional promise: If you will come down and vote for Cross and Knollys, the Liberal candidates, the expenses of obtaining a railway ticket shall be paid; we shall bear all the expense. That would have brought it, no doubt, within *Cooper v. Slade*, and it would have been an act of bribery. But it appears to me that it was not a bargain of that nature—that the voter was not bound by any other consideration than an honourable one—that is to say, this is sent to me that I may go to the poll. If I were to take advantage of the opportunity afforded by this ticket, not to vote at all, but to go to Bolton on my own business, or to vote upon the other side, I should be doing a shabby thing. That appears to me to be the only obligation, something arising from the honour or good faith by which the voter receiving such a pass should be affected; but it is entirely free from that question, which was the turning question in *Cooper v. Slade*. If a voter had voted for the other candidates, could the liberal candidates have recovered back this pass from him, or the value of it? They could not. He was under no other obligation by accepting that pass than that which his own sense of honour might dictate. He was under no legal obligation whatever, and therefore it was not, in my opinion, within the case of *Cooper v. Slade*. Now I think the law as laid down in *Cooper v. Slade* is the governing law, except so far as it is affected by the two sections to which reference has been made. And now it is very important upon some parts of Mr. Leresche's argument to see what it is that these sections enact. *Cooper v. Slade* having laid down that very hard rule (because it was not pretended that a farthing more was given than the actual expenses) that that was bribery, the suggestion was made by one of the learned lords during the decision that if the Legislature thought their decision a hard one they might interpose. Accordingly the Legislature did interpose. This is the Act of Parliament. By the 21 & 22 Vict. c. 87, s. 1, it is enacted as follows:—"It shall be lawful for the candidate, or his agent by him appointed in writing." There they were careful to provide that it should only be done by the agent appointed in writing, and the object undoubtedly was to guard against abuse. They thought that if it were confined to the agent appointed in writing there would not be the liability to abuse which there might be under other circumstances. Therefore

they made it lawful for the agent appointed in writing to provide conveyance for any voters for the purpose of polling at an election, and not otherwise. That, so far, was intended to interfere to some extent, not, probably, to the extent of directly legislating upon the doctrine of *Cooper v. Slade*; but it was intended to provide without danger to the election for the conveyance of voters. That applied both to county and to borough elections alike—there is no distinction in that section between the voters in counties and the voters in boroughs; and the interpretation which has always been put upon that section (I do not mean judicial interpretations, because I am not sure that it has ever arisen), but the general practice of all persons connected with county elections, and up to the time of the passing of the next Act of Parliament, with borough elections, with regard to out voters, has been to provide them with railway tickets to come up and poll, and to return after they have polled; but so careful was the Legislature to guard against money being given, that they say, "But it shall not be lawful to pay any money or give any valuable consideration to a voter for or in respect of his travelling expenses for such purpose." Therefore, although they allowed the agent appointed in writing to provide the means of conveyance, they would not allow any money or valuable consideration to be paid to a voter in respect of his travelling expenses for such a purpose.

Now this is material with regard to Mr. Leresche's argument upon the question of bribery, because he says it comes within the 2nd section, quite independently of the doctrine in *Cooper v. Slade*; but as an offer of valuable consideration to a voter in respect of his voting. If that is so, it applies both to county and to borough elections. Everyone of those tickets which has been sent to county electors under the words "provide means of conveyance," would be a valuable consideration, the object being to get people to vote; and it would, therefore, if Mr. Leresche is right in his argument, be equally applicable to a borough election as to a county election. Therefore, that would be so strange a construction of the words "valuable consideration" as applied to the other words of the section, that I should only come to that conclusion in case I felt myself coerced by legal considerations to do so. That is the state of the law as it stood up to the time of the Representation of the People Act, therefore the decision in *Cooper v. Slade* remained only affected to the extent to which it was affected by that section which I have read; leaving the conveyance untouched as far as it applied to counties; and I think the Legislature seemed to proceed upon this principle: 'You are going to extend enormously the constituencies of boroughs in England, because you are going to enact that for the future household suffrage shall prevail. That would very likely strike the Legislature as giving probable occasion for an enormous expenditure in conveyances for bringing voters up to the poll, and therefore they determined to make a difference between borough elections and county elections, and I may say originally, when the ambit of the boroughs was formed under the original Reform Act, the distance of seven miles from the borough was appointed for this purpose. It was supposed by the Legislature that people living within seven miles would have no difficulty in coming up to

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vote if they desired to vote, without having any provision made for them by conveyance or otherwise. That was perhaps an inconsiderate opinion of the Legislature at that time. In practice it has been found that persons living at a distance of seven miles did, up to the passing of this Act of Parliament, require to have conveyances provided for them, and it became the practice in a great many boroughs that voters living at a distance of three or four miles would not come without having such conveyance provided for them; but in extending those boroughs it was thought likely that those numbers would be very much increased, therefore what the Legislature did was to say: We will make a distinction in county elections—we did think it right after the decision in *Cooper v. Slade* to permit the agent of the candidate to provide conveyance in the case of voters generally—now we will only allow that to be done in the case of elections in counties—we will not allow it to be done in the case of elections in boroughs." These are the words of the 36th section of the Representation of the People Act: "It shall not be lawful for any candidate, or anyone on his behalf, at any election for any borough, except the several boroughs of East Retford, Shoreham, Cricklade, Much Wenlock, and Aylesbury, to pay any money on account of the conveyance of any voter to the poll, either to the voter himself or to any other person; and if any such candidate, or any person on his behalf, shall pay any money on account of the conveyance of any voter to the poll, such payment shall be deemed to be an illegal payment within the meaning of "The Corrupt Practices Prevention Act 1854." Now, when they refer to the Corrupt Practices Prevention Act 1854, that is an Act of Parliament which defines what bribery shall be. The second section which is most comprehensive, which I believe selected from every existing Act every definition of bribery, enacts what shall be bribery; and it also enacts that certain things which it prohibits shall be illegal payments; and it subjects the person who commits them either to a penalty, or it leaves him to be punished by an indictment at common law for a breach of the section.

Now, it must strike everybody that if the Legislature had intended to enact that this payment for the conveyance of voters should be punished as bribery, nothing would have been easier than for them to have said—"It shall be a corrupt practice, or it shall amount to bribery within the meaning of the Corrupt Practices Prevention Act 1854." They do refer to the Act. They say "It shall be deemed an illegal payment within the meaning of the Corrupt Practices Prevention Act 1854," but, as I say, if they had intended it to be made bribery, nothing would have been easier than for them to have said so. Looking at the Act of Parliament, I should have thought that was intentionally done; that although they were quite prepared to prohibit the conveyance of voters in boroughs, except in the case of persons who had carriages of their own who might give a voter a lift if they chose, and would not allow any money to be paid for it, I can quite understand their not making it bribery, because it does not come within the common notion of bribery as an immoral and corrupt thing. It is a mere statutory notion of bribery—it does not come within any corrupt design—and, therefore, I can quite under-

stand the Legislature being satisfied with enacting that it should be an illegal payment, and also judging from what one collects from the words of the statute, that seems to be historically true. I do not say a judge could act upon historical evidence, even when he found the words clear, yet when I am asked to believe that the words of the Corrupt Practices Prevention Act that this "shall be deemed an illegal payment" should have a more extended meaning than that, then I look at the words to see—Do they compel me to say so? I think not. Do they convey an inference to the contrary? I think they do. One member of Parliament proposed to enact, as an amendment to the Bill, that this should be a corrupt practice within the meaning of the Corrupt Practices Prevention Act 1854. That was negatived by the Legislature; they refused to enact that. Therefore, historically, I am quite satisfied that the construction I am putting upon the statute is the correct construction, although I should not have been influenced to arrive at any other construction by any historical idea of what had taken place while the Bill was in Parliament. That, I think, disposes of the two questions, namely, whether this was bribery by virtue of the statute, and of the questions arising under the Ballot Act.

The Corrupt Practices Act enacts what shall avoid an election. It says bribery, corrupt treating, undue influence, all these things avoid an election. I have already said that the common law, or the common law of Parliament I ought to say, does provide sufficiently for general intimidation, for general bribery, and for general corruption, by saying that quite independently of the act of the candidate or his agent, where the election has been brought about by these means, it shall be avoided *ipso facto*, but there is no such principle which can come in aid of the construction sought by Mr. Leresche to be put upon those two sections.

There remains only one other point which I agree is a serious point, and it is one which was dealt with by my learned brother Martin in the *Salford* case, which is not exactly like this, but is a kindred case, where the payment was for cabs. In that case Baron Martin intimated upon that part of the case that if he found it was done intentionally and wilfully in violation of law, not that he should decide that it would upset the election, but that he should regard it as a case to be considered further by the Court of Common Pleas which is authorised if the judge desires it, to give its opinion upon any point of law which arises in the course of one of these inquiries. But that was not a decision, and I am not sure what would have been the course I should have adopted had the present case come up to the hypothesis of Baron Martin, namely that it was a systematic intentional general violation of the law to a very considerable extent, and was done wilfully and designedly by the agent for whom the candidate was responsible. Whether or not I should have thought it desirable under those circumstances to pause and to obtain the assistance of the Court of Common Pleas, I doubt; because my own opinion is very clear upon the matter and very decided. I agree with the opinion of Mr. Justice Willes which has been over and over again referred to as an opinion very influential in considering these election matters. He was one

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of the most learned and most eminent judges who ever sat in a court of justice. He was a man who applied his mind, not only his great stores of law but his general knowledge of history and of jurisprudence, to the consideration of these questions; and Mr. Justice Willes very decidedly was of opinion that a violation of the Act of Parliament which itself created the offence and provided the penalty, which the Act of Parliament and the Legislature thought was enough, could not avoid an election. It inflicted penal consequences upon the persons who did the acts, but it could not avoid the election. And that is in exact conformity with what is attributed to Martin, B. in his evidence before the Election Committee of Parliament to which I have referred. It bears upon both the cases—it bears upon the case under the Ballot Act—it bears upon the case of the travelling expenses; but I am satisfied that in this case I could not so report. It appears to me that I could not state a case under those circumstances which would come up to the suggestion which Mr. Herschell made, and which really formed the circumstances upon which my brother Martin was disposed to have taken the opinion of the Court of Common Pleas. It appears to me that the statute here very distinctly having given an appropriate penalty, as they supposed, a wilful and intentional violation, I think, would not be sufficient to avoid an election; but in this case, as I have said, I am relieved from raising that question necessarily by the evidence which has been given upon the part of the respondent with regard to this point. This has no relation to the ballot question. The ballot goes upon quite different considerations with regard to that. I think it was intentionally done, and that the agent was liable to punishment. I think here that the payment, if made, would be an illegal payment; and I think the effect of the statute is to provide for this distinction between county and borough elections, that in boroughs you shall not provide for the expenses of voters. Every voter must walk—that is the idea which Martin, B. says the Legislature had in their minds—that every man who will not take the trouble to walk and vote—it does not matter whether he votes or not—is a very unfit depository of the right to vote; but I am clearly of opinion that the circumstances in this case do not enable me to state a case for the opinion of the Court of Common Pleas which would raise the question which Mr. Herschell desired to raise. I must, therefore, decline to state any case, but must act upon my individual responsibility; although, if the facts had been as they were opened by Mr. Herschell, I might have thought it necessary to have reserved this point if it depended on that. I am of opinion that the remedy for an illegal payment must be found within the statute itself—that it has no indirect effect in avoiding an election. I may say that this is an opinion not entertained by myself alone. It was the deliberate opinion of Willes, J.; it is also, I know, the opinion of my brother Bramwell, for when I was communicating with him upon the point of the telegram I took the opportunity of asking his opinion upon this particular point; and in the answer which he gives me, he entirely goes the length of Mr. Justice Willes's opinion and entirely concurs in the view which I have taken of the effect of that section. Therefore, under these circumstances, I have no alternative but to declare that the grounds upon

which the seat has been sought to be impeached, have failed, and, therefore, that the election was a valid election.

But at the same time I must add that if this had been an ordinary case—if one side had been clearly right, and the other side had assailed the seat without any foundation, I should have made the costs follow as a matter of course. As is my invariable practice, unless there is something done by the sitting member or his agent, which involves a petition, I should have dismissed it with costs, but in this case, fully believing as I do that the sitting member himself, Mr. Cross, is as free from blame as I am, or any other person in the room, his agents have done what I consider to be an illegal act—they have violated the plain intention of the Ballot Act. I think again that the incurring a liability for those passes was contrary to the law, and although I acquit the sitting member and his agent in that matter of any intention of violating the law at all (I do not do so in the ballot case—I think that was an intentional violation), but in this case I think it was a mistake in point of law—a mistake which it was not unnatural for Mr. Winder to make, he having been asked a question upon the subject, and referring to a book, upon the authority which he acted. We know it is very often said, "It must be true because it is written in a book." Mr. Winder seems to have acted a little under that impression, and to have acted upon the principle that that book, and even the book which my friend Mr. Edge has given to the world are infallible guides. People must take care that they do not rely upon those books too strongly. With regard to Mr. Hall he seems to have had nothing to do with it, and therefore I ought not to use the word "acquit" with regard to him; but with regard to Mr. Winder, I acquit him of any intentional violation of the law. I think he did what was right in trying to stop these circulars from being sent out, because I think they were improper circulars, although they did not have the bearing which was attributed to them.

Now under these circumstances, as there were two acts undoubtedly done by the agents of the sitting member, which did, as it appears to me invite a petition, that is to say, which might very fairly be considered by the persons who were advising the petitioner as acts which not only were illegal but might avoid the seat, I think, that so far as regards the question of the conduct of the personation agents at the polling booths, and the sending of those papers to the voters, the sitting member must bear his own costs, and that he must not come upon the petitioner for any costs in respect of those two matters. But with regard to those individual cases of bribery, which entirely failed, so far as the costs are applicable to those cases, I think the petitioner must pay them. I do think that as the respondent's agents have certainly by their acts invited a petition to the extent that I have mentioned, therefore the costs should be apportioned accordingly—that is to say, that the sitting member will bear his own costs so far as they refer to the two main illegalities of the case, but that the costs, so far as they refer to those witnesses that I have referred to must be borne by the petitioner, because those cases entirely fail from their own weakness.

Solicitors: for petitioners, *Ramwell and Pennington*; for the respondent, *Hall and Winder*.

H. OF L.]

THE METROPOLITAN BOARD OF WORKS v. MCCARTHY.

[H. OF L.]

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

May 8 and 11, and June 22, 1874.

(Before the LORD CHANCELLOR (Cairns), Lords CHELMSFORD, HATHERLEY, PENZANCE, and O'HAGAN.)

THE METROPOLITAN BOARD OF WORKS v. MCCARTHY.
ERROR FROM THE EXCHEQUER CHAMBER IN ENGLAND.*Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 68—Compensation for lands injuriously affected.**The damage which will support a claim for compensation, under the 68th section of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), must be a physical interference with a right, public or private, which increases the value of the premises apart from any special use to which they may be put, if by such interference they are lessened in value; provided that such right is not merely one enjoyed by the occupier of the premises in common with the public at large, or one personal to himself.**The test to be applied (Lord O'Hagan dubitante on this point), is, whether the act done would be sufficient ground to maintain an action if it were not authorised by the Act of Parliament.**In a case in which the defendant in error (the plaintiff below) was the occupier of premises adjacent to which, and only separated from them by a public highway, was a public draw dock communicating with the River Thames, whereby the premises were rendered more valuable to occupy or to sell, and the plaintiffs in error (defendants below), in constructing the Thames Embankment, under the powers conferred upon them by the Thames Embankment Act 1862, which incorporates the Lands Clauses Consolidation Act 1845, filled up the dock and cut off the defendant's access thereby to the river:**Held (affirming the judgment of the court below), that the defendant's interest in the premises, independent of any use to which he might put them, was injuriously affected within the 68th section of the Lands Clauses Consolidation Act 1845, so as to entitle him to compensation.**Chamberlain v. West End of London, &c., Railway Company (8 L. T. Rep. N. S. 149; 32 L. J., 173, Q.B.), and Beckett v. Midland Railway Company (17 L. T. Rep. N. S. 499; L. Rep. 3 C. P. 82), approved and followed.**Ricket v. Metropolitan Railway Company (16 L. T. Rep. N. S. 542; L. Rep. 2 H. of L. Cas. 175), and Reg. v. The Metropolitan Board of Works (L. Rep. 4 Q.B. 358), distinguished.**This was a proceeding in error on a judgment of the Exchequer Chamber (reported 28 L. T. Rep. N. S. 417; L. Rep. 8 C. P. 191), affirming a judgment of the Court of Common Pleas (reported 26 L. T. Rep. N. S. 772; L. Rep. 7 C. P. 508), on a special case stated in an action brought by the defendant in error against the plaintiffs, to recover the sum of 1900L., being the amount assessed by a jury as compensation due to him, under the provisions of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18). The facts are fully stated in the reports in the courts below.**Hawkins, Q.C. and Philbrick, Q.C., for the plaintiffs in error.**Prentice, Q.C. and Thesiger, Q.C., for the defendant in error, urged the same arguments and**relied on the same authorities as in the courts below. In addition, the following cases were cited**Hammersmith Railway Company v. Brand, 21 L. T. Rep. N. S. 238; L. Rep. 4 H. of L. Cas. 171;**Dobson v. Blackmore, 9 Q. B. 991.**Cur. adv. vult.**June 22.—Their Lordships delivered judgment.*

The LORD CHANCELLOR (Cairns), after going through the facts as set out in the special case, continued: Now, my Lords, in this state of things we have to decide over again the meaning of the words, "injuriously affected," in the 68th section of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), and I propose to accept the test which has been applied here and elsewhere, namely, to consider if the act done would have been actionable if it had not been authorised by the Act of Parliament, without pausing to consider if that test would be quite satisfactory if the question were now raised for the first time; it has been already laid down in many cases, and is convenient. Divesting the present case from the precise description, it amounts to this: the occupier of a tenement had got two highways adjacent to it, the one a street the other a highway by water; the water highway has been taken away, and the highway by land remains. It is impossible to doubt that the destruction of the highway by water is other than a permanent injury to the premises by whomsoever or for whatever purpose they may be occupied. It is analogous to the case of *Beckett v. The Midland Railway Company* (17 L. T. Rep. N. S. 499; L. Rep. 3 C. P. 82), for it makes no difference whether the occupier is deprived of part of one highway, as in that case, or of one of two highways, as in the present case. I do not find fault with what Mr. Thesiger stated in his able argument, that he would rely upon this definition of the right to compensation, and would explain the various cases by laying down that it arises where there is a physical interference with a right public or private which increases the value of the premises, apart from any special use to which they may be put, if by such interference they are lessened in value. The case of *Ricket v. The Metropolitan Railway Company* (16 L. T. Rep. N. S. 542; L. Rep. 2 H. of L. Cas. 175) seems at first sight to be opposed to this view, but it does not really apply to this case at all. In that case there was only a temporary interference with the trade of the plaintiff, and his claim was for the loss of trade, not for the diminution of the value of his property. I therefore submit to your Lordships that the judgment of the Court of Exchequer Chamber is right, and should be affirmed.

LORD CHELMSFORD.—I agree in the opinion which has been expressed by the noble and learned lord on the woolsack, that the judgment should be affirmed. The question to be determined is, whether upon the facts the respondent's interest in the premises has been injuriously affected within the meaning of the 68th section of the Lands Clauses Consolidation Act 1845. The Exchequer Chamber held that the case was governed by that of *Chamberlain v. The West of London, &c., Railway Company* (8 L. T. Rep. N. S. 149; 31 L. J. 201, Q. B.; 32 L. J. 173, Q. B.), and entered into the question as to whether that case was overruled by *Ricket's case* (*ubi sup.*). I should have thought there could have been no doubt in the matter, for in my judgment in the latter case I took pains to distinguish them, and by classing *Chamberlain's*

case with houses and lands injuriously affected, plainly expressed the distinction. In *Rickett's* case, there was no damage to the house, but only a loss of custom. To proceed to the questions before the House—after a series of decisions the law has at length arrived at a settled condition, and it has been finally decided that an injury done to a house, or to the land itself, in which a person has an interest, if it be personal, or affect only his trade or goodwill, even if it might be the ground of an action for damages, will not entitle him to compensation. The learned counsel for the respondent proposed to lay down that where there is a physical interference with any right to which the owner is entitled, apart from any use to which he puts the premises, by which they are diminished in value, he is entitled to compensation. In the case of *The Caledonian Railway Company v. Ogilvy* (2 Macq. 229), a claim was made for the deterioration in value of a residence by reason of the railway crossing the high road near to it by a level crossing with gates, but it was held that the damage sustained did not differ in kind from that to which all the public were subject in respect of their access to the high road in question, but only perhaps in degree. Now in this case has the respondent suffered any injury different from that sustained by the public generally by the interruption of his communication with the draw dock? His premises were thereby more valuable for any use to which they might be put, and have become permanently injured in value, and it is distinct from any injury by which the public are affected. The case is distinguishable from *Reg. v. The Metropolitan Board of Works* (L. Rep. 4 Q. B. 358.), which it somewhat resembles, for in that case it was held that the injury was merely personal, as the right was common to the public, though more often exercised by the plaintiff than by others. This case appears to me to be within the principle of *Beckett's case* (*ubi sup.*), which I think was rightly decided; in fact, it is scarcely distinguishable from it. In that case the access was affected by narrowing the highway; in this case by destroying the dock, which was part of the highway, and so the premises are permanently damaged. The judges of the court below appear to have been needlessly embarrassed by *Rickett's* case, which is quite distinct. I think the judgment of the Exchequer Chamber was right, and ought to be affirmed.

Lord HATHERLEY.—I concur in what has been said by the noble and learned Lords who have addressed the House, but I do not wish to extend the rule which has been laid down. There is a distinction between damage to an individual and damage to the public at large. No public works could be carried out if the whole public were entitled to compensation for damage done in the course of them, and that was not the intention of Parliament. I think the rule is sound that compensation can be recovered where the act done would have been actionable but for the Act of Parliament. I wish to follow *Beckett's case* (*ubi sup.*), and not to go one step beyond it. Suppose the dock had been on the other side of the house to the road, there can be no question that the occupier would have been entitled to compensation within *Beckett's* case, and it can make no difference that they are on the same side. I am willing to adopt Mr. Thesiger's definition, though it seems to be difficult to reconcile all the cases.

Lord PENZANCE.—I am of the same opinion. A rule has been established from which I think it would be disastrous to depart, namely, that the right to compensation in these cases depends upon the right to bring an action but for the Act of Parliament. This interpretation was first acted upon with approbation in *Ogilvy's* case, and it has been consistently adhered to, in spite of the doubts expressed by Lord Westbury in *Rickett's* case, and I hope it always will be adhered to. A man may do just what he pleases on his own land, as long as he does not injure his neighbour; but these same acts may become actionable if done by a third person; and why should we substitute another rule, because they are done for public purposes? The damage must not be personal, but to the land independent of the trade carried on upon it: (*Reg. v. The Metropolitan Board of Works, ubi sup.*). Applying this to the present case, the jury have found that the premises were permanently damaged, independently of any trade carried on by the plaintiff, by the obstruction of his access by water to the River Thames. If it were a private right of way, the remedy would be by action, but it is said that it is a public matter in which the procedure should be by indictment; but see *Ivison v. Moore* (1 Ld. Raym. 486), and *Ashby v. White* (1 Smith's Lead. Cas. 227). The question is, when a highway is obstructed, do the adjacent owners suffer damage beyond the public at large? They surely do. A frontage to a highway is a well-known element of value in a property, so is easy access or proximity to a highway, and if this element is withdrawn, the owner suffers a special damage. If it is asked, where are we to stop? The answer is, whenever a special value attached to premises is permanently destroyed or abridged. This is the view taken in *Chamberlain's* case, and I think the true one.

Lord O'HAGAN.—I also concur. The authorities are conflicting, and not altogether satisfactory, but I am willing to adopt Mr. Thesiger's definition. If the matter were *res integra*, on the facts, it would be difficult to answer the question whether the premises are injuriously affected within the section of the Lands Clauses Consolidation Act, in any way but one. The Act was passed to prevent private selfishness from standing in the way of public improvements, and that works for the common profit might not be carried out to the loss of individuals. The principle applies to damage as well as to land purchased against the will of the owner. If the case were new, I should have doubted if it was within the meaning of the Act to make the right of action the condition of compensation; but rather, as Lord Westbury said in *Rickett's* case, it would appear to me that where there is an injury there should be compensation, and that the Act should not be so narrowed. But it is unnecessary to discuss the point further, for in this case there is no doubt that an action would lie. Public injury is counterbalanced by the public benefit, but particular damage must be compensated: (*Ashby v. White*). Here the plaintiff clearly sustained particular damage of a permanent nature, to a large extent, independent of the use to which he put his premises. It is unreasonable and unjust that he should suffer for the public benefit without being recouped. If the statute did not enlarge his right it did not narrow it. I would not say that the damage must be structural, or to the substance of the premises; if they are lessened in

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value it is an injury as much as structural damage, as Lord Cranworth said in *Ricket's* case. While injury common to the public at large, or personal, or remote, forms no claim; when, as here, it is particular and appreciable, it gives a clear title to compensation: (*Chamberlain's* case, per Erle, C.J.) That case appears to be undistinguishable; or, if anything, this is rather stronger, and it is not overruled by *Ricket's* case, the distinction in which is quite clear, as it was a personal injury.

Decision of the Exchequer Chamber affirmed, and judgment given for the defendant in error.

Attorney for the plaintiffs in error, *W. W. Smith*.

Attorney for the defendant in error, *A. S. Edmunds*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

June 3 and July 6, 1874.

TAYLOR v. GREENHALGH.

Negligence—Damage caused by repairs of highway—Liability of surveyor—5 & 6 Will. 4. c. 50 s. 56.

The carriage of plaintiff, who was driving by night along a highway, was upset by some repairs which were not sufficiently lighted; and this action was brought for the damage against the surveyor appointed by the vestry at a salary. The defendant had, by order of the vestry, contracted with another person to do the work required at so much per yard, the vestry finding materials. The jury found there was negligence in not lighting the road, but that the defendant did not personally interfere in doing the work, or in directing the road to be left in such a condition as it was:

Held, that the defendant was not liable for the damage suffered by the plaintiff, either at common law, or by reason of sect. 56 of 5 & 6 Will. 4. c. 50.

This was an action tried at Manchester on the 30th Nov. 1872, before Mellor, J. A verdict was found for the plaintiff, leave to move being reserved to defendant.

The declaration stated that the defendant, Samuel Greenhalgh, wrongfully and improperly placed and laid upon certain parts of a certain highway, large quantities of earth, stones, rubbish, and materials, and caused the said highway to be raised in the said parts, and thereby to be dangerous to persons driving along the said highway in the dark; and the defendant wrongfully and improperly suffered the said quantities of earth, stones, rubbish, and materials to be and remain upon the said parts of the said highway, and the said parts of the said highway to be raised as aforesaid, during the dark, without any light or means to prevent persons from driving against the same, whereby a certain carriage, in which the plaintiff was then being lawfully driven along the said highway, was driven and struck against the said earth, stones, rubbish, and materials, and the said raised parts of the said highway, and was upset, whereby the plaintiff was thrown out of the said carriage and greatly bruised and injured, and his collar-bone broken; and by reason of his said injuries has been prevented from attending to his

business and employment of a book-keeper, and has lost profits and wages which he otherwise would have derived therefrom, and has been put to and incurred great expense in medical and surgical attendance and otherwise, in endeavouring to get cured of his said injuries.

The first plea was not guilty.

The second plea, that the defendant was, at the time of the alleged grievances, surveyor of highways for the township of Tottington Lower End, and that it then was his (the defendant's) duty, as such surveyor, to repair the highway in the direction mentioned; and that the defendant, as such surveyor, was executing certain necessary repairs in and upon the said highway, and certain parts of the said highway were then being and were necessarily raised for the purpose of such repairs, and the plaintiff by his own negligence and improper conduct, and without any fault of the defendant, drove the said carriage against the said part of the highway so raised as aforesaid, and caused the injuries complained of.

At the trial, it appeared that the action was brought to recover damages in respect of injury caused to the plaintiff by reason of his carriage being upset in consequence of stones and materials having been left upon the turnpike road from Tottington to Bury, in Lancashire. The defendant had been appointed surveyor of highways by the vestry of Tottington Lower End, at a salary of 20l. a year. The vestry had, by resolution, ordered that the part of the road where the accident happened should be raised, and the defendant was ordered to employ men to do it. He contracted with his brother, John Greenhalgh, to do the work at 3½d. per yard, the vestry finding the materials. John Greenhalgh employed and paid his own men, and proceeded with the work. The plaintiff, in driving along the road in the dark, between 9 and 10 p.m., on the 23rd May 1872, came to that part which was being repaired. There was neither light nor fence, or protection. Half of the road had been raised, and the other half was left temporarily at the old level. The difference in level was about a foot, and the plaintiff, with his horse and cart, were upset.

It was contended that there was no liability on the defendant, but Mellor, J., left the case to the jury, who returned a verdict for the plaintiff. They found that there was negligence in not lighting the road, but that the defendant did not personally interfere in doing the work, or in directing the road to be left in such a condition as it was. Leave was given to the defendant to move that the verdict should be set aside and a verdict entered for him on the ground that no personal liability on his part was shown, and a rule nisi was obtained accordingly.

E. G. Williams, Q.C. (with him *The Solicitor-General, Holker, Q.C.*) showed cause, and contended—First, that notwithstanding the second finding of the jury, that the defendant did not personally interfere, the defendant was liable by reason of sect. 56 of 5 & 6 Will. 4. c. 50, which imposes a penalty on the surveyor who causes any heap of stones or other matter to be laid on a highway, and allows it to remain there at night without proper precautions, to the danger of persons passing thereon. The cases, *Couch v. Steel* (3 E. & B. 402), *Atkinson v. Newcastle Waterworks Company* (L. Rep. 6 Ex. 404), were cited, as showing that where a duty is imposed under a

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penalty, a person injured by the breach of the duty can maintain an action. [The court, without hearing counsel on the other side, held that this section did not apply.] Secondly, it was contended that, under the circumstances of the case, the defendant was liable, without reference to the above section.

Pope, Q.C. and John Edwards, supported the rule.

The following were cited and discussed:

Davis v. Curling, 8 Q. B. 236;
Newton v. Ellis, 5 E. & B. 115;
Foreman v. Mayor of Canterbury, L. Rep. 6 Q. B. 214;
Story on Agency, § 453;
Gibson v. Mayor of Preston, 10 B. & S. 942;
McKinnon v. Penson, 9 Ex. 609;
Young v. Davis, 7 H. & N. 760;
Lane v. Colton, 12 Mod. 438;
Manley Smith's Law of Master and Servant;
Stone v. Cartwright, 6 T. R. 411.

Cur. adv. vult.

July 6.—The judgment of the court (Blackburn, Mellor, and Quain, JJ.) was delivered by

BLACKBURN, J.—This was an action tried before Mellor, J., at Manchester. It appears that the defendant was the surveyor of highways, appointed by the vestry at a salary of 20*l.* a year. By a resolution of the committee of management of the vestry, it was ordered that a part of one of the roads, about 150 yards in length, should be raised, and the defendant was ordered to employ men to do it. He accordingly contracted with one John Greenhalgh to do the work at 3*d.* per yard, the vestry finding materials. John Greenhalgh employed and paid his own men, and proceeded to perform the work accordingly. At the time of the accident to the plaintiff one-half of the road had been raised, and the other half was left temporarily at the old level. The difference in level was about a foot. No fence or light, or any other protection was put up to warn persons using the road at night of this difference in level, and the plaintiff driving along fell over with his horse and cart and was injured. The jury found that the defendant did not personally interfere in doing the work, or in directing the road to be left in such condition as it was left. The verdict was entered for the plaintiff, with leave to move, and a rule was obtained accordingly, on the ground that there was no personal liability on the part of the defendant shown. Under the above circumstances we are of opinion that the defendant is not responsible to the plaintiff for the injury caused to him in the manner above-mentioned. The defendant, as surveyor of highways, is but the servant of the inhabitants, on whom the obligation to repair the road lies: (see *Young v. Davis*, 2 H. & C. 197.) It was not proved that the defendant himself was guilty of any negligent act, and it is clear that John Greenhalgh and his men, who actually did the work, were not the servants of the defendant. As surveyor of highways he employed John Greenhalgh, by direction of the committee or vestry, but that does not constitute John Greenhalgh a servant of the defendant so as to make the defendant responsible for the acts of John Greenhalgh or his men: (see *Foreman v. Mayor of Canterbury*, L. Rep. 6 Q. B. 214.) The rule must be made absolute.

Rule absolute.

Attorneys for plaintiff, Shaw and Tremellen, for P. and J. Watson, Bury.

Attorneys for defendant, Clarke, Woodcock, and Ryland, for T. A. and J. Grundy, Manchester.

REG. v. EDMONDS.

Friday, June 12, 1874.

Rating—Valuation list—Amendment by Assessment Committee—Re-deposit of list—Certiorari—Costs—Union Assessment Committee Acts 1862—(25 & 26 Vict. c. 39), ss. 21, 22; Union Assessment Committee Act 1864 (27 & 28 Vict. c. 39), sect. 1.

Where the assessment committee makes an alteration in the valuation list of a parish under sect. 1 of the Union Assessment Committee Act 1864 (27 & 28 Vict. c. 39), it is not necessary to re-deposit the valuation list in accordance with the provisions of sect. 21 of the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103).

The court in discharging a rule to quash contribution orders brought up by certiorari has power to grant costs against the party bringing them up, although no recognisances have been entered into.

In this case a rule nisi had been obtained for a certiorari to bring up, in order to quash them, two contribution orders, made respectively on the 24th Oct. 1873, and 30th Jan. 1874, by the guardians of Newent Union, the former on the churchwardens and overseers of the parish of Newent, and the latter on two of the overseers of the same parish, for the payment of certain sums from the poor rates of the parish of Newent towards the relief of the poor thereof, and towards defraying such proportion of the general expenses of the union as was lawfully chargeable to the said parish. The ground on which it was sought to quash the orders was that they were based on a valuation list, which, after being altered, had not been re-deposited for inspection in accordance with the provisions of sect. 21 of the Union Assessment Act 1862 (25 & 26 Vict. c. 103).

Two alterations of the valuation list had been made, one on 21st March 1873, reducing the rateable value of the Newent Gas Works from 53*l.* to 26*l.* 10*s.*; the other on 31st Oct. 1873, reducing the rateable value of the property occupied by one James Summers from 24*l.* 10*s.* to 20*l.* 12*s.*, and the value of the property occupied by one James Eve, from 1*l.* 10*s.* to 1*l.* These alterations were made under sect. 1 of the Union Assessment Act 1864 (27 & 28 Vict. c. 39), which enacts that before any appeal shall be heard by any special or quarter sessions, against a poor rate made for any parish, contained in any union to which the Union Assessment Act 1862 applies, the appellant shall give twenty-one days' notice, in writing, previous to the special or quarter sessions to which such appeal is to be made, of the intention to appeal, and the grounds thereof, to the assessment committee of such union; provided that after the 1st Aug. next no person shall be empowered to appeal to any session against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deemed just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of and no subsequent list has been transmitted to them, and if they amend the same, shall give notice of such amend-

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ment to the overseers, who shall thereupon alter their then current rate accordingly.

25 & 26 Vict. c. 103, sect. 2, provides that where the committee make any alteration in the valuation of any hereditaments included in, or insert therein any rateable hereditaments omitted from, any such valuation list, they shall cause such valuation list, with such alteration or insertion, to be deposited for inspection in manner hereinbefore provided, concerning the valuation list made by or delivered to the overseers, and shall cause the like notice to be given of such deposit as is required in the case of a valuation list so made or delivered as aforesaid, and shall appoint a day, not less than seven days or more than fourteen days from the re-deposit of such valuation list, for the hearing of any objections to the valuation list as so altered; and when the committee have heard and determined any such objections, or have made such further alterations, insertions, and corrections in such valuation list, they shall approve the same in manner hereinbefore provided.

Act 12 of the Union Assessment Act 1864 (27 & 28 Vict. c. 39) incorporates with that Act the provisions of 25 & 26 Vict. c. 103.

Wills, Q.C. and *Anstie* showed cause against the rule.—The provisions as to re-deposit contained in sect. 21 of 25 and 26 Vict. c. 103 could not have been intended by the Legislature to apply in cases where the alterations made were of such a trivial character as those made in the present case. If the valuation of a single ratepayer is altered, it surely cannot have been the intention of the Legislature that it should thereupon be necessary to re-deposit the list. The provisions of sect. 21, it is submitted, were intended to apply only to cases where a general or sweeping alteration was made in the list, or where a revision took place which amounted practically to the making of a new list. If a new or supplemental list is made, then, no doubt, sect. 21 of 25 & 26 Vict. c. 103 requires that it should be re-deposited for inspection in the manner previously provided concerning the valuation list made by or delivered to the overseers, and that like notice is to be given of the deposit; but sect. 1 of the later Act (27 & 28 Vict. c. 89) makes no mention of any re-deposit in cases where an amendment is made by the assessment committee. That section simply provides that the committee shall hear the objections made to the valuation list, with full power to call for and demand such list, although the same has been approved of and no subsequent list has been transmitted to them; and if they amend the same, they shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly. It was under this section that the alterations made by the assessment committee in the present case were made.

Manisty, Q.C. and *Stone* in support of the rule.—There was confessedly an alteration of the valuation list by the assessment committee, and a re-deposit was consequently necessary. Such re-deposit is necessary wherever an alteration is made in the valuation list. It is impossible to draw the line between the number and character of the alterations necessitating a re-deposit and those not requiring a re-deposit; for the effect of a single alteration, if made in respect of a large property, might be to alter entirely, and in a most important degree, the valuation of the rest of the parish. [COCKBURN, C.J.—The section under which

this alteration was made says nothing about a re-deposit being necessary. And we feel forcibly the argument which has been pressed upon us from the public inconvenience which would result from holding it to be necessary in such a case as the present. Where a ratepayer appealed to quarter sessions against a rate under sect. 22 of the Act of 1862, and the result of the appeal was to amend the rate appealed against, no re-deposit was necessary. Why, then, should it be necessary where the alteration is made after objection before the assessment committee, which is *pro tanto* substituted for the quarter sessions? I think the line to be drawn is this: where the valuation list has not yet been made and approved and delivered to the overseers, an alteration in it is to be followed by re-deposit; but where the list is once approved and delivered to the overseers, if an alteration is subsequently made no re-deposit is necessary.]

COCKBURN, C.J.—For the reasons which I have already stated, and which it is not necessary to recapitulate, I think that this rule should be discharged.

QUAIN, J.—I am of the same opinion. On looking at the Act of 1862 (25 & 26 Vict., c. 103), we find, by sect. 23, that every valuation list, when approved by the committee, shall be delivered to the overseers of the parish to which the same relates, and shall be preserved at the like place, and in the like custody, and be subject to the like resort, &c., as the books are wherein rates and assessments for the relief of the poor for the same parish are entered, &c. Then sect. 24 provides that when and so often as any property not included in the valuation list in force in any parish becomes rateable, or where, by reason of any alteration in the occupation of any property included in such list, such property becomes liable to be rated in parts not mentioned in such list as rateable hereditaments, and separately valued therein, and when and so often as it shall appear to the overseers that any rateable property included in such list has been increased or reduced in value, since the valuation thereof, whether by building, destruction of building, or other alteration in the condition thereof, or otherwise, the overseers of the parish, in each of the cases aforesaid, shall, as soon as conveniently may be, make a supplemental valuation list, showing the annual rateable value according to the judgment of the overseers, of the property so become rateable, or of the party so become liable to be rated separately, or of the property so increased or reduced in value, as the case may be. Now sect. 21 of the same Act provides that where the committee make any alteration in the valuation of any hereditaments included in, or insert therein any rateable hereditament omitted from any such valuation list, they shall cause such valuation list, with such alteration or insertion, to be deposited for inspection in manner hereinbefore provided, concerning the valuation list made by or delivered to the overseers, and shall cause the like notice to be given of such deposit, as is required in the case of a valuation list so made or delivered as aforesaid, and shall appoint a day, not less than seven days, or more than fourteen days from the re-deposit of such valuation list for the hearing of any objections to the valuation list as so altered, &c. And by sect. 22 in case any ratepayer shall appeal to the special sessions or quarter sessions against any poor rate,

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and the result of such appeal shall be to amend the rate appealed against, the assessment committee is to alter the valuation list of the parish in conformity with the decision so made. Now I think that sect. 1 of the Act of 1864 (27 & 28 Vict. c. 39) comes in by way of a proviso to sect. 22 of the former Act. It provides that no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by the assessment committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act, with respect to objections, the committee shall hear with full power to call for and amend such list, although the same has been approved of and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly. This enactment is certainly drawn in rather obscure and ambiguous language; for although the same objections have already been raised and heard under the 19th section of the earlier Act, it seems that there may be a fresh hearing of them under this section; so that there may be a double hearing of the same objections, for the enactment in sect. 1 of the Act of 1864 is not confined to new objections, which is rather curious. However curious it may be, it is enacted in the strongest words that there shall be no appeal to any sessions against a rate made in conformity with the valuation list until there has been a previous application to the assessment committee, who have power to make all requisite amendments, and a failure to obtain relief from them. The assessment committee is by this section empowered to amend the valuation list "although the same has been approved of and no subsequent list has been transmitted to them." The section contains no direction about re-depositing the list after they amend it; but notice of the amendment must be given to the overseers, who are thereupon to alter their current rate accordingly. And manifest in convenience would result from rendering a re-deposit necessary in such a case; for seven days would then be allowed for fresh objections, and the result would be that the valuation list of the parish would never be final. I am therefore of opinion that no re-deposit was necessary in the present case, and that the rule should consequently be discharged.

ARCHIBALD, J.—I am of the same opinion; and on the short ground that section of the Act of 1864 was intended as an amendment of sect. 22 of the former Act, and that it contains nothing to make a re-deposit necessary, and, so far as it contains any ambiguity, reasons of convenience weigh with me in construing the enactments in the sense already mentioned.

Wills, Q.C., asked for costs.

Stons contended that no recognisances having been entered into, no costs could be given; and referred to *Rex v. Jenkinson* (1 T. R. 82), where it was held that no costs are due on a *certiorari* removing summary proceedings, unless a recognisance has been entered into at the time of removing the proceedings; Lord Mansfield, C.J., saying: "By the rule of law the king neither

receives nor pays cost. We are aware of the mischiefs of granting *certioraris* for vexatious purposes, and it is discretionary in the court whether they will grant them or not. For the future we will oblige the party applying for a *certiorari* to enter into a recognisance to pay costs; but we are not authorised to grant them by the 13 Geo. 2, c. 18 without a recognisance."

COCKBURN, C.J.—The rule must be discharged with costs. I do not see any reason why the court should not exercise the jurisdiction which it undoubtedly possesses, of making a party pay costs who in any way abuses the process of the court by putting it in motion in a proceeding which is purely vexatious.

Rule discharged with costs.

Attorneys for prosecutors, *Taylor, Hoare, and Co.*
Attorneys for C. J. Cooke, *Newent.*
Attorneys for defendant, *Torr and Co.*

ELECTION PETITIONS.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

THE CITY OF DURHAM.

May 19, 20, and 21, 1874.

(Before BRAMWELL, B.)

Parliamentary election—Bribery—Colourable employment of voters—Excessive number of persons employed—Payment of relatives of voters as messengers, runners, &c.—Persons so paid not employed—Influence on election—Payment of expenses after time at which accounts may be investigated—Indiscreet proceeding.

By sect. 11 of 30 & 31 Vict. c. 102, "no elector who, within six months before or during an election for any county or borough, shall have been retained, hired, or employed for all or any of the purposes of the election, for reward, by or on behalf of any candidate at such election, as agent, canvasser, clerk, messenger, or in other like employment, shall be entitled to vote at such election, and if he shall vote he shall be guilty of a misdemeanour."

Held, that although voters so employed do not, by voting, affect the seat, yet if a candidate employs a large number of voters, who subsequently vote, the inference must be that they are employed for the purpose of influencing their votes, and that there was a corrupt bargain.

A large number of voters and their relatives were engaged on behalf of the respondents as messengers and runners. It was admitted that some of these were not actively employed; but experienced persons stated on oath that the number of persons engaged was not disproportioned to the size of the constituency:

Held, that in the face of this evidence, the election would not be avoided in this instance; but the learned judge intimated that indiscriminate payment of a large number of persons connected with voters was a most efficacious method of corrupting a constituency, and raised suspicions which, on another occasion, would probably prove fatal.

The payment of bills by candidates after the time at which they are subject to investigation, is an indiscreet proceeding, and may be taken as an element in considering the validity of an election. This was a petition against the return of two sitting members.

CITY OF DURHAM ELECTION PETITION.

Counsel for the petitioners were *Ballantine*, Serjt., *Giffard*, Q.C., and *A. L. Smith*.

Counsel for the respondents, *Russell*, Q.C., *Greenhow*, and *McKellar*.

The principal allegations in this petition had reference to the colourable employment of voters, and bribery by promises. This report is mainly confined to the first, and the facts were not in dispute. It appeared that there were 480 persons employed by the respondents as runners and messengers, doorkeepers and canvassers, at a cost of 120*l.*, and that many of them were voters, who voted, notwithstanding their employment. Upon this point

BRAMWELL, B., said to *Giffard*, Q.C., I suppose you are at liberty to say and contend that the employment was colourable, and that the money was a bribe?

Giffard, Q.C.—Yes, that is what we propose to contend upon this matter. Your Lordship knows that, even before the statute made it unlawful to vote, it had been repeatedly decided by committees that where there was an excessive number employed, although they were then allowed by law to vote, if it was a colourable employment, it was a cloak for bribery, and people have been unseated for it. [*BRAMWELL*, B.—I don't know that it has been decided, but I have no doubt it ought to be.] I was counsel for Mr. Morley, at Nottingham, and he was unseated on this ground. [*BRAMWELL*, B.—It is clear that if the number is so undue that the legitimate conclusion upon it is that they were not employed for the mere purposes upon which they purported to be employed, why then the inference is that they were intended to be employed and paid for another purpose, and that is bribery.] *A priori*; the statute has absolutely prohibited their voting at all. [*BRAMWELL*, B.—Yes; but what you will have to show is, that there was an undue number of persons employed.] I should have thought that if I showed that these persons, who, by law, were prohibited from voting, did vote, that would be enough. I do not dispute that there must be the inference from the fact. If the candidate hires a number of voters, with a tacit understanding that, notwithstanding their employment, they should vote, although he does not say so, yet that is at all events an effort to induce them to vote, and to vote of course for him. [*BRAMWELL*, B.—Clearly you know that would be so. "I will employ you, if you vote for me," would be plain bribery. If a voter was employed, and it was part of the bargain that he was to vote, that was direct bribery. If it was not a part of the bargain, then the fact that he voted, although an unlawful act, did not affect the respondents.]

Giffard, Q.C.—*Martin*, B., in the *Salford* case (20 L. T. Rep. N. S. 120; O'M. & H. 136), took the view that where this was done to a considerable extent, the common law would operate, and the election would be void. That was in reference to the employment of conveyances.

Ballantine, Serjt., did not suppose there was an express contract that these parties should vote; the question was what they understood, and what it was intended they should understand.

BRAMWELL, B.—Clearly, it is a question as to what inference might be drawn. If one found that the candidate or his agent employed a very large number of voters, and all those voters voted, the conclusion one would draw is that they were employed for the purpose of securing their votes.

Supposing that conclusion were not drawn, it seems manifest that the candidate or his agents have done nothing to void his seat—simply, the voters have done what they ought not to have done.

Ballantine, Serjt.—My view is, that the employment of these persons was for the purpose that they should vote.

BRAMWELL, B.—You are going to say, as a conclusion from the fact, that the people who employed these people employed them in order to gain their votes; and that, although nothing was said between them, yet it was understood that the votes should be given accordingly, and that, if that was so, it was an act of bribery?

Ballantine, Serjt.—Precisely.

BRAMWELL, B.—I do not understand that Mr. *Russell* will deny those conclusions?

Russell, Q.C., *contra*.—Oh, no. I admit that if you can properly draw the inference that these men were employed upon the implied condition—[*BRAMWELL*, B.—Oh, more; if employed with the view to influence their votes?] Yes; I will go that length. [*BRAMWELL*, B.—Because it is necessary that there should be a bargain.] Certainly. Now, there are one or two considerations in this matter. Was there any reason or necessity for the employment of persons in the condition of voters; and was it usual? He did not mean to convey that if the other side had been in the habit of doing what was corrupt and illegal, that that would create a precedent for making a thing which was corrupt and illegal, legal and proper. But if the thing had been in the habit of being done by both sides, it would afford some evidence that it was not looked upon by either side as in itself corrupt; and it would probably afford some ground for drawing the inference that it was not unreasonable in the sense of not being necessary. Now, the figures stood very much in this way—the population of Durham was about 14,000; if you took one-fourth of these—which was putting it at a high figure—as representing the male adults, you would have 3500 persons. The persons on the register numbered 2000; no doubt some of these might be freemen and other voters, but not to any considerable extent. That would leave a residue of adults, not on the voting lists, of 1500; and that again must be divided by two; because you cannot go to your opponents for your employees, which reduces the available number to 750 votes on our side. But how is that made up? Assuming that there are 750, that would be made up of all classes of persons. In the first instance, a very large proportion of these persons would be unfit for that class of occupation. Although numbers of them are in residence in the town, and in houses of decent rents per annum, and earning good wages, still they are not the kind of persons to employ in this kind of thing. Then, again, men in connection with the University and other institutions, who might not have houses or votes, but who would not be eligible for this kind of work, and whom it would be rather an insult to ask; so that they really come down to a very inconsiderable number available for these purposes. It was not merely intelligence and character what they wanted, although they might be desirable. They required persons who were conversant with the voters, who knew where they lived, the hours of their work, where they were to be seen, and all those considerations. They might have a good

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deal of information on this question from the other side, if it would have been favourable to his learned friend. He did not speak of these obscure gentlemen—the petitioners in this case; but the great and powerful party of whom they were put forward as the worthy exponents, and representatives who could have given a good deal of evidence on this point if it had suited his learned friend's case. His learned friend could have called gentlemen of position in that town, representatives of the party, whether it was usual to employ voters, and whether it was not true that on both sides it had been done. They found some thirty-six names in a similar position on the other side; and nobody had ever thought of suggesting in Durham that that was corrupt employment. He quite concurred in the force of what was said by Willes, J., as to the danger of that kind of employment. He could not but see it was open to very serious peril indeed, and the candidate put himself in very great difficulty. [BRAMWELL, B.—If there should be another election at Durham, I should say that if the same practice should continue, there would be but one conclusion from it.] That was exactly the language that Blackburn, J., used in talking of a cognate branch of the question, namely, the employment of runners. He said that this had been going on in the town; and that both sides had done it—one side had done it more than the other, but both had done it; but if done at a future election it would be impossible to say that both parties would not understand the character of the things they were doing.

Giffard, Q.C.—This was not for voters only.

Russell, Q.C., said the case to which he had called attention was a case where voters were employed. His Lordship would probably think the danger was greater where party spirit ran high. If there was a lethargy in politics on both sides, and the line of parties was not sharply and accurately drawn, there would be a greater danger. But where party spirit rules high, where each man was known to belong to any particular side, although the danger exists, yet in such case it would be less. But in no single case was a voter employed who had not already promised, and whose political opinions were well known to be on the Liberal side; and in all these cases the sums charged were with respect to work *bond fide* done.

BRAMWELL, B.—In this case there was one charge, and one only, of personal bribery against one of the sitting members, Mr. Thompson; otherwise it has not been suggested that either of the two respondents has been guilty, or has wished to have been guilty, or so far as intention goes, had authorised the commission of any offence against the laws of the country or the laws of their election in particular. I have no doubt that these two gentlemen wished that nothing wrong should be done, and that, as they had both stated, they have carried out that wish to the best of their ability. My firm belief also is, that the four respectable gentlemen, who have been called the four principal agents, Messrs. Marshall, Granger, Chambers, and Smith, have acted in the same manner; and I am satisfied with their conduct. And the only fault I find with either of them, or the respondents, is as to what I consider the indiscreet payment of bills after such a time had arrived that they could not be subject to efficient investigation; and I give them this piece of advice—I should strongly recommend

them not to do it in future. It may lay them open to the suspicion which has told against them on the present occasion, namely, that there might be expenses which might not yet be sent in, but which might be sent in in the hope that the same indiscriminate mode of paying them would be adopted as was adopted on former occasions, and that things which never ought to have been paid at all would be paid to those who laid out the money. Otherwise, I have no fault to find either with the respondents or their agents. But great complaint has been made of the employment of voters for various purposes, not actually as canvassers, but to accompany the canvassers; and, certainly, it is a very remarkable thing that so large a number of voters should have been employed, and that the receipts of the voters so employed should have been so much more considerable than the receipts of persons employed in a similar capacity, but who were not voters. And it is impossible to shut our eyes to it that that may be the means of very extensive and very efficacious bribery. And as the argument has been used, I addressed myself to these matters with very great distrust, on account of my inexperience of these matters, I never having been a candidate or concerned in an election, or knowing anything more of it than as one goes through the world, and until I have had to try some of these election petitions. Therefore I express myself with distrust upon it; but it is manifest to my mind—at least, I cannot help feeling very strongly that it is impossible to suppose that persons cannot be found to do these duties who have not a vote. I should strongly recommend that for the future such persons be found; or, if they cannot be found, that the thing be left undone; because it may no doubt be made the means, to a certain extent, of influencing the voter—very likely to this extent, that good blues on the one hand, or good reds on the other as it may be, if they had not had this employment, would have turned from blue to red or red to blue, as the case might be. Therefore, if it was only for this reason—if it is only to secure them—it is of mischievous character, because it is having an influence upon their minds which it ought not to have. Then, again, as to the numbers of these runners. We have, unfortunately, runners in one case of one to three voters; and we have the very candid evidence of Mr. Granger, that the runners were not wanted for the work they professed to do, but were paid money for other purposes and for other considerations; and it is admitted also that there was a very large number of voters who had children or relations employed; and we have had two remarkable instances of children being professedly employed, neither of whom did any work. And when we consider into what subordinate hands these tickets are intrusted, and the indiscriminate and careless way in which they are delivered out, one cannot help seeing that they are also a very great means of corruption. But when one has a gentleman like Mr. Peele saying that they are, in his judgment, necessary—a sort of peculiar necessity in the city of Durham for anything I can see—and when you find four gentlemen who have been called before us say, in their judgment, the numbers were not excessive, why one hesitates very much to trust to what seems the dictates of common sense in the matter, and decide against them. If the case had turned upon this only, I should have been most re-

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luctant to say that there had been corrupt practices or bribery from the employment of these runners. And if I may venture to give a warning to the city of Durham, and to those who may endeavour to be its representatives at some future time, it would be to caution them most strenuously against any repetition of this practice; for it is impossible not to see that it must be held to be a corrupt proceeding.

Return of election expenses—Vouchers given for less than the whole amount—Vouchers subsequently furnished to returning officer—Inspection—Right of petitioners.

The respondents' election expenses amounted to 1500l. Of this amount vouchers covering only 500l. or 600l. were furnished. Subsequently further vouchers were furnished to the returning officer. The petitioners applied for inspection, and to take copies, which the returning officer refused.

Seemingly, neither an election judge, nor the Court of Common Pleas, has jurisdiction in such a case to order copies to be given; but, in the absence of any reasonable objection on the part of the returning officer, permission to inspect and take copies should be given.

In opening this petition,

Ballantine, Serjt., said: The system to which I propose to call your Lordship's attention is that of the employment of a vast number of people—a great many more than was at all necessary for the purposes of the election. Thus, there were night watchers, when no watchers are required; messengers, when there are no messages to send; and if they happen to be voters they are not employed at all, but instead of being employed themselves their children are employed. I believe that, on one occasion, they secured as a messenger the valuable services of a child three years old; and that sort of thing has been carried on at the last election to a very great extent. I believe I shall show your Lordship that there were upwards of 300 or 400 persons employed as messengers, in addition to those employed as night watchers; and other people were employed in a similar manner. I shall show that several of these persons were undoubtedly voters, and that the mode in which their votes were probably influenced was nominally through the medium of their children; and that, in point of fact, the system was an entire and absolute sham. We have a good deal of evidence upon this point—but for the circumstances to which I have been obliged to allude, we should probably have heard a great deal more. Your Lordship is aware that it is the duty of the returning officer to make a return of the expenses, and the returning officer should receive the returns, with all the vouchers connected with the expenditure stated in it. The returning officer is the mayor; and the legal adviser of the mayor—the gentleman who is practically the returning officer—is the town clerk of the borough, and the father of the legal agent to the Liberal candidates, and we have had the greatest difficulty in obtaining the information which we required. There has been every endeavour made to obtain full particulars on this subject, and there has been a great deal of resistance offered to our doing so; and at the end of two months we applied to see the return of expenses, and we found that, although 1500l. was the amount returned as expenses, vouchers

were returned to the amount of only 500l. or 600l. I believe applications were made to see all the vouchers, and, at all events, a subsequent application was made to take copies of vouchers, and also copies of expenses. At the time when the application was made it turned out that further vouchers had been filed, but to what extent I cannot tell, and whether it covered the whole bill of expenses I cannot say at this moment; and the returning officer positively refused to allow us to take a copy or extracts. I believe your Lordship was applied to on the subject, and you thought you had not power to order copies to be taken.

BRAMWELL, B.—I think I said I had no jurisdiction at all, and that they must go to the Court of Common Pleas.

Ballantine, Serjt.—Under these circumstances, this matter, which I consider to be a material one, this payment of a vast number of people, really and practically to influence votes by means of the money which was expended, we were not able to reach the bottom of. We have witnesses who will show what the whole system is, and perhaps we shall have to make an application to your Lordship, if necessary, to have further time to make inquiries as to the return of expenses. We all feel that this is one of the most important matters in the case. It shows an organisation, and a very extensive one, and, under such circumstances, I think your Lordship will agree with me, that all matters connected with the case must be very rigidly looked into to see how far this goes, and what the city members were cognizant of.

BRAMWELL, B.—I thought that I had no jurisdiction as to ordering a copy of the vouchers to be taken. The Court of Common Pleas were not sitting. I believe that you could do it. I doubted whether they had jurisdiction to order copies to be taken; but I may state that I believe it would be desirable, rather than that the parties should be put to the expense of an adjournment, that you should be allowed to see these additional vouchers, and take copies of them, unless it can be suggested on behalf of the returning officer that there is an obligation of secrecy. I cannot see any. I think the mayor is the returning officer, is he not?

Ballantine, Serjt.—Yes; assisted by the town clerk, and the town clerk's son.

BRAMWELL, B.—I think it would be better now for them to produce them, and you will mention the necessary time to inquire into them.

Ballantine, Serjt.—We propose to call the agents as the very first witnesses, and we will see how far we can go; and, if necessary, we shall apply to your Lordship for an adjournment.

BRAMWELL, B.—I don't say they are bound to show them to you: I really don't know. I don't know what the duty of the returning officer is in relation to them; but I think, in the absence of any reasonable objection on the part of the respondents, that you should see them.

Solicitors for the plaintiffs, *Trotter, Bruce, and Trotter*, Bishop Auckland.

Solicitor for the respondents, *W. H. Marshall*.

EXCHEQUER CHAMBER.

Reported by ETHERINGTON SMITH, Esq., Barrister-at-Law.

(Before COCKBURN, C.J., BRAMWELL, B., MELLOR, J.,
CLEASBY, POLLOCK, and AMPHLETT, BB.)

May 12, 13, and June 24, 1874.

SOWERBY v. SMITH.

Inclosure Act—Reservation clause—Rights of the lord of the manor—Reservation of right of sporting—Manorial rights.

An inclosure Act, reciting that there were several persons entitled to rights of common together with the lady of the manor in different proportions, appointed commissioners to allot to the lady of the manor her heirs and assigns, one twentieth part of the commons and waste grounds in lieu of, and as a full compensation for, her right and interest in and to the soil of the said commons and waste grounds to be inclosed, and to the other several persons having rights of common therein the residue of the said commons and waste grounds. And it was further enacted that the several allotments so made to the persons entitled as allottees under the Act, should be vested in them respectively in full bar of and satisfaction for all right of common, and other rights and interests whatsoever, in over and upon the said lands and grounds thereby directed to be divided and inclosed (except such manorial rights as were thereafter reserved to the said lady of the manor, her heirs and assigns), and that from and immediately after the making of the said allotments, all rights of common in over and upon the lands and grounds intended to be inclosed, and also all tithes, &c. arising and renewing out of and from the said commons and waste grounds, and all other lands and grounds lying within the said township and hamlet (except such manorial rights as last aforesaid, mortuaries, Easter offerings, and surplus fees), should cease, determine, and for ever be extinguished.

The form of the reservation was as follows:—

"Nothing should prejudice, lessen, or defeat the right, title, or interest of the said lady of the manor, her heirs or assigns, of in or to the seignory or royalties incident or belonging to the manor, but that she should and might from time to time, and at all times, hold and enjoy all rents, quit rents, and other rents, reliefs, duties, customs, and services, and all courts, perquisites, and profits of courts, right of fishery, and liberty of hawking, hunting, coursing, fishing, and fowling, within the said manor, and all tolls, fairs, marts, markets, stalls, goods and chattels of felons and fugitives, felons of themselves, and put in exigent, deodands, treasure-trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises, matters and things whatsoever to the said manor or to the lord or lady thereof incident or belonging, or which had been theretofore held and enjoyed by the said lady of the manor or any of her ancestors, other than and except such common right as could or might be claimed by the said lady of the manor as owner of the soil and inheritance of the said common or waste ground, in as full, ample, extensive, and beneficial a manner to all intents and purposes as they respectively could or might have held and enjoyed the same, in case the Act had not been made."

No claim of a right of free warren over the manor was set up:

Held (per Cockburn, C.J., Bramwell, B., Mellor, J. and Amphlett, B., *dissentientibus* Cleasby and Pollock, BB.) that the right of sporting over the lands allotted, having been formerly enjoyed by the lady of the manor by virtue of her ownership of the soil, and being a territorial right, was not preserved to her by the reservation clause in the Act, and that that clause was only effectual as a reservation of manorial rights, and could not apply to a right which was not a manorial right at all, but simply incident to the ownership of the soil. The judgment of the Court below was therefore affirmed.

THIS was originally an action of trespass for breaking and entering a close of the plaintiff, and for an assault in which the defendant justified his act by the assertion of a right to shoot over the land in question. A verdict was entered for the plaintiff, for 40s. damages, subject to the opinion of the court upon a special case. Upon the argument in the court below, the majority, Keating and Grove, J.J. decided against the claim of right set up by the defendant, and gave judgment for the plaintiff, Honyman, J., *dissentiente*.

The case and facts are set out at length in the report in the court below (29 L. T. Rep. N. S. 370; L. Rep. 8 C. P. 514).

The defendant now brought error upon that judgment, and the question to be determined was shortly whether the right of shooting over the wastes of the manor belonging to the lord, was preserved to him by a reservation clause in an Act inclosing the commons and wastes, which Act allotted to the lord one twentieth part of the commons and waste grounds in lieu of and as a full compensation for his right and interest in and to the soil of the said commons and waste grounds, and also allotted the remaining parts of the commons and wastes among the persons having at the date of the Act rights of common, and in full bar of and satisfaction for all rights of common and other rights and interests whatsoever, in over and upon the said lands, except such manorial rights as were thereafter reserved to the lord.

Field, Q.C. (Barker with him) for the defendant. —As owner of the soil, the lord of the manor must have had the right of shooting over the wastes before the Act was passed, and it is found in the case, that down to 1840 he did enjoy the right of shooting, and he appointed gamekeepers over the old inclosures as well as the new. This may perhaps have been done under the alleged right of free warren; this claim we gave up finding that it could not be supported. But it is clear that he had in 1798 a valuable right of shooting over 5600 acres of waste, and the question is, has the right been taken away from him? [COCKBURN, C.J.—The right of shooting being in respect of his ownership of the soil, and being incident thereto, when the ownership is taken away would not the incident follow?] Yes, it probably would but for the reservation. The rights of the lord after the Act must turn on the interpretation of that clause. The words of the Act must be carefully examined; there is first what we may call the barring clause which is that "the several lands and grounds so to be set out and allotted unto and for the several persons, who by virtue of this Act shall be entitled to the same, shall be and are hereby vested in them respectively in full bar of and satisfaction for all rights of common and other rights and interests whatsoever, in over and upon the said lands and grounds hereby

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directed to be divided and inclosed (except such manorial rights as are hereinafter reserved to the said Margaret Walker, her heirs and assigns);" and then the enacting clause, which following upon the reservation of manorial rights to the lady of the manor, says, "but that the said Margaret Walker and all succeeding lords and ladies of the said manor shall and may from time to time, and at all times hold and enjoy all rents and a right of fishery, and liberty of hawking, hunting, coursing, fishing and fowling, within the said manor, and all matters and things whatsoever to the said manor or to the lord or lady thereof, incident or belonging, or which have been heretofore held and enjoyed by the said Margaret Walker or any of her ancestors (other than and except such common right as could or might be claimed by her as owner of the soil), in as full, ample, extensive and beneficial a manner, to all intents and purposes, as they respectively could or might have held and enjoyed the same in case this Act had not been made." This enactment is distinct in terms, and the intention is plain. The court will have to construe the words "manorial rights," and it is contended that under this expression all the *de facto* rights enumerated, were to be preserved. There was perhaps not a clear understanding when the Act was passed of the strict rights of the lord of the manor as such: see *Pickering v. Noyes* (4 B. & C. 639); *Askew v. Wilkinson* (3 B. & Ad. 152), where there is a confusion manifested between manorial and territorial rights. But the intention of the Act must be regarded, though the language may be inaccurate; and any inaccuracy in the mode of reservation is cured by the express enactment which preserves all ancient rights to the lord. The exception of the right of common is inaccurate, as the lord could not have a right of common over his own soil, but that such expressions in Acts of this kind are not rare, and at the same time ought not to prevent the obvious intention of the framer of the Act, from being carried into effect, may be seen from various cases. *Arundell v. Lord Falmouth* (3 M. & S. 440); *Lloyd v. Lord Powis* (4 E. & B. 485); *Musgrave v. The Inclosure Commissioners* (L. Rep. 9 Q. B. 162); *Ewart v. Graham* (7 H. L. Cas. 331.) [BRAMWELL, B.—You are contending for the creation of an entirely new right which never existed before. How can that be covered by the reservation of existing manorial rights.] The right of sporting was previously in the lord, and its preservation is not in substance though it might technically be described as a new one. The allotment to the lord was in lieu of his rights, which are called rights of common over the whole of the wastes, but the saving clause enumerates the rights reserved, some of which are manorial, some not. If the question raised here be *res integra*, I should ask the court for a decision in my favour, on the ground of the evident intention of the Act to maintain the rights of the lord whatever they were; but if it be not *res integra*, I ask on the authority of *Ewart v. Graham* (*ubi sup.*). In that case, which is very similar, Wightman, J. says "It is difficult to suggest a form of words better adapted to continue the right than the clause 'Nothing herein shall defeat, &c., the right of Sir J. Graham to any seignories, royalties, rights, or services, incident or belonging to such manor.'" The similar clause here must have the same effect. [BRAMWELL, B.—The words are not quite the same. Possibly here the lady of the manor may have exercised a manorial

right of shooting over the lands which it was intended to preserve, and the words were used in reference to it; but you suggest the creation of a new and odious right as to the existence of which there is no evidence.] As to the odiousness of such a right, is there not an analogy between the ownership of minerals and sporting rights? It is wisely thought not to be worth while to give such rights to small owners. In *Bruce v. Helliwell* (2 L. T. Rep. N. S. 292; 5 H. & N. 609) the territorial rights of the lord were taken away in express terms; and for that reason, while I agree that that case was rightly decided, I say it is clearly distinguishable from the present. And it is important to observe that the language was all of reservation and exception, and there were no words of grant, as there are here. *Greathead v. Morley* (3 M. & G. 139) is most nearly like this case and the decision there was said by the House of Lords in the judgment in *Ewart v. Graham* (*ubi sup.*) to be wrong. Then there is *Lord Leconfield v. Dixon* (16 L. T. Rep. N. S. 288, and in error 17 L. T. Rep. 18; L. Rep. 2 Ex. 202 and 3 Ex. 30). This is in favour of the defendant's contention. There there was no right of free warren; and the Inclosure Act reserved to the lord the right to the seignories or royalties incident or belonging to the said several manors, in as full, ample and beneficial a manner as they might have been exercised if the Act had not been made. The Court of Exchequer Chamber held that the Act reserved to the lord the right of sporting over the allotments.

J. W. Mellor (*Jeune* with him) for the plaintiff.—The right claimed here is not within the reservation clause. At the time the Act passed most probably the lord of the manor believed that he had a right of free warren and a right of sporting all over the manor, including the wastes and the allotments. The object of the Act was to settle the rights for all time, and to make an arrangement beneficial to all parties. Had it been intended to reserve an existing right of sporting, there would have been express words in the Act separating the territorial right, and making it an incorporeal one; but as it is, the lady of the manor has ground allotted to her in lieu of her right and interest in the soil of the commons and waste grounds, and no exception whatever is made in respect of a territorial right such as that of sporting. Nay more, there is another clause that the allotments are to be in full bar of all rights of common and other rights and interests whatsoever, in on or upon the said lands; except such manorial rights as were reserved afterwards. Now, what is the exception here referred to? It must be the clause: "Nothing shall prejudice, lessen, or defeat the right, title, or interest of the said Margaret Walker, &c., but that she shall enjoy all rights within the manor, or which have heretofore been held and enjoyed by the said Margaret Walker, in as full and beneficial a manner," &c. [COCKBURN, C.J.—You argue that the latter part of the clause is a *videlicet*, the rights reserved are manorial rights.] Yes; and from 4 & 5 Vict. c. 35, s. 82, may be seen what manorial rights are. So that if this be held to be an enacting clause, it purports to give to the lord the fishing and fowling within the manor, which it is now admitted he never had, and it would affect persons owning old inclosures. The object of the Act here was we contend simply to reserve to the lord what he might have. The commissioners were not to decide that question, it was

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as if they said, "You claim a right of free warren; if you have it we will reserve it to you, but you must establish the alleged right elsewhere." *Ewart v. Graham* (*ubi sup.*), which has been relied on for the defendant, is clearly distinguishable from the present case; for the grant there was in express words "over the stinted pasture," giving a right of hunting, shooting, fishing, and fowling in terms, and in addition all other seignories incident to the lord of the manor. *Bruce v. Helliwell* (*ubi sup.*) is exactly in point; there was there no exception to the territorial right of shooting which, as owner of the soil of the commons, the lord had; and the reservation of the seignorial rights, if any such existed, would not, if no right of free warren or free chase in fact existed, create throughout the manor a right of shooting over the portions of the commons allotted to others by the Act. As to *Lord Leconfield v. Dixon* (*ubi sup.*), the distinction has been pointed out by the court in the course of the argument. There was not by that Inclosure Act an absolute compensation given to the lord in respect of his rights as owner of the soil; for there was an exception affecting his territorial rights, and only those territorial rights were taken away, which were expressly stated in the Act to be so. The judgment of Honyman, J. in the court below in the present case contains an accurate distinction of *Lord Leconfield v. Dixon*.

Field, Q.C., in reply.—There was a right at the time of the passing of the Inclosure Act existing, and *prima facie* we should expect to find it continued, so that it is not correct to say that there was any creation of a new right; the right remained though the foundation of it may have been changed. We must look at the manifest intention of the parties to the Act, in interpreting its provisions. Are there not here affirmative words expressive of the intention to preserve that *de facto* enjoyment of a right that existed at the time of the passing of the Act? [*COCKBURN, C.J.*—If the framers of the Act have not put operative words in, we cannot read the Act according to what they may have meant. They may have thought these rights to be manorial rights, whereas they are really territorial.] In *Ewart v. Graham* (*ubi sup.*) the words "but that" were held to be operative words of grant, and not as the Lord Chief Justice has suggested, merely equivalent to "that is to say." So here I contend that although the territorial right of shooting was taken away by the allotment of the soil, yet the "liberty" of shooting, as the reservation clause describes it, was at the same moment created instead of it, that clause being inserted to preserve various rights which would otherwise have perished. [*BRAMWELL, B.*—You cannot say that the saving clause was put in to save many things which would otherwise have been lost. It is clear that many would not have been destroyed, such as the quit rents. Probably it was to prevent all question as to what were the manorial rights. If that be so as to one, possibly it is so as to others.]

Cur. adv. vult.

On the 24th June, the following judgments were delivered:—

COCKBURN, C.J.—The question for our decision in this case is, whether the lord or lady of the manor of Messingham, in the county of Lincoln, is entitled to shoot and take the game on the freehold inclosures allotted under an Inclosure Act, in lieu of rights of common enjoyed by the allottees prior to the passing of the Act in the commons

and waste lands of the manor. The Inclosure Act in question was passed in the 38 of Geo. 3. It provides for the inclosure of the commons and waste lands in the township of Messingham and in that part of the hamlet of East Butterwick which is within the township of Messingham. After reciting that Margaret Walker is lady of the manor of Messingham, and of that part of East Butterwick which is within the township of Messingham, and as such is interested in the soil of the waste grounds within the manor, it provides that the commissioners appointed under the Act shall set out and allot unto the said Margaret Walker, her heirs and assigns, as lady of the manor of Messingham aforesaid (exclusive of all other allotments unto the said Margaret Walker, in respect of her other property), such part and parcel of the residue of the commons and waste grounds hereby directed to be divided and inclosed, as shall (quantity, quality, and situation considered), in the judgment of the said commissioners, be equal in value to one-twentieth part, and no more, of the said commons and waste grounds in lieu of and as a full compensation for the right and interest of the said Margaret Walker, her heirs or assigns, in and to the soil of the said commons and waste grounds, by this Act directed to be divided and inclosed. By the 2nd section, it is provided that the several lands and grounds so to be set out and allotted unto and for the several persons who by virtue of this Act shall be entitled to the same, shall be, and are hereby vested in them respectively, in full bar of and satisfaction for all rights of common, and other rights and interests whatsoever over and upon the said lands and grounds hereby directed to be divided and inclosed, except such manorial rights as are hereinafter reserved to the said Margaret Walker, her heirs or assigns, and that from and immediately after the making of the said division, and allotments, all rights of common in over and upon all the lands and grounds intended to be inclosed shall cease and determine, and forever be extinguished. Then follows a clause reserving the rights of the lady of the manor, in these terms: "Nothing herein contained shall prejudice, lessen, or defeat the right, title, or interest of the said Margaret Walker, her heirs or assigns, or of any other person or persons who shall respectively for the time being be lady or ladies, lord or lords of any manor or manors, lordship or lordships, or reputed manors or lordships within the jurisdiction or limits whereof the said township of Messingham, or the said part of the said hamlet of East Butterwick, or the said fields, ings, meadows, pastures, moors, and other commonable lands and waste grounds hereby directed to be inclosed or exonerated from tithes, or any part thereof respectively are comprised, of in or to the seignory or royalties incident or belonging to such manor or lordship, or either or any of them, but that the said Margaret Walker and all succeeding lords and ladies of the said manor shall and may from time to time, and at all times, hold and enjoy all rents, quit rents, and other rents, reliefs, duties, customs, and services, and all courts, perquisites, and profits of courts, rights of fishery, and liberty of hawking, hunting, coursing, fishing, and fowling within the said manor, and all tolls, fairs, marts, markets, stallage, goods and chattels of felons and fugitives, felons of themselves, and put in exigent, deadlands, treasure trove, waifs, estrays, forfeitures, royalties, jurisdictions, franchises, matters, and

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things whatsoever, to the said manor, or to the lord or lady thereof, incident or belonging, or which have been heretofore held and enjoyed by the said Margaret Walker, or any of her ancestors (other than and except such common right as could or might be claimed by the said Margaret Walker, as owner of the soil and inheritance of the said commons or waste grounds), in as full, ample, extensive, and beneficial a manner, to all intents and purposes as they respectively could or might have held and enjoyed the same, in case this Act had not been made." The Act was duly carried into execution by the commissioners appointed under it. The twentieth part of the wastes was allotted to the lady of the manor, in extinguishment of her right to the soil of the waste, and the residue was divided among the commoners, as directed by the act, in extinguishment of their rights of common, whereby each allottee acquired a several freehold in the land so allotted to him. It is over the lands so allotted and inclosed that the lady of the manor claims the right of sporting and shooting. The right having been asserted by going on the plaintiff's allotment, an action of trespass was brought in the Court of Common Pleas; and on the cause coming on for trial, a verdict for the plaintiff was taken by consent, subject to a special case. On the argument in banc, judgment was given in favour of the plaintiff, from which judgment error has been brought. I am of opinion that that judgment must be affirmed. At and before the time when this action was brought, the right claimed and asserted by the lady of the manor was a much larger right than that contended for before us, being no less than a right of free warren claimed over the whole of the manor, or, at all events, as stated in the plea, a right to sport on the wastes as a profit *à prendre* otherwise than in respect of being seized of the waste so as to constitute the right a manorial right in the terms of the reservation. It appears that for many years prior to the passing of the said Act, and down to the time of this contest, the lords and ladies of this manor have regularly appointed gamekeepers for the manor, and deputations of such gamekeepers have been duly registered at the office of the clerk of the peace for the said county of Lincoln; and the gamekeepers so appointed have shot over the ancient inclosures and freehold lands in the manor as well as over the wastes. It further appears that, about the year 1806, the then lord of the manor was in the habit of shooting over the freehold lands within the manor as well as over the waste lands, accompanied by the gamekeeper of the manor, and that his right to do so was not contested. Permission was also given by the lord or the steward to persons to shoot over the freeholds within the manor, and the persons to whom permission was thus given were allowed to shoot without interruption. It was, however, fully admitted on the argument before us that the claim to a right of free warren or to any right of sporting over the freeholds and ancient inclosures could not be maintained, and that the right of the lord of the manor was confined to the right of sporting over the waste as incident to the ownership of the soil; and the question became limited to the right of the lord in respect of the wastes allotted under the act as preserved under the reservation clause. This being so, the question in dispute appears to me to be free from difficulty. The land having been allotted as freehold, the ownership must carry with it all the incidents

which ordinarily attach to a freehold interest, unless, by the special provisions of the Act, some right has been reserved to the lord which would derogate from the ordinary rights of ownership in the soil; and the question turns, therefore, entirely on the effect of the reservation clause. Now, by the express terms of the Act, the allotment to the lady of the manor is to be in bar and satisfaction for all rights of common and other rights and interests whatsoever over and upon the said lands and grounds hereby directed to be divided and inclosed, except such manorial rights as are hereinafter reserved to the said Margaret Walker, her heirs and assigns. Then the right of sporting reserved is expressly stated to be "the right of fishing and liberty of hawking, hunting, coursing, fishing, and fowling, within the said manor," and "all matters and things whatsoever to the said manor or to the lord or lady thereof incident or belonging, or which have been heretofore held and enjoyed by the said Margaret Walker or any of her ancestors." It appears to me that the effect of the clause which, being in derogation of the right of freehold given by the Act to the allottees of the lands inclosed, must, I think, be construed most strictly against the party claiming under it, is simply to preserve to the owner of the manor such rights as were of a manorial character, that is to say, were in the lord *quâ* lord of the manor, and not as owner of the soil of the wastes. Had the intention been to reserve to the lord the right of sporting over the waste lands when inclosed under the Act, nothing would have been more easy than to say so in terms as was done in the Inclosure Act under which the case of *Graham v. Ewart* (*ubi sup.*) arose. No doubt the reservation clause in the present Act, however general may be its terms, copied probably from some other Act without considering how far the language might be applicable to the manor in question, was intended to have some effect, and to preserve a right of sporting to the lord. But I cannot think, from its terms, that it was the right of sporting as incident to the ownership of the soil of the waste lands that the framers of the Act had in view. At the time the Act passed, it was believed that the lord had, as lord, the right of sporting over all lands within the manor. There existed at that time of day, quite independently of any right of free warren, a general notion that the lord of a manor had the right of sporting over all lands within the manor, whether freehold or otherwise; a belief which, however, had no foundation in law. "We all know," says Mr. Justice Bayley, in *Pickering v. Noyes* (*ubi sup.*), "that a very mistaken notion long prevailed, that the lord of a manor had a right to go, not only over his own lands, but over the lands of others within his manor." "In the West Riding of Yorkshire," says Baron Martin, in *Bruce v. Helliwell* (*ubi sup.*), "an idea prevails that lords of manors have a right and liberty of hawking, hunting, coursing, fishing, and fowling analogous to that of free warren or free chase. But the notion is erroneous. They have no such right." Mr. Christian, in his Notes to Blackstone, book 2, c. 27, p. 418, says that this notion, which he terms a very erroneous one, has probably sprung from the Acts of Parliament, from 22 & 23 Car. 2, c. 25, downwards, which, for the preservation of game and for preventing unqualified persons from sporting, have empowered lords of manors to appoint gamekeepers, with power to seize guns, dogs, nets,

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and engines kept by unqualified persons for the destruction of game. It was believed that the lord of the manor of Messingham possessed such a right, and I cannot doubt that it was with the view of preserving such a right, and not with reference to any right as incident to the ownership of the soil in the wastes of the manor, that the reservation clause in the present Act, so far as it relates to the rights of sporting, was passed. And as soon as it is admitted that no such right existed independently of the ownership in the soil, the reservation appears to me altogether inapplicable and, so far as regards any right arising from such ownership, as of no effect. In this respect the present case appears to me clearly distinguishable from that of *Ewart v. Graham* (*ubi sup.*), in which there was an express reservation of "all rights of hunting, shooting, fishing, and fowling in the stinted pasture," which was the land about to be inclosed. In the present case there is no reservation of the previously existing right of sporting over the waste lands about to be inclosed, but only of a general right inherent in the lord as incident to the manor, which right failing, the reservation fails to have any effect; and this appears to me to result not only from the language of the reservation clause, but from the preceding provision that the allotment to the lady of the manor shall operate to extinguish all her right and interest in the waste except the rights "of a manorial character" afterwards to be reserved. If authority were wanting for the view I take of the case before us, the case would, I think, come within the principle of the decision in *Greathead v. Morley* (*ubi sup.*), in which, under an Inclosure Act, there was a reservation of "free warren and liberty of hunting, hawking, fishing, and fowling, &c., matters and things to the manor, or to the lord, or to the lords thereof for the time being incident, belonging, or appertaining in as full, ample, and beneficial a manner as if that Act had not been made." Tindal, C.J., in giving judgment, says, "We are of opinion that the right of hunting or fishing over the allotments of the manor or common is not reserved to the lord of the manor by the saving clause of the inclosure Act set out in the plea. It is the manifest object of that clause to save to the lord all those manorial rights which he possessed before the inclosure as lord of the manor, other than and except the right to the soil. The saving clause gives no new royalty or manorial right to the lord which he did not possess before; it only reserves such as he was before entitled to. If he had no market or fair before, if he had no right of free warren before, it is needless to say the clause referred to confers none. So, if before the Act passed he had no liberty of hunting, hawking, fishing, and fowling over the moor or common "to the said manor, or to the lord thereof incident, belonging, or appertaining," he acquires no such right under the clause in question. Now, it would be against all legal construction to hold that the power of the lord of the manor to hunt or shoot over a waste or uninclosed common within his own manor was merely a "licence or liberty" incident to him as lord; it is a mode of direct enjoyment of his own property. The soil of the waste or common is his, subject only to the right of the commoners to take the herbage by the mouths of their cattle, and the right in the lord to walk or ride over it in every direction and at all times is the same right which he has over his other demesne lands, and not a mere liberty or

easement. The statute, if it had intended to grant the new lord a new liberty or licence of this nature, after the soil had become the property of those to whom it was allotted, would have employed proper words to create such new liberty or easement." The reasoning of the learned Chief Justice appears to me directly in point to the present case. By the Act the allotment is to extinguish all rights or interests in the soil, with an express reservation of manorial rights only. The reservation is of the "liberty" of hunting, &c., within the manor—a term inapplicable to a right incident to the ownership of the soil, and the observations of Tindal, C.J., on the omission of any direct reservation of the right of sporting over the lands withdrawn from the ownership of the soil, are equally applicable here. It is true that when the case of *Graham v. Ewart* (*ubi sup.*) was before the Court of Exchequer Chamber, the Court of Exchequer having, in the first instance, decided in favour of the defendant on the authority of the foregoing case of *Greathead v. Morley* (*ubi sup.*), the authority of that case was impugned, and by the majority of the judges (Erle and Willes, J.J., dissenting) overruled as applicable to the case before the court. But the overruling of the case of *Greathead v. Morley* (*ubi sup.*) was wholly unnecessary to the decision in favour of the plaintiff in *Graham v. Ewart* (*ubi sup.*); and when the latter case was before the House of Lords, on appeal from the Exchequer Chamber, though the judgment of the Exchequer Chamber was affirmed, neither of the learned lords who concurred in affirming the judgment went the length of overruling *Greathead v. Morley* (*ubi sup.*), but on the contrary, they distinctly say that the case before them is distinguishable from it, and uphold the judgment of the court below on the ground of a clear reservation of the right of the plaintiff, as if still owner of the soil. Lord Campbell says, "Great stress has been laid on the case of *Greathead v. Morley* (*ubi sup.*). I do not at all mean to say that the case was not well decided. I give no opinion upon that. I am not called upon to give an opinion upon it. I think it is clearly distinguishable from the present. I am bound to express my own opinion that it is clearly distinguishable. According to *Greathead v. Morley* (*ubi sup.*), the language of the reservation was uniformly, as it seems to me, confined to manorial easements. Here there is an express, absolute, and unqualified reservation, which, I think clearly reserves this right to Sir James Graham, as if still owner of the soil. For these reasons, my Lords, I must advise your Lordships that this judgment should be affirmed." Lord Brougham says, "I entirely take the same view as my noble and learned friend. Without being called upon to give any opinion whatsoever upon the case of *Greathead v. Morley* (*ubi sup.*), I will only say that I think it may be perfectly well decided. I do not say that it is not, but it is clearly distinguishable, upon the ground stated by my noble and learned friend, from the present case. I am therefore of opinion that your Lordships ought to give judgment for the defendant in error." Lord Cranworth says, "My Lords, I take exactly the same view of this case with my noble and learned friends. With respect to the case of *Greathead v. Morley* (*ubi sup.*), I must make this observation: Either this case is distinguishable from it, or else the decision in that case in my opinion was wrong. We need not say which of these two alternatives we think the right one; and it would be improper

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for us to say that we overrule a case which possibly may be distinguishable from the present. But, if not distinguishable, I have no hesitation in saying that the case was wrongly decided. Here, after what is called the saving clause, there is an express enactment that Sir James Graham, his heirs, and assigns, shall at all times hereafter enjoy the right of hunting, shooting, fishing, and fowling in and through and over the said stinted pasture and every part and allotment thereof." Then the noble and learned lord proceeds to point out that the difficulty in that case arises from the seignorial rights having been in the same clause reserved to the lord, and to this having been stated in the case, but he observes "it was evidently no seignorial right." "I am very glad," he says, "that the form in which the case was put for the opinion of the learned judges raises what is the real question, viz. that there was no other right than the right which arose from the defendant in error being the owner of the soil." Lord Wensleydale says, "I entirely agree with my noble and learned friends that the judgment ought to be for the defendant in error. I entirely adhere to the opinion which I gave in the Court of Exchequer, in which all of us concurred, that in this case there was a reservation of the *de facto* right to Sir James Graham. The only part of that judgment as to which I have any doubt is, whether this case can be distinguished from the case of *Greathead v. Morley* (*ubi sup.*), but I adopt the alternative of my noble and learned friend opposite, that either it can be satisfactorily distinguished, or that the decision is wrong." The result then of their judgments is that Lord Campbell and Lord Brougham expressly decline to overrule *Greathead v. Morley* (*ubi sup.*); Lord Cranworth and Lord Wensleydale only so far overrule it as the *ratio decidendi* may be applicable to the case before them, while all the four law lords concur in saying that the case before them was plainly distinguishable from the case in the Common Pleas, the reservation in the latter having been of seignorial rights, while in the case in the House of Lords there was a direct and express reservation of the right of sporting over the land to be inclosed. The House of Lords having declined to overrule *Greathead v. Morley* (*ubi sup.*) as applicable to such a case as the present, and having clearly held that the overruling of that case in the Exchequer Chamber in *Graham v. Ewart* was unnecessary to the decision of that case, it must be looked upon as extra-judicial, and I therefore feel at liberty, sitting in a court of error, to treat *Greathead v. Morley* (*ubi sup.*) as not overruled, and to express my concurrence in the reasoning and conclusion of Tindal, C.J., in the Court of Common Pleas, as to my mind more cogent and satisfactory than those of Wightman, J., in *Graham v. Ewart* (*ubi sup.*). Independently, however, of authority, I arrive at the conclusion that nothing short of a positive reservation to the lord of the right of sporting over the inclosed lands, if not in express terms, at all events in language necessarily leading to such a conclusion, will suffice to entail on land allotted as freehold a burden of a feudal and onerous character inconsistent with the ownership in fee. I agree with what is said by Baron Bramwell in *Lord Leonfield v. Dixon* (*ubi sup.*), that the reservation of such a right to the lord is contrary to the policy of the Inclosure Acts. The policy of the legislation on this subject has been to cause the reclaiming of waste lands, and the

making them available to the purposes to which landed property is capable of being applied. The inconveniences of such a reservation are there forcibly pointed out. "It should be remembered," says Baron Bramwell, "that the right now claimed by the plaintiff is inconsistent with the useful design of the statute; which was that the lands affected should be held in severalty with a plenary proprietorship unfettered by the rights of others over them. There is no doubt that this is most for the public interest. If the plaintiff's claim is well founded there is no use to which the defendant can put his lands without their being subject to the claim. He could not build a house and have a garden or lawn without the privacy of the occupier being liable to intrusion by the plaintiff in search of game." I am therefore prepared to hold that nothing short of a clear recognition of a right of the lord to take the game in what becomes *alienum solum* will suffice to preserve this right, and that the mere reservation of manorial rights, properly so called, will not have this effect. In the present instance, we have only a reservation of manorial rights; and it is not because the parties have intended to preserve a right as incident to the manor which turns out to have had no existence, that we can give effect to this intention by holding the reservation to apply to a right which was not in the contemplation of the parties and which was not a manorial right at all, but simply a right incident to the ownership of the soil, and which therefore was not in the lord as a manorial right. I am therefore of opinion that the decision of the Court of Common Pleas was right and should be affirmed, and in this judgment my Brothers Mellor and Amphlett concur.

BRAMWELL, B.—If I had to say what was the intention or object of the draughtsman in the clauses beginning "Nothing herein contained shall prejudice, &c.," I should say he found certain words had been commonly used either for preserving some right which otherwise would be lost, or for avoiding a question of whether it was lost, and so put them in to serve the same purpose here, believing that they would at least do no harm. And I should say that most certainly he never put them in to save or confer the right of sporting claimed by the defendant. That his object was what I suggest seems manifest from the words used. There is a whole string of words many of which are probably, and certainly one is, inapplicable and useless. There is no fishery probably, no fairs, markets, or stallages, and probably no right to the goods and chattels of felons and fugitives, felons of themselves, and put in exigent, treasure trove, waifs, estrays, and forfeitures; these words and the general words "matters and things" satisfy me the object of the draughtsman was what I have mentioned. That it was not the object to save or confer the right of sporting claimed I am satisfied from the inappropriateness of the language used. The claim is of an exclusive right to take and destroy all game and rabbits, and I suppose other edible birds as plovers, quails, &c.; also I suppose the exclusive right of hunting foxes and destroying other vermin. This was delicately put forward, but it is the claim made, viz., a title to a right of sporting which was territorially possessed before the inclosure. Is it conceivable that a man who wished to save or confer that right would have contented himself with

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using such terms as "liberty of hawking, hunting, coursing, and fowling within the manor?" No such words as sporting, shooting, taking game and rabbits, no word of "right," no word of exclusion, but the old fashioned words "hawking and fowling," and the useless ones as a matter of profit of "hunting and coursing." I have no doubt no such idea was in the head of the draughtsman as is suggested. Had there been he would have used such words as appear in *Graham v. Ewart* (*ubi sup.*) If, however, it could be proved to me there was some such idea, then I should say it was this: that thinking there was some right in the lord of the manor as such over land "within the said manor," he meant that it should extend, such as it was, to the new inclosures. I am satisfied, as I have said, that he had no such idea; but if he had and used these words to carry them into execution, then he only saved or conferred the same right over the new as existed over the old inclosures, and that is none. If it was a doubtful right, then the allotments were on the footing that it was doubtful—more to the tenants than if it was certain that there was no right, less than if it was certain there was a right. But we are not called upon to say what the draughtsman intended. The question for us to decide is what intention he has expressed, what is the meaning of the words he has used. In construing these words we may well take into account the general intention of the statute and the probabilities. The intention was to allot the land in severalty, free from rights interfering with its use and in such a way as the owner thought most beneficial. But, according to the argument of the defendant, this intention was only partially carried into execution, for a right of sporting was given to the lord over every allotment. The freeholder is not at liberty to sport on his own land, nor to destroy hares or rabbits, however mischievous or however inconsistent with the most profitable use of it, but is subject to the right, well called odious, of having his freehold invaded by the lord or those whom he may license with any number of beaters and helpers. May the allottee build a house, or erect a brick wall, or lock a gate to his freehold? It is in vain to say ordinary farming tenants are subject to this right. So they are to pay rent. They take their farms on those terms or leave them alone. They pay rent accordingly, and the feeling is different in the case of a freehold. The right claimed is in my judgment injurious and objectionable, and consequently one not likely to have been conferred by the Legislature. Let us see if it has been. The burthen of proof is on the defendant. The right of sporting was territorial, an incident of the property in the soil. When the property was transferred to the allottee this right went with it, unless the defendant can show it was saved to or conferred on the lord. I might content myself with saying I have heard nothing to show that has been done. But, further, I think I can show negatively that it has not been. The statute says that the lands allotted are vested in the allottees in full bar of and in satisfaction for all rights of common and other rights of and interests over and upon the lands, except such manorial rights as are hereinafter reserved to Margaret Walker, her heirs, &c. The statute reserves and does not pretend to create a right, and the rights it deals with it calls "manorial." It afterwards proceeds thus: "Nothing shall prejudice, &c., the right of the said Margaret Walker or any lord of the manor

of in or to the seignory or royalties incident or belonging to such manor." This is the reservation clause, and if it stopped there it is clear that nothing but seignory or royalties would be reserved, but it goes on to explain what it means by "manorial rights" and "seignory or royalties;" introducing the explanation with the words, "but that the said Margaret Walker, and all succeeding lords of the manor shall enjoy rents, &c., and liberty of fishing, &c., within the manor." Now this which is meant to explain ought not to extend the meaning of the words "seignory or royalties." It then enumerates what it has thus called manorial rights and seignory or royalties. The clause is merely to preserve whatever was in the nature of a seignory or royalty. The words "if any" must be read in that enumeration, as it is certain there was no right of fishing. Now these rights, if any, are certainly not all manorial; that is to say, some might be held where there was no manor, or by other than the lord. But they are all of a manorial character, or such as often belong to the lord of the manor, like a seignory or royalties, and are none of a territorial character. It is needless to enumerate them. Moreover, they are all spoken of as "to the said manor, or lord or lady thereof, incident or belonging, or which have been heretofore held by Margaret Walker or any of her ancestors." These words clearly govern the whole sentence, and not "matters and things" only. They are, therefore things incident to the manor or belonging to her as lady thereof. If the matter rested here there would scarcely, as I think, be a word to be said for the defendant. But then it was said that the words "other than and except such common right as could or might be claimed by the said Margaret Walker, as owner of the soil and inheritance of the said common," show that something different from and more than a reservation of manorial rights was intended. What was meant I might fairly say I do not know; many meanings might be and were suggested. But the argument proves too much. It is this: the draughtsman supposed that the lord of the manor had a right of common in his own soil: this he meant should cease, therefore he did not mean others should. Well, but what then? Why, the logical conclusion is that all others remain, including the right to the soil, right to trees, gravel, and stone-pits, cutting, furze, or gorse, &c. But that is absurd. But if none of these territorial rights are preserved, why is the territorial of shooting? no reason can be given. So that this argument, based on the assumed ignorance of the Legislature, fails. I will not repeat the arguments I used as to the probable intentions of the draughtsman, nor those I have used in former cases. I abide by them. If the defendant here succeeds the almost ludicrous consequence will follow that the lord will have a greater right in the new than in the old inclosures. For, with great respect to my Brother Honyman, the liberty is not limited to the old inclosures. *Bruce v. Helliwell* (*ubi sup.*) is not distinguishable, and Mr. Field admits that was well decided. The Exchequer Chamber in *Lord Leconfield v. Dixon* (*ubi sup.*) did not dissent from it. As to the latter case, I retain the opinion I expressed in the court below, which was overruled but, as I think, with all humility, not answered. Though the opinion of the court is expressed, no reason is given for that opinion. I say this with great respect, but deem it my duty to notice it to account for my not

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acquiescing in the judgment. It is added that the words are stronger than in *Ewart v. Graham* (*ubi sup.*) although there the right was expressly given over the new inclosures. But the case is distinguishable, as in that judgment the general Inclosure Act is relied on, which was not in force when the statute governing this case was enacted. Moreover, the judgment says the case cannot be distinguished from *Ewart v. Graham* (*ubi sup.*), which I cannot but think a mistake. In the court below Mr. Justice Honyman says that *Lord Leconfield v. Dixon* (*ubi sup.*) is not an authority bearing on the case. He also thinks *Ewart v. Graham* (*ubi sup.*) not distinguishable from this case. I must therefore think that he considered himself bound by authority, and if he had not considered himself so bound he might have construed the statute differently. Then there is the case of *Greathead v. Morley* (*ubi sup.*) as to which I avail myself of the observations of my Lord. I think the judgment should be affirmed.

CLEASBY, B.—It appears to me that the only mode in which fair effect can be given to the words of this Act of Parliament is by holding that, after it was passed, the lady of the manor retained the same right of shooting over the wastes of the manor which she possessed before. Only two views can, as far as I can see, be taken of the enactment in question. Either it was passed upon the idea that she possessed some defined right, such, for example, as that of free warren, and intended to reserve that particular right, or without having reference to any particular right which might be uncertain and not exactly known or agreed to, it might leave that open and still reserve everything which could properly be called a right which she actually possessed and enjoyed. With regard to the first view, I could be satisfied that the Legislature,—or which is the same thing, the parties, that is, the commoners and the lady of the manor,—had in view a particular right such as I have mentioned. I think as soon as it appeared that such right did not exist before, there would be an end of the question; the enactment would be inoperative. To give it in that case any operation would be to make a fresh Act of Parliament or agreement by making it apply to something not intended, which it is not the province of a court of justice to do. But I cannot satisfy myself, from the language of any part of the Act of Parliament, that this was the case. Before considering the first question, viz. whether the enactment in question upon the face of it has reference to some particular right, distinct from that possessed and enjoyed by the lord of sporting over the wastes and possibly over old inclosures in the manor, it is requisite to consider what the position of lords of manors was, and whether they stood in a different position from mere owners of land. It is quite unnecessary to enter into the question of the original right of the Crown to take all animals *feræ naturæ*, in which there was no right of property, and whether originally no man could do it without some grant from the Crown, such, for instance, as a right of free warren, as to which Blackstone may be consulted, vol. ii. p. 38 (ed. by Stewart), because all questions connected with the right must be decided upon the effect of the numerous statutes on the subject. Those statutes had reference to the right to preserve and kill game, and to the qualification which was required. The necessity for a qualification was abolished by 1 & 2 Will. 4, c. 32. But my

object in referring to the earlier Acts is to show that lords of manors were regarded as standing in a different position from other persons as regards the right of sporting over the manor. The difference was not sufficiently adverted to upon the argument. It is only necessary to refer to the statute 5 Anne, c. 14, "an Act for the better preservation of game," which empowers lords and ladies of manors to take within their manors game from the possession of unqualified persons, and to take guns, dogs, and nets, and also to appoint gamekeepers to kill game for the use of such lord or lady; and the statute 1 & 2 Wm. 4, c. 32 (which being passed subsequently to the Act in question, is only of importance historically as being founded not upon new, but upon old, ideas), is to the same effect. The 13th section enables lords and ladies of manors to appoint gamekeepers, and confers upon such gamekeepers the right to seize for the use of the lords nets used for taking game within the limits of the manors by persons not authorized to take game. The same Act in many sections deals with the right to kill game as something distinct from the ownership of the soil. The words "right of killing game whether enjoyed by the landlord or other persons" are frequently used, and that separate right is made the subject of legislation. Without referring further to the statutes, it is sufficient to notice the case of *Calcraft v. Gibbs* (5 T. R. 19) decided in 1792, the Act in question having been passed in 1798. It was an action for a penalty under the Game Laws for sporting without a qualification. The qualification set up was a deputation as gamekeeper under a person who, it was said, had purchased the right of shooting over the manor. But this was held to be no answer, there being no *bonâ fide* dispute as to who was lord of the manor. If there had been such a dispute it could not have been tried in an action for a penalty, but there being no dispute, it was said the lord of the manor was the only person who could grant the deputation as the law then stood. The words of Lord Kenyon are: "Now that decides the question at once; for a man cannot convey to another the power of appointing a gamekeeper without a conveyance of the manor itself. Such a power is a mere emanation of the manor and inseparable from it." The clear effect of the legislation on the subject and of the authorities was, it is submitted, that the lord had certain rights connected with the preservation and taking of game which was regarded as inseparable from the manor, and therefore as a manorial right. The extent to which the lord had the exclusive right of sporting has nothing to do with this. It might be over the whole manor, or it might be over the wastes, and particular inclosures, or it might be a subject of dispute whether it existed beyond the wastes of the manor, and to what extent. Mr. Christian, in his note to Blackstone, vol. ii. p. 408, says that the power of lords of manors to appoint gamekeepers had led to the inference (which he considers as erroneous) that lords of manors have a right to take game throughout the manor superior to that of other duly qualified owners of land within the manor. Having regard to the position of the lords of the manor at the time when the Act passed, we may now consider whether it appears that the Act of Parliament in the various clauses is intended to preserve some right to the lord which did not exist. It was suggested that the language of the Act

was used upon the supposition that the lady of the manor had some such distinct right as a right of free warren which it was intended to preserve, and as it was now conceded that there was no such right as that of free warren, that the enactment was inoperative. Upon reading the various clauses of the Act, I see no reason whatever to conclude that they have reference to any such particular right independent of the general right of the lord of the manor. By the first clause there is to be an allotment to the lady of the manor of a certain portion of the wastes in lieu of and in full compensation for her right and interest in the soil of the commons and waste grounds, and in the section which follows we have the effect to be given to that allotment. By that section the allotment to each allottee, including the lady of the manor, is made a satisfaction for all his rights over all the wastes, with the following exception: "except such manorial rights as are hereinafter reserved to the said Margaret Walker, her heirs and assigns." A right of free warren does not come within the description of a manorial right of all. It is a franchise to which title must be made either by grant from the Crown or by prescription, and may be held just as well by a person not lord of a manor as by one who is. It is so separate from the manor, that when the lord of a manor has also acquired a right of free warren over the manor and conveys away the manor with all rights of fishing, fowling, hunting, and shooting belonging to it, this would not carry the free warren, because, though the words "all rights, &c.," are large enough to include a free warren, yet the warren does not belong to the manor, and therefore does not pass. This was expressly decided in *Morris v. Dimes* (1 A. & E. 654). In that case Littledale, J., says: "Whether these words be sufficient to include a free warren I will not inquire; the grant is only of things belonging to the manor, and the warren was distinct from the manor, and therefore it will not pass by the release." It may no doubt be by prescription or by the terms of the original grant, like any other profit *à prendre* or easement appurtenant to the manor, so as to pass by a conveyance of the manor with all its appurtenances, but that does not make it any more than any other such profit or easement a manorial right, so that this exception of manorial rights could not by any natural conclusion be held to have reference to such a right as has been mentioned. As regards the reservation and enacting clause which is referred to in the 2nd section, it contains general words including all rights of hunting, fishing, and fowling, and all franchises and privileges, and every right which could be enjoyed by the lady as lady of the manor, and therefore would no doubt include a free warren if such a franchise had become appurtenant to the manor, but coupling those general words with the more particular words of the exception in the preceding clause which refers to them it seems impossible to contend that the whole enactment so clearly refers to a supposed right of free warren, which did not exist, to the exclusion of any more limited right which did exist. Applying, however, the whole of the enactment to the state of things which did exist, we must consider what that state of things was. Miss Walker was lady of the manor, with the usual right of appointing gamekeepers, and granting deputations for, the manor, with the exclusive right of sporting on the wastes of the manor. She might

have or might not have the right of sporting over old inclosures, although the inference derivable from the Act is that she had not, or, at all events, that it was not admitted by the parties to it that she had, any right beyond that over the wastes, because the exception in the 2nd section only refers to the rights over the wastes, and it refers to the subsequent enactment as carrying into effect the previous exception. The effect of the enactments as applied to what was undisputed appears to be, that the allotment clause excepts the lady's rights over the waste and the enactment clause contains words carrying into effect the exception, and we ought to give it this operation by applying it to what did exist rather than make it inoperative by supposing it to apply exclusively to something which did not exist; the only real question appears to be whether, in any fair sense of the word, the lady of the manor can be said to have any right of sporting over the wastes. There is perhaps some want of strict accuracy in speaking without some explanation of the right of the owner of the soil to the exclusive sporting on his own land, although it should be borne in mind that the owner of land has not necessarily the exclusive right of sporting over it. There may be a right of free warren in some other person, or he may himself have granted away the exclusive right of sporting. But even if there is some want of strict accuracy, the only question is, whether what is intended is clearly understood, and it has been so common a thing to have the right to the land and to use it for the ordinary purposes of occupation in one person and the privilege of sporting in another, the latter privilege being one of the most common subjects of bargaining in all parts of England, that even before it has become, properly speaking, a separate right it is spoken of as such. It may never have existed in the time of the owner for the time being, except as a separate right. It may always have been let either for terms of years or from year to year, and it may be under demise at the time when the lord and the commoners come to the agreement for the inclosure. And as to its coming within the words "manorial rights," enough has been said to show how much the rights of lords of manors in relation to game were and are treated as manorial rights. I will only add, that, supposing the lord of a manor having always enjoyed the exclusive right of sporting over the wastes of the manor, and having made it the subject of profit by letting it from time to time, the commoners were to meet for the purpose of settling the terms of the inclosure, and there was to be an agreement to the effect that the allotment to the lord should be in satisfaction of all his rights over the wastes, would it not be considered that he had given up all his rights, including that of sporting? On the other hand if the agreement was that the allotment to the lord should be in satisfaction of all his rights over the wastes, except the manorial right afterwards mentioned, and the right afterwards mentioned was that of sporting, along with certain other rights, that then the right of sporting would be reserved? It is only a question of intention, and the intention, I submit, would be obvious. It was said that there was a difficulty upon this construction in giving effect to the exception in the 3rd clause, which excepts out of the reservation, "such common right as could or might be claimed by the said Margaret Walker as owner of the soil and inheritance of the said commons or waste grounds." The words

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"such common rights as might be claimed by the lady" are inartificial, because the common right would be claimed by the commoners and the lady would have no right as owner of the soil with the commoners. If this had applied to her right in respect of tenements in the manor, her property, it would be correct, but the language applies it to the wastes. The lord would have no right as a commoner; but he would have a right to stock the common as owner of the waste, provided enough was left for the commoners, and in that general sense he may be said to claim a common right with the others, to which the language might apply, for the lord receives compensation by his allotments not only for his giving up the ownership of the soil, but also for his losing the benefit of stocking the common. At any rate, the words "common rights" cannot, by any straining of language, be held as referring to the lord's exclusive right of sporting so as to except it. As regards the distinction which is drawn between territorial and manorial rights, I beg to be allowed to say that all manorial and seigniorial rights are in any proper use of the word territorial. Without regard, therefore, to any authorities, I should come to the conclusion that there is nothing to prevent effect being given to the language of this agreement, or rather Act of Parliament, and that the clear effect is to reserve to the lady of the manor the exclusive right which the lady actually possessed and enjoyed of sporting over the wastes of the manor. It would occupy more space and time than I should be justified in appropriating if I were to examine the several authorities which were referred to. Decisions upon the language of one agreement or Act of Parliament are seldom of much service in construing another. But the decisions are of importance, showing as they do, that the exclusive right of sporting by the owner of the land, though, properly speaking, not a separate right from the ownership, becomes so in the construction of agreements and Acts of Parliament if the language shews it was intended to be made so. Thus the reservation of the exclusive right of sporting in a deed between parties executed by the grantee of the land, would be given effect to as a grant by the grantee: *Wickham v. Hawker* (7 M. & W. 63); and if occurring in an Act of Parliament, it would be operative to the same extent: *Ewart v. Graham (ubi sup.)* This last case resembles the present so much that Mr. Justice Honyman regards the decision as conclusive of the present case. And bearing in mind that the enactment of the 2nd section is that all the lady's rights over the waste are satisfied by the allotment to her (except the manorial rights afterwards reserved), which necessarily imports that "the rights afterwards mentioned," include rights over the waste, it appears to me that Mr. Justice Honyman's view was correct, and that the case of *Ewart v. Graham (ubi sup.)* is in point. I should agree, as a matter of construction and upon the authorities, with my learned brothers in their conclusion if the language of the exception in the 2nd section did not necessarily import that, the rights over the waste were intended to be reserved; but this exception appears to me to be the decisive feature of the case. Unless proper effect is given to this, it is not too much to say that the intention of the parties introducing this exception is disregarded. The 1st section must be read in connection with the 2nd section, and the 2nd in connection

with the 3rd. It appears to me that the judgment in *Ewart v. Graham (ubi sup.)* removes the principal objection which could be made to the decision at which I have arrived; because it was conclusive that in an inclosure Act a reservation to the lord of all rights of hunting, shooting, fishing and fowling over the waste in as full a manner as he would have enjoyed it before carried not only any right, properly so called, which he might possess separate from the soil, but the benefit and privilege which he in fact enjoyed as owner of the soil. That decision was arrived at upon the principle which, it is submitted, is the only true one of carrying out the intention of the parties to the agreement. Decisions had been arrived at before, and some were already overruled, which appeared rather to satisfy particular views than the terms agreed on. It was stated in the course of the argument before us, that, in order to arrive at the conclusion which I have come to, it was necessary to overrule the case of *Bruce v. Helliwell (ubi sup.)* in the Exchequer. But that is not so. There is in that case an express exception out of the reservation clause of such rights as could or might be claimed by the lord as owner of the soil and inheritance of the common. There is no such exception here. The language in that case seems clearly to have expressed the intention that the rights over the waste should be extinguished. I believe the conclusion I have arrived at is not inconsistent with *Bruce v. Helliwell (ubi sup.)*, or with any case which has not been overruled, and that it only reserves to the lady of the manor the same rights as are reserved by the landlords in England generally when they lease their lands. Dealing with the present case as a question of intention, I should say that the only sound argument is that the words "manorial rights" in the exception to the 2nd section did not include the exclusive right of the lord to sport over the waste. If it appeared that there were other manorial rights over the waste to which these words were intended to apply, there might be some force in the argument, but as there are no others, what else could the parties intend by those words? And although the words might not properly describe such a right taken by themselves, enough has been said, I hope, to show that there is nothing so inappropriate in them as to make it impossible for them to be construed as including the only thing to which the intention of the parties could apply them. It is because I am satisfied that this judgment carries into effect the intention of the parties to this arrangement of rights in 1798, that I venture to differ from the Lord Chief Justice and many of my learned brothers. I think, for the above reasons, that the judgment of the Common Pleas ought to be reversed. In this judgment my brother Baron Pollock concurs.

Judgment affirmed.

Attorneys for plaintiff: *Scott and Co.*

Attorneys for defendant: *Pilgrim and Phillip.*

MID. SESS.] LONDON TRAMWAYS CO. (LIMITED) v. ASSESSMENT COMMITTEE OF LAMBETH. [MID. SESS.]

MIDDLESEX SESSIONS.

Monday, July 6, 1874.

(Before P. H. EDLIN, Esq., Q.C., Assistant Judge.)
THE LONDON TRAMWAYS CO. (LIMITED) (apps.) v. THE
ASSESSMENT COMMITTEE OF LAMBETH (resps.).

Rating — Assessment — Tramways — General expenses.

In assessing the rateable value of tramways, the annual gross traffic receipts earned over the entire system must be taken as the basis of the estimate of the rent, and the net receipts in each parish as the criterion of the rateable value in each parish.

Where a tramway route begins and ends in the same parish, the net receipts of that route is the value upon which the tramway owners must be rated.

Where a tramway route extends through two or more parishes, the fairest practicable mode of apportioning held to be by dividing the receipts from each distinct service route in proportion to the lineal mileage of such route in each parish respectively.

The general expenses, except horse expenses, allowed proportionately to the number of car miles run over in each parish upon each of the several distinct service routes therein.

THE ASSISTANT JUDGE.—This [is the first case in which an assessment of tramways constructed in public roads has been the subject of appeal to this court; and as there are several other appeals pending before us, which would be more or less governed by the result of the present one, it may be convenient that we should state the grounds and reasons for our decision upon several of the questions incidental to the inquiry, more fully than is usual in appeals of this kind, or than would otherwise have been necessary.

That the occupiers of tramways laid down along a public street or highway are rateable to the relief of the poor, has been recently decided by the Court of Queen's Bench, upon a case stated after notice of appeal to this court:—*Pimlico Tramway Company (apps.) v. The Assessment Committee of the Greenwich Union (resps.)* (29 L. T. Rep. N. S. 605; L. Rep. 9 Q. B. 9). Each of the learned judges before whom that case was argued, expressed his inability to distinguish it from the well-known cases which have been decided upon the occupation of land by gas companies and water companies. This analogy presents itself upon the question simply of liability to be rated; but for the purposes of estimating the rateable value of this property, the series of decisions of the Queen's Bench bearing upon the mode of rating railways have a more obvious application, and it is to these authorities that we have chiefly looked for guidance in determining the questions raised upon the present appeal.

The assessment with which we have now to deal is "6290l. gross value," and "5890l. net rateable value," in the supplemental valuation list of the parish of St. Mary, Lambeth, made on the several lines of tramway belonging to the London Tramways Company in this parish. The appellants contend that the tramways, so far from fairly admitting of this assessment, have in point of fact no rateable value whatsoever. Both parties profess to have based their calculations mainly upon the balance sheets and revenue

accounts issued by the company to their shareholders, for the year ending the 30th June 1873, but their respective conclusions from these and other data furnished by the company for the purposes of the several appeals, have little or nothing in common; and the various amended estimates which each side has been permitted to substitute from time to time in the course of this inquiry, present no less material differences.

The tramways laid in the respondents' parish comprise one entire route confined to this parish, and considerable portions of five other service routes, running without break in several parishes; each route forming part of an incorporated system of tramways belonging to the appellants and which extend altogether into eight parishes. In this, as in all cases under the Parochial Assessment Act, the value to be found has to be determined according to the annual rent that a hypothetical tenant, making the suitable deductions, would give for the rateable property; that is to say, in estimating property of this kind, what amount a tenant of the whole hereditaments would give, upon a fair division of the entire rent, for so much of the rateable property as is situate in the particular parish: and in the endeavour to arrive at this amount we have, conformably with the now well-established rule, been guided, as far as the facts and circumstances of the case admit, by what is called the *parochial* principle in contradistinction to the *mileage* principle. This amount—the rent which the property would command—or, in other words, the beneficial value of the occupation, must necessarily therefore be based upon the receipts and expenses connected with the entire undertaking; so that, accepting the annual gross receipts as the basis of the estimate of the rent, the net receipts in each parish would afford the best criterion of rateable value in each parish. We have proceeded upon this principle; and it being agreed that the annual gross traffic receipts earned over the entire system are to be taken from the companies' accounts at 109,006l., the first question that arises is as to the mode of apportioning this sum, so as to give to each parish, as near as may be, its proper share thereof.

Separate accounts having been kept of the earnings derived from each service-route,—wherever a service-route is from end to end entirely in one parish only (as in the case of the Westminster and Brixton route, the whole of which is in the respondents' parish), the entire amount of such earnings is of course to be credited to the rateable property in such one parish, no question of division arising in such case. But it appears that the cars take up and put down passengers at every part of the tram-lines, and it has been the practice to collect and bring into the account relating to each route, the fares thus earned upon it, without distinctive reference to the particular parts of it, from or to which the passengers were carried. Thus, where the tram-rails of a route are laid in an unbroken line along the roads in several parishes (as on the route from Blackfriars to Brixton, which runs in three parishes,—and the Westminster and New-cross route, which runs in five parishes), we are without any data from which to find, with approximate accuracy, how much of the aggregate receipts of the company derived from such route had been actually earned in any one of such parishes. In these cases a strict adherence to the parochial principle is impossible, and we

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think the fairest practicable mode of apportionment is found by dividing the receipts from each distinct service route in proportion to the lineal mileage of such route in each parish respectively. But here another important point for observation arises. Upon certain portions of the system, where several distinct routes converge, the same tram-rails are used for a certain distance in the working of each of such several routes. For example, it appears that between Westminster-bridge and Hercules-buildings, to and from those points, the same tram-rails serve for the cars running between Westminster-bridge and Clapham,—Westminster-bridge and Brixton,—Westminster-bridge and Camberwell,—and Westminster-bridge and New-cross, that is to say, for four distinct service routes. It will be observed, therefore, that the rule of distributive proportion in respect of earnings which we have adopted will operate to give an inter-parochial division, not in the proportion that the lineal tram-mileage in the parish bears to the lineal tram-mileage of the whole system, but in proportion to the mileage on each distinct service route, measured separately from end to end. Each parish will thus derive its proportionate benefit from the earnings on each of the several routes, if more than one, running in or along it. Proceeding upon this principle of division, the several sums to be allocated for gross receipts to the respondents' parish amount to £39,256. On behalf of the appellants, however, an argument was pressed, and after being abandoned, was again urged upon us, which must be here disposed of. It may be briefly put as follows: That inasmuch as the parishes of Clapham and Greenwich are less populous than the districts in which the tramways are situate in Lambeth, we should subtract certain sums devolving to the former parishes according to the mode of apportionment above stated, and add them to those appropriated to Lambeth, with a view to adjust the differences in local traffic arising from this inequality of population, and thus carry out the parochial principle with greater exactitude. But the two sums introduced into the account by the appellants for this purpose are purely speculative, and we cannot assume that the parishes affected by this attempt to balance unknown quantities, and equalize undefined numbers, would admit the justice of it. We reject these additions to the gross receipts allocated to the respondents' parish,—as inconsistent with the prescription of any certain ratio of proportion based on actual fact,—or with any mode of apportioning receipts generally applicable to the entire system.

Having thus arrived at the amount of gross earnings in the parish, we have next to dispose of the subjects in dispute relating to the allowance and apportionment of the expenses. We will first deal with the mode of apportionment. With regard to the "general expenses" incurred in the management of the undertaking, the evidence has satisfied us that the fairest apportionment is obtained by dividing them in the manner proposed by the appellants;—that is to say, proportionately to the aggregate number of *Car Miles* run over in each parish upon each of the several distinct service routes therein. Thus the expenses allowed to each parish will have the same ratio to those over the entire system as the car miles run in the parish bear to the car miles

run over the entire system. From this rule of apportionment, however, the horse expenses must be excepted, the expenditure for horses admitting of a more exact allocation, separate accounts thereof having been kept in respect of each route. The same rule, therefore, must prevail for dividing the horse expenses as for apportioning the receipts derived from each distinct route, where the route extends into more than one parish. In dealing with this branch of the case, we have not failed to notice that the respondents base their estimate of the rateable value upon the proposition that the working expenses bear an equal proportion to the receipts over the entire system—in a word, that every pound is earned at the same cost; and it may be useful to state, in view of the other appeals pending, that this mode of dealing with the working expenses appears to us to be not only contrary to the manifest requirements of the facts, but opposed to the parochial principle. With regard to horse expenses more particularly, the account furnished by the appellants, clearly shows that they bear no such uniform proportion to the traffic receipts. Upon the Westminster and Clapham route, for example, it appears that the expenses for horsing the cars are materially less, in proportion to the earnings, than on other routes, which extend into several parishes. There would also result from the adoption of this method, as it seems to us, the further injustice of throwing a disproportionate charge for expenses on those portions of the system to which we have specially adverted as being used in common for several distinct service routes.

Passing on to the various items included in the appellants' estimate under the head of "General Expenses," the reasonableness of which is disputed by the respondents, we consider that certain deductions ought to be made from the respective amounts claimed by the appellants for "Directors' Fees," "Law Expenses," and "Depreciation of Equipment;" and it should be understood that we have dealt with the claim for compensation moneys in our estimate of the proper percentage to cover Risks and Casualties. The sum total of these disallowances is 2737*l.*, by which amount the sum claimed in the appellants' schedule for "general expenses," must be reduced. The proportionate reduction for the present purpose is 1035*l.* We adopt as reasonable the appellants' estimate of the fund requisite for Horse Renewals, taking the life of a tramway horse at four years; but with respect to the Car Renewals, we find the life of a tramway car to be fourteen years instead of seven. Taking the Car Stock as of the value alleged, and doubling the life, a deduction of 1710*l.*, is required from the sum claimed by the appellants for an annual sinking fund for Car Renewals. The cost of Horse and Car Renewals in the respondents' parish must, therefore be stated at 1093*l.* instead of 1739*l.* We have estimated the gross rateable value of the several stations, car sheds and stables, at 2484*l.*, and are of opinion that instead of dividing this sum in proportion to the gross receipts over the entire system, as proposed by the appellants, the same rule should govern its distribution, as we have applied to the other general expenses. The contribution from Lambeth towards these expenses will thus be found to amount to 939*l.* We estimate the tenants' capital at 43,000*l.*, of which the share devolving to the respondent parish, by the same

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rule of apportionment, is 16,263*l*. For Trade Profits and Risks and Casualties, we think that no more than twelve and a half per cent. should be allowed in addition to five per cent. interest on the capital sum. Calculated at these rates, the total allowance under this head is 2845*l*.

Having made these several reductions in the appellant's estimates of the "working expenses," "rateable value of stations," and "occupiers' share," we arrive at a gross rental of 4539*l*., less the usual tenant's rates and taxes. Lastly, there remain to be determined the probable annual average cost of the repairs, and the other expenses necessary to maintain the hereditament in a state to command that value. After a careful consideration of the very conflicting evidence given upon this important part of the case, we have come to the conclusion that 350*l*. per mile will be a proper and sufficient allowance to meet the annual cost for the repairs and renewal of the tramway, including therein, as necessary to its maintenance and efficiency, the expense of repairing the midways. The amount to be credited for these purposes in respect of the mileage in the respondents' parish should therefore be 2318*l*. instead of 3312*l*. Having further deducted 398*l*. for rates and taxes, computed at 4*s*. 4*d*. in the pound, we have at last before us all the calculations necessary for the eduction of the rateable value,—which we find to be 1823*l*.

We have only now to direct that the assessment upon the appellants in the supplemental valuation list of the respondents' parish be amended by altering the gross estimated rental from 6290*l*. to 4141*l*., and the net rateable value from 5890*l*. to 1823*l*.

As to the costs of the appeal we make no order.

COURT OF COMMON PLEAS.

Reported by ETHERINGTON SMITH and J. M. LELY Esqs.,
Barristers-at-Law.

June 22 and 23, 1874.

THE BOSTON ELECTION PETITION; MALCOLM (pet.)
v. INGRAM AND PARRY (resps.).

Parliamentary election—Scrutiny under sect. 25 of the Ballot Act—What must be proved to entitle a petitioner to strike off a vote from the poll of a candidate adjudged to be guilty of bribery—Evidence of corrupt motive in the recipient of a bribe.

The 25th section of the Ballot Act enacts: "Where a candidate on the trial of an election petition claiming the seat for any person, is proved to have been guilty by himself, or by any person on his behalf, of bribery, treating, or undue influence in respect of any person who voted at such election, there shall, on a scrutiny, be struck off from the number of votes appearing to have been given to such candidate, one vote for every person who voted at such election, and is proved to have been so bribed, treated, or unduly influenced."

Under this section the proceedings on a scrutiny remain just the same as before under the earlier Acts, except that no inquiry can be made as to how the voter voted. It is still necessary to prove the candidate guilty of bribing, to give evidence of the corrupt receiving of the bribe by the voter, and to prove the fact of voting. This done the judge may strike off a number of votes equal to the

number of bribed voters (per Lord Coleridge, C.J. and Brett, J., (Irons. J. dubitante).

Mr. P., the accepted candidate of a party in a borough, distributed gifts of coal to 877 persons in the borough, shortly before a dissolution of Parliament. Each recipient had, as the authority to receive the coal, a card sent to him, on which was printed, "With Mr. P.'s compliments," and which was signed by Mr. P.'s political agent; and the coals were distributed by persons who afterwards canvassed for Mr. P.

Held, per Lord Coleridge, C.J. and Grove, J., Brett, J. dubitante, that this was sufficient evidence, it not being rebutted, of a corrupt receiving on the part of the electors to bring them within the 25th section of the Ballot Act, as having been "so bribed."

Semble, per Lord Coleridge, C.J. and Brett, J., that the words "so bribed" in sect. 24 of the Ballot Act refer only to the two modes in which a candidate may be guilty of bribery, mentioned in the earlier part of the section, and do not mean that it is only necessary on a scrutiny to prove the act of the briber.

THIS was a case stated for the decision of the Court of Common Pleas by Mr. Justice Grove, upon a question arising upon the trial of a petition before him against the return of William James Ingram and Thomas Parry, as members for Boston, at the last Parliamentary election for that borough.

At the election Mr. Ingram and Mr. Parry had been returned at the head of the poll, and Mr. Malcolm stood next below Mr. Parry. The learned judge found that Mr. Parry had been, through his agents, guilty of bribery, and unseated him; and the question was, whether Mr. Malcolm was to be seated in his place without it being necessary to hold a new election. This depended upon two considerations: first, does the true construction of the 35th section of the Ballot Act require that evidence be given of the corrupt receiving as well as of the corrupt offering or giving of a bribe, before striking off a vote from the respondent's poll for every voter proved to have received that which the judge decided to be a corrupt gift? and secondly, if so, was there evidence here of such corrupt receiving?

The facts were shortly these: Mr. Parry, who had a few weeks before been accepted as the Liberal candidate for the borough, gave orders about Christmas time for the distribution of a quantity of coal to the poor, and his agent who carried the orders into execution distributed the coal to, among others, a large number of voters many of whom were not fit objects of charity. The coals were distributed by means of cards which had on the back printed the words, "With Mr. Parry's compliments," and which were signed by a man who was Mr. Parry's political agent. The persons distributing these orders for coal afterwards canvassed on Mr. Parry's behalf.

The dissolution of Parliament occurred in January, and at the ensuing election, on 3rd Feb., Mr. Parry was returned but was petitioned against. It was proved on the trial that 877 persons had received coals, and the petitioner contended upon the scrutiny that he had a right to strike off under sect. 25 of the Ballot Act 877 votes without further inquiry, they being votes of voters "so bribed" within the section.

The respondent contended that the section required proof of the receipt by the voters of the

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coal with a corrupt motive, and that no evidence of that had been given.

Some of the voters were represented by counsel at the trial, but after discussion it was agreed that they should not be called to deny a corrupt receiving in individual cases, but that the question as to all should be left to the court, to determine whether upon the facts proved by the petitioner there was any evidence of a corrupt receiving by the voters, so as to entitle the petitioner to strike off a sufficient number of votes to reduce Mr. Parry's majority.

Giffard, Q.C. (*Thesiger*, Q.C., and *Cave* with him), for the petitioner.

O'Malley, Q.C. (*Chandos Leigh*, and *Le Marchant* with him), for some of the voters.

J. O. Griffiths watched the case on behalf of Mr. Ingram, one of the respondents.

Giffard, Q.C., stated that O'Malley, Q.C., was anxious to appear for some of the voters, and that the petitioner did not raise any objection to his doing so.

BRETT, J.—The electors may petition if they choose, but if they have not done so, how can they appear, as they are not parties?

Lord COLERIDGE, C.J.—Perhaps it will be best to let Mr. Giffard begin his argument, and then Mr. O'Malley must satisfy us when it comes to the time that he ought to be heard, before we do hear him.

Giffard, Q.C.—The whole question here arises under sect. 25 of the Ballot Act, and that section has to be construed by looking at ss. 2 and 3 of the Corrupt Practices Act 1854. Bribery is defined in those sections; the one having reference to the person bribing, the other to the persons bribed, and so as to treating in ss. 4 and 5. But there is a distinction between cases of bribery and those of undue influence, for in the latter the penalty attaches upon proof of guilt in the person influencing alone. At common law also the bribed vote, that is, the vote given corruptly after the corrupt reception of a bribe would go off upon a scrutiny, and we have now to deal with a section in an Act which was intended to make some change in the law, and introduce greater stringency in dealing with corrupt practices. Sect. 25 of the Ballot Act then, it is contended, adds something to the previous mode of dealing with electoral corruption, and gives a power of striking off a vote for the misconduct of the candidate or his agent, quite irrespective of the moral guilt of the person voting. It is submitted that the section refers only to persons bribing. [BRETT, J.—Is your argument that a candidate may have bribed fifty persons, and yet that they are not guilty of being bribed? If so, are their votes to be struck off?] Yes, I say that the words "so bribed" have reference only to the act of the briber, and mean a bribe administered by the candidate. The fact that the voters have received the coals, and the fact that the coals were given corruptly, together bring the persons "so bribed" within the 25th section of the Act. We cannot ask definitely whether they received the gifts corruptly; indeed, as *Martin*, B., said in the Westminster petition, it would be quite useless to ask such a question of the voters themselves. [BRETT, J.—There might be a great difference between a gift of coals and one of money. In the one instance no one could help drawing the universal inference. But this

case I understand to be stated on the assumption that the judge could not draw the inference as to all. GROVE, J.—Yes, that is so; I did not. Lord COLERIDGE, C.J.—May it not be that the onus is upon those as to whom no inference is drawn, to show that they were not influenced corruptly, the petitioner having shown that the briber was corrupt? I contend that the facts proved render disproof impossible as well as inadmissible. [GROVE, J.—The question of onus was argued before me at the trial. Ultimately the question left was this: Was there a case on which I was bound to find that the voters were corruptly influenced?] Assuming, for the purpose of arguing the second point, that the construction of the section is against me, I will consider the evidence that was adduced of the persons being bribed in the sense required. The facts speak for themselves; the coals were distributed by the election agent with the compliments of the candidate, and the recipients were canvassed by the same persons who took part in the distribution. [BRETT, J.—What will you say in respect of those who did not know that Dyer was an election agent, or that Mr. Parry was a candidate, and who received the coal in very small quantities as a charity?] I say that even that would be some evidence against them, because of the card. But, generally, I say that the facts are *prima facie* proof of knowledge in the voters, and are such as call on them for an explanation. They were not, however, called to explain, and did not explain; therefore, it is absolute proof.

O'Malley, Q.C., as to the right to be heard.—The court is sitting under the Act of 1868, and by virtue of sect. 11, sub-sect. 13, its powers and duties exist. It is not trying an issue between the parties, but it has to decide whether any or what person has been duly elected. The respondent has at this stage no further interest; but a scrutiny proceeds on the express assumption that the voter is an interested party. Although it is urged that the voters, by not being called, have admitted the charge against themselves, yet, this cannot be such an admission as to prevent the court from hearing them upon their rights under the statute. [BRETT, J.—Has a voter on a scrutiny before an election committee ever been allowed to appear by counsel?] There is no case; but by the old Acts, now repealed, a voter might be made a respondent; and this and such like provisions were to protect the voters from being thrown over by members or candidates. Then in the 1868 Act all these securities are given to the persons impugning the decision of the majority. There is, however, no provision for voters coming in after the trial is begun. It is a *casus omissus*; but it is not prohibited by the Act. [BRETT, J.—Are you a party to the petition, or do you claim to be heard without being a party?] I take both grounds. (He then referred to the *Evesham* case (*Falc. & Fitz.* 529), and the *Yorkshire* case, in the first volume of the printed judgments, before *Martin*, B.) [Lord COLERIDGE, C.J.—We are hearing a special case. The voters might have been heard below, but not having then intervened, can they now appear? However, we think that, as a matter of convenience, and as Mr. Giffard does not object, we will listen to Mr. O'Malley, it being expressly understood that we do not admit his claim to be heard as of right.] There are two grounds on which the petitioner

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relies, one on the positive language of the 25th section; and the second on the determination whether there is not *prima facie* evidence, which if not met ought to lead the judge to the conclusion that these men were guilty of bribery. [Lord COLERIDGE, C.J.—You had better address yourself to the second.] This has to be discussed just as if these persons were on their trial for bribery. Assuming that sect. 25 means corruption on the part of the voter, then I say that the evidence which would not be sufficient to leave to a jury as to his guilt, could not entitle the judge to find him guilty. [Lord COLERIDGE, C.J.—In a criminal case they cannot be heard, and in this they cannot—there is a difference.] Here there was no evidence how any of the persons voted. There was no evidence that they even knew that Mr. Parry was a candidate. Surely an act, the quality of which depends on the motive of the giver and the motive of the receiver, is not to be assumed to be complete without any evidence of one branch of it. This is like throwing upon a man the onus of proving his innocence, merely because it is said that he is guilty. I draw a distinction between cases which necessarily imply guilt on the part of the receiver, unless explained, and this case. Here there may be innocence on the part of the receiver though the giver may be guilty. The simple fact of giving would not have satisfied the judge of guilt in the giver, and yet it is sought to maintain that a single act of receiving makes the receiver guilty. The statute is a penal one, because, by sect. 11, sub-sect. 14, the names of the persons bribed are to be scheduled by the judge. The Act must, therefore, be construed strictly, and nothing is to be assumed against the alleged violators of it, and no admission of guilt is to be implied.

He was then stopped on the other question as to the construction of the statute.

June 23.—The following judgments were delivered:—

Lord COLERIDGE, C.J.—We shall not call on Mr. O'Malley upon the first point, because we agree in that construction of the section for which he would contend; and we will not trouble Mr. Giffard for a reply, because we are with him upon the question of fact—the only one on which Mr. O'Malley has been heard. The questions are raised for the consideration of the court in this manner: A gentleman of the name of Parry in Dec. 1873 declared himself a candidate for the borough of Boston at the next election. At the end of December he determined to give away coals to the poor; and he wrote a letter to an alderman named Wright, which it is not material for me to read at length, telling him to arrange for the distribution of the coals. The coals were distributed by means of tickets ordered by Mr. Wright and with Dyer's name upon them, and were distributed by, amongst others, persons who afterwards canvassed the electors on behalf of Mr. Parry. The mode of distribution was, that persons were asked if they would accept coals from Mr. Parry, and, if so, their names were put down in a book. Then all such persons had tickets sent to them, which between the 14th Jan. and the dissolution of Parliament were in the following form: "Please to deliver to (name of the donee) ten stones of coal for Thomas Parry, Esq., Sleaford (delivered free), B. B. Dyer;" and on the back were the words, "With Mr. Parry's compliments."

The tickets were addressed to and were orders on some coal merchant. B. B. Dyer is the same man who was Mr. Parry's political agent, but the latter did not know that the cards were issued with his signature. Many of the people receiving the coals were not objects of charity, but were small shopkeepers and persons in the occupation of premises exceeding 10*l.* in annual value. Mr. Parry, however, knew nothing of the mode of distribution; but Dyer intended to influence the votes, and several persons engaged in the distribution afterwards canvassed on Mr. Parry's behalf. The question under these circumstances for us was, Did the facts bring the matter within the words of the 25th section of the Ballot Act? No further evidence was given at all, beyond the extent of the distribution; 877 persons were proved to have received coal; and we have thus all that was proved before my brother Grove. He found as a fact that so far as Mr. Parry was concerned, he was, by the hands of his agents, guilty of bribery, and so disqualified from being returned; and the questions which arise for us are, whether without more proof all these persons can be held to have been bribed upon the true construction of the Ballot Act? or, apart from the Ballot Act, and assuming that it requires not only an act of bribery on the part of the person bribing, but also some corrupt act on the part of the person receiving the bribe, whether there was sufficient evidence, whether enough appears to justify the judge in finding that there was here a corrupt receiving by the persons proved to have received the coals. I will take the second question, first, as there is not an absolute unanimity, though I cannot call it a disagreement in the court as to the other point. The facts are, that 877 persons received coals, that Parliament was in its fifth or sixth year of existence, was at any rate an old Parliament, and a dissolution was in the course of things to be looked for, not immediately perhaps, but during the coming session. Mr. Parry had declared himself to be, and had been accepted as a candidate by the Liberal party, and very soon after this the distribution of coal takes place. It was done by his political agent. Those who went round to ask if the coal tickets would be received were the same men who at some time or another about that period canvassed the electors for Mr. Parry. The borough had 2500 electors, and 877 of them received coal. Now it appears to me that this is, I might say abundant evidence, but it is enough to say that it is evidence that assuming a corrupt receiving be necessary to be made out as well as a corrupt giving, there was here a corrupt receiving. Then, if these facts were evidence, it was agreed that the court should judge of them; and it was at the time pointed out to the counsel for the voters, that although the evidence might not be conclusive, yet the court might say that it was evidence calling on the voters for a reply; and if it were so, then that by not calling the voters it would be taken as a fact that they were not called to rebut the evidence, and so the decision might be against them. It was, therefore, fully understood in what way the matter was left for the court. And so, without saying that it was conclusive, I say that there was evidence calling on the persons interested in the maintenance of their votes to come forward and defend them; and that as there was in fact no appearance of any such voters, my brother Grove

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was justified in going through the list, and in striking off the names of those who had received coal a sufficient number to reduce the majority of Mr. Parry. But then another matter was raised involving a question of the true construction of the Ballot Act; and it was said that it would render the consideration of the character of the recipients of what the judge has found to be a gift in the nature of a bribe immaterial. But I am of opinion that the true construction of the Act does not produce this result. It must be remembered that at the time of the passing of the Act we are dealing with a state of law which makes the act of bribery by the briber one thing and the corrupt receiving by the person bribed another, which constitutes two different offences. The words are, "Where a candidate on the trial of an election petition claiming the seat for any person, is proved to have been guilty by himself or by any person on his behalf of bribery, treating, or undue influence, in respect of any person who voted at such election . . . there shall on a scrutiny be struck off from the number of votes appearing to have been given to such candidate one vote for every person who voted at such election and is proved to have been so bribed, treated, or unduly influenced." Now, my opinion is that the expression "so bribed" in the latter part of the section means bribed by the candidate or by some person on his behalf, and that therefore, before you can strike off a vote from the candidate's poll, you must show that there has been a corrupt receiving on the part of the voter. It is said (that is, it has been suggested in argument) that this construction will very materially diminish the protection of this section of the Ballot Act, and that the voter will, contrary to the spirit of the Act, be exposed to inquiry as to his exercise of the franchise. But I think not. All we hold necessary to be proved is, an act of bribery on the part of the person offering or giving the bribe, and then that there should be some evidence of corrupt receiving by the voter. That being done, then without opening the register or inquiring further as to which way the vote was given, ascertain the fact of voting, and immediately a vote goes off from the poll of the person proved to have been guilty of bribery. The effect of the section is still very ample. Secrecy is preserved, and yet the guilty candidate loses a vote. It may, of course, be that the bribed voter did not vote for that candidate, so the latter may lose the actual vote of the man he bribed and also have another vote struck off in consequence of the corrupt reception of the bribe by the voter. We give by this interpretation a construction to the section, which is consistent with what was the law at the time of the passing of the Act, when there were two offences included in the term bribery.

BRETT, J.—What we must consider as to both the points now before us is, what is the true interpretation of sect. 25 of the Ballot Act. It seems that that section has altered both what it is necessary to prove, and also the mode of proving it. Let us see what was the state of the law before the passing of 17 & 18 Vict. c. 102, and what after that Act, in reference to the case to which this section applies, viz., where the seat is claimed by the candidate who was in a minority on the poll. The first question was, Is the member returned to be unseated? and then, if so, it was always necessary to go into a scrutiny before the minority candidate could be

seated. Upon the scrutiny, before 17 & 18 Vict. c. 102, in order to strike off bribed votes, you had to prove an agreement between the person bribing and the person bribed, and then find out which way the latter had voted. After the passing of 17 & 18 Vict. c. 102, it was no longer necessary to prove any agreement. By that statute it is made an act of bribery if a candidate or his agent either offered or gave anything to a voter to influence his vote; but proof of that did not prove that the voter was bribed, and was, I should think, necessarily no evidence against the voter. Then, if there was also a claim of the seat vacated, and a scrutiny took place, you had to go on and inquire if the voters had been bribed, and when satisfied of that, see which way they had voted, and strike off their votes accordingly. There were, therefore, three main objects of inquiry at the time of the passing of the Ballot Act, in reference to a petition alleging bribery in the candidate returned, and claiming the seat for another below him on the poll. First, was the candidate returned guilty of bribery in the active sense? Secondly, had the voters been guilty of being bribed? Thirdly, which way had they voted? Now, under the Ballot Act, the main object of the Act would be defeated if you had to inquire which way the voters had voted, for the secrecy would not be preserved. Under these circumstances, then, such being the existing requirements, and such the main object of the Act, the section we are considering was passed, and its meaning is therefore obvious. It becomes perfectly clear when we regard the state of facts to which it was applied. First, as to the candidate himself, where he is proved to have been guilty of bribery, he would have lost his seat before and does so still; but then the section goes on to a scrutiny, and says, "there shall be struck off from the number of votes appearing to have been given to such candidate one vote for every person who voted at such election and is proved to have been so bribed." I agree with my Lord that the words "so bribed" are only applicable to the distinction in the beginning of the section, between the candidate being himself guilty of bribery or some person on his behalf, and do not limit the inquiry to the act of the briber. Indeed, unless you strike out the latter part of the section altogether, you cannot stop without inquiring whether or not the voter has been bribed, that is, has accepted a bribe corruptly. In truth, the section leaves the proceeding on a scrutiny just as it was before, with the sole exception that you cannot inquire how the voter has voted. What, then, is the result? It would be that you would not know from whom to strike off the vote were it not for the increased stringency of this section; but the section, in dispensing with the inquiry for whom the vote was recorded, enacts that for every person proved to have been bribed and to have voted you may strike off a vote from the poll of the bribing candidate; not that particular bribed vote, because you don't know who has got it, but one from the briber's poll. Thus the Act is more stringent upon the bribing candidate than the old one was; for, as has been pointed out, he may lose fifty votes where he would only have lost twenty-five, and the gain to the other side is proportionately greater. That is, in my opinion, the result of the section as to what has to be proved; but it is also concerned with the mode of proving

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it. I agree with Mr. O'Malley that formerly the strongest evidence of corruption on the part of the voter was that, after receiving a gratuity or promise, he had voted contrary to his known political opinions or a promise he had made. Now it is obvious that, under the Ballot Act, in order to preserve the secrecy of voting, you strike off the possibility of adducing this formidable piece of evidence which previously in many cases was available to the petitioners. But, with the exception of that, the Act leaves matters as they were. It is still the duty of the judge to go into the question of every vote, and to be satisfied that each was a bribed vote, and strike it off accordingly. In the present case on this point I have not the same clear opinion as the other judges have. I will not go so far as to differ from them in their finding as to there being evidence, but I will say that I think the evidence to be of the slightest kind. I have a difficulty in coming to the conclusion that these voters were all corrupt recipients of the gift of coal; and from the way in which the case was reserved for the court, it is difficult to know what evidence was in fact given that they were so. On the assumption that it was necessary to prove that the voters had been bribed, we have to consider whether there was evidence of it, that is to say, evidence which ought to be submitted to a jury. I think that the question of there being evidence for a jury is to be treated in the same way in civil as in criminal cases; for although in the former the defendant can be called, yet you have no right to make the fact of his not being a witness evidence against him. He is not bound to appear, and the proper way is to consider whether, apart from any inference from his non-appearance, there is evidence against him. There is, as I understand, one exception only to this rule, and that is where matters are exclusively in his own knowledge and such as he can easily explain. You are then entitled to take into account whether the defendant chooses to come forward and explain or not. Was there, then, evidence within this rule here? I confess that to me it seems as if there was evidence of different kinds against different voters. What were the facts? Before any notice of the dissolution of Parliament, Mr. Parry announced himself as a candidate, and was accepted as such by the so-called Liberal party in the borough. We do not know what that amounted to; we do not know whether he was openly proclaimed or not, or whether any address was issued. That being so, the difference between those of the electors who knew of his candidature and those who did not is great. The next evidence is that at the time of year at which he had been in the habit of making gifts to the poor of the borough, he offered to give away a quantity of coal. Then the mode in which it was done was this, some persons, agents of Mr. Parry, went round and asked the voters if they would receive a present of coal. Some of these, it is said, were shopkeepers, and some 10l. householders, and so not fit recipients of charity; but it is obvious that there would be a great difference between those who could require and those who could not require charity. Then we come to the card, about which a great deal has been said. Now that card to a voter knowing that Mr. Parry was a candidate, and that the person signing it was Mr. Parry's political agent, would no doubt have a tolerably plain meaning;

but to those who did not know either of those facts, but who did know that Mr. Parry was in the habit of giving charity at the time of year, the card would have no possible signification at all. The coals are given and received with the card; and that is the whole of the evidence that could be adduced against any one of the voters. I do not very much press the idea, but surely it is going rather a long way to affirm that those who might fairly be recipients of charitable gifts, and who did not know that Dyer was a political agent or that the other persons who appeared in the transaction were political agents or canvassers for Mr. Parry, were necessarily corrupt. I refrain from saying that there was no evidence against them, but I repeat that I think it was of the slightest possible character. If a political contest had not immediately followed, it would be impossible to say that all those persons were tainted by the receipt of bribes. It seems to me to be eked out by bringing in against the voters what was known against the giver of the bribes, but which is no evidence in any way against the voters. It is very difficult, without having been there, and without knowing how much was intended to be admitted at the trial by the course adopted, to say exactly how the matter stands; but I think it to be a most difficult question for the court as it is placed to say whether there was then sufficient evidence of the corruption of the voters. I do not take it upon myself to say that there was no evidence; but I leave it to the learned judge who tried the petition to say whether he is satisfied that a sufficient number of the voters were bribed in the sense in which we hold that the construction of the Act of Parliament requires, to reduce the majority of the unseated candidate below the numbers of the candidate claiming the seat. I think that he has still cast upon him the duty of saying this.

GROVE, J.—I should, perhaps, preface my judgment in this case by stating how the matter arose at the trial which is now before the court. At the conclusion of the case, when Mr. Parry was declared to be not duly elected, a scrutiny was begun to determine whether Mr. Malcolm was to obtain the vacant seat. Upon this Mr. Giffard called my attention to sect. 25 of the Ballot Act, and claimed on the construction of that section alone to strike off a vote from Mr. Parry's poll for every person who had received coal. There was at that time no one to oppose Mr. Giffard, but I suggested that the section was not so clear as he assumed it to be, and that the words might necessitate proof of corruption in the receiver as well as the giver. The next morning Mr. Chandos Leigh said he appeared for a number of the voters to argue on their behalf, and expressed his readiness to call them to say that they did not receive the gifts of coal with a corrupt feeling. Thereupon a considerable discussion arose, because there was manifestly a great practical inconvenience in the course that was proposed. There was a great number of voters to be examined and cross-examined, as to whether they had a corrupt mind or not, and whatever they might have said it still might have been that I should not have believed the witnesses. It was therefore a question whether, as the case stood, the onus was on Mr. Leigh to rebut the existing presumption, and so the court was to be asked to decide whether the evidence already given was *prima facie* evidence of corruption, Mr. Leigh

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not calling his witnesses or exposing them to cross-examination. It was thus in the nature of a compromise, each side taking some risk, and upon this basis the case was drawn up. The questions, therefore, to be raised were, first, was the statute conclusive? secondly, if not, has a case been made out which requires an answer? Now, I entirely agree with my Lord that a case has been made out which demands an answer, but I am not quite satisfied as to the proper construction of the 25th section. I am not satisfied with the interpretation put on it by the rest of the court, and yet my leaning is not the other way. I entertain a doubt, and my judgment is in suspense about it. The difficulty I have arises in this way: Mr. Giffard based an argument upon the definition of bribery at the time of the Corrupt Practices Act, and which was acted on in the statute. Now, if bribery, treating, and undue influence are to be taken *in omnibus* as referring to the definition in the Corrupt Practices Act, I should agree with the rest of the court and say that the section requires corruption on the part of the voter to be proved; but there are other arguments which might, I think, be urged to show that bribery under the Ballot Act does not mean the same as in the Corrupt Practices Act. By the 41st rule it is provided that "care shall be taken that the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted, and his vote has been declared by a competent court to be invalid." Now, if that has any meaning at all it must be that the vote shall not be disclosed until it is proved that the voter had no right to vote, and then the object of inspecting the ballot paper would be to enable the judge to strike off the invalid vote from the party receiving it; not striking it off haphazard, but from the person who benefited by it when it was recorded. But the construction of the rest of the court would produce an anomaly. If it be the case that when a man who has been bribed votes with a corrupt mind his vote is invalid, why was it necessary to have the section which enables a judge to strike off the vote without any inquiry as to for whom he voted. The 41st rule and the 25th section are *in pari materia*, and according to the construction proposed they contain different provisions in respect of the same thing. Having these difficulties before me, I therefore, without differing from my Lord and my brother Brett, pronounce no opinion on the construction of the statute. On the second point, however, I entertain no doubt. Assuming that Mr. Giffard proved no more against the voters than the receipt of the coals and the cards, was there evidence on which a judge or a jury might have acted? I think yes; but I shrink from the onus put upon me by my brother Brett, and do not consider that I have to say whether each voter of the 877 was corrupt or not. In the way in which the case was left I have only to say that there was evidence just as in points reserved at a trial or stated by agreement—the judge does not go into the facts. I therefore do not give my own opinion of the separate cases, for it is impossible that I should do so now; but I am of opinion that there was evidence requiring an answer, that the voters in question came within sect. 25 of the Ballot Act; no answer was given, and the court should give judgment in favour of the person claiming the seat. Now the difficulties in deciding this could not have

arisen if Dyer had presented a sovereign instead of coal to the voters. Could it possibly be said, if that had been done, that an agent of the candidate having given a pecuniary donation to a voter, such was not *prima facie* evidence of corrupt receiving by the voter? That would surely be reasonable *prima facie* evidence of his having been bribed in any sense in which the word may be taken. There are degrees in bribery no doubt, and it is not common to go openly to a man and offer a 5*l.* note, but the same thing is effected in a more insidious way, such as giving 1*l.* for a lodging worth 3*s.*, and the quality of the act is the same. Here the circumstances were rather different; the coal was given away when a proximate dissolution was expected, and we have to say whether donations of such a nature obviously not merely charitable, although given to non-voters as well as voters, were *prima facie* evidence of corruption on the part of the recipients. It was said by my brother Brett that it was not proved that all knew that Mr. Parry was a candidate or that Dyer was his agent; but we cannot reduce human affairs to a certainty, and it would be impossible to try any case if it were demanded. There can be no doubt that a great many knew, and knew also that the persons who canvassed them were the same persons who had distributed the coal to them; at any rate the onus is thrown on them to say that they knew nothing. Mr. Chandos Leigh took, in my opinion, a reasonable course for those whom he represented at the trial, for otherwise he would have run a great risk in contesting each individual case, and he elected not unwisely to abide by the decision of the court on the general question. Now that I have heard it fully argued, I think there was evidence against the voters, and therefore that Mr. Malcolm who claims the seat upon the scrutiny must be seated. I may just add that when I reserved the points I did not see the full bearings of all the difficulties on the subject, and thought it would have been a very short matter.

Judgment for the petitioner.

Attorneys for the petitioner, Collyer-Bristow, Withers, and Russell.

Attorneys for the electors, Paterson, Snow, and Burney.

Attorneys for Mr. Ingram, Rogerson and Ford.

ELECTION PETITIONS.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

COUNTY OF DURHAM (NORTHERN DIVISION).

Wednesday, Aug. 12, 1874.

(Before GROVE, J.)

Parliamentary election—Withdrawing petition—Functions of the judge—Conditions of withdrawal.

By the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125) an election petition can only be withdrawn with leave of the court or a judge.

But, semble, where the petitioner withdraws during the hearing of the petition it would be practically impossible for the judge to proceed with the inquiry.

The only power which the judge has in such a case is to recommend the court not to allow the return of the deposit except upon the most satisfactory explanation of the grounds of the withdrawal of the petition.

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The learned judge having come to the conclusion that no case had been made out to justify the unseating of the respondent the withdrawal was allowed, costs following the event.

THIS was a petition against the return of Sir George Elliott, and contained the usual allegations of corrupt practices.

Counsel for the plaintiffs were *Charles Russell, Q. C., Edwards, Q. C., and Anstie.*

Counsel for the respondent were *Hawkins, Q. C., H. Giffard, Q. C., and A. L. Smith.*

After some evidence had been given in support of the petition counsel intimated the intention of the petitioners to withdraw.

GROVE J.—The withdrawing of an election petition must be by leave of the judge, and if the judge saw that the withdrawal was the result of any compromise, of any giving and taking so as to prevent evidence being brought forward, which ought to be brought forward, not in the interest of either of the parties, but in the interest of the constituency, and of purity of election, the judge ought not to allow a petition to be withdrawn; he ought as far as he would have power to do so, to insist upon the petition being proceeded with. But although the Act of Parliament in my mind rather expects that, on the part of a judge no doubt it is an extremely difficult task, because if parties do not call witnesses forward a judge himself cannot become as it were counsel for the petitioners and judge at the same time. He cannot examine a witness and force him, if he is reluctant, or antagonistic, to answer questions, and if I may say so exercise his ingenuity to elicit the truth from a possibly adverse witness, while at the same time he has to keep the scales of Justice even and to hear what may be said on both sides; nor can he on the other hand know what answers might be given if he had those instructions which counsel have, and could find out what the real facts were as presented by the opposite side. Therefore, when, as appears to be supposed by some, the duty is thrown upon the judge to occupy that somewhat equivocal position of being counsel and judge, it is simply at all events according to the practice of the law of England, an impossibility. All that the judge can do is to see the truth is as far as he can possibly do it fairly elicited; and to my mind it can never be so well elicited as when there are persons on either side representing opposite interests, the judge only exercising his power in furtherance of the truth, when he sees that there is an endeavour to keep it back. I mention that because the task is an unusual one, which the Act imposes upon the judge of his exercising a discretion as to the withdrawal of a petition. I mention those circumstances for this reason that I think there possibly might be cases in which a judge would not allow a petition to be withdrawn, but would, as far as he could, use his power to prevent it. He might for instance exercise the power which is given to him of recommending the court not to allow the deposit to be withdrawn without considerable explanation. The task no doubt would be an extremely difficult one. The mode in which a judge is to compel parties to go on with a petition which they have determined to withdraw remains to be proved. I am not aware of how it can be made compulsory, but at all events he has the power over the deposit in court, which may in some degree be indirectly used as a compulsion.

I mention that, not as applying to the present case, because I am thoroughly and entirely convinced, not only from the character of the learned counsel who now withdraws the petition, but from the course that the case has taken, that this is a petition in which he would have had no reasonable hope of success. I have watched the evidence to the best of my ability, and I will not say that some suspicion has not been excited in my mind as regards the acts of some of those who might be proved to be agents, in the election law sense of the word, but it seems to me that there has been something like an intimation of some small reward to some of the witnesses. I presume as is usual in nearly all these cases the strongest portion of the case is put forward in the first instance, so as to impress the tribunal, the judge or jury, with the strength of the case, but this case is such that it would be idle to say that it has had the effect upon my mind of satisfying me that there has been upon the part of the agents of Sir George Elliot corrupt practices. No imputation at all has been made upon Sir George Elliot in this case, therefore I need not say a word more upon that subject.

With regard to the acts of the agents, there has been some degree of suspicion, and I am not prepared to say that a good deal of doubt might not have been raised in my mind, not as to the finding that I should come to, but as to whether the case was open to an explanation or not, that is to say whether at the close of the case I should have required Mr. Hawkins to go into any answer to it. At present certainly upon the case as it stands, if I were asked to give judgment, I should say that no case had been proved to my satisfaction to unseat the member. The matters were some of them extremely trifling. There was the alleged gift of a shilling to a man who happened to be a voter, which he, the man, says, whether truly or untruly I do not stop to consider, was given for old acquaintance sake. To say that a member should be unseated because somebody who was alleged to have been an agent, by what I might almost call a legal fiction, because he had been seen coming in after a candidate on one occasion, when he was canvassing a voter, or because he had on one occasion given a voter a shilling or a glass of beer, or something of that sort, would certainly be a very strong proceeding. It appears that upon two other occasions a man was paid, not in pursuance of any corrupt promise, or understanding or undertaking, but going with his master to vote on this occasion for Sir George Elliot, he told other persons, if I remember rightly, that he had voted upon the other side, there being apparently no compulsion exercised by the master, who did not deduct (for practically it amounts to that) his day's wages from him. There was another matter—the man who was examined to day, who says that he changed his house; he positively swore that he did not do it with any reference to his vote. He was no doubt pressed and canvassed on both sides and pulled about, if I may use that expression, by the Red and Blue parties, and he got at last into a cab, belonging to the Liberal side. Which way he voted we do not know, but he appears to intimate that having quitted his place he may have voted on the Red side. It does not appear to me that those are cases which are supported by such an amount of satisfactory evidence as a judge could reasonably act upon; and therefore I may say that

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as the case at present stands, if I were asked for my decision without a word by counsel upon either side, I should say that the case has not been made out to my satisfaction. Therefore upon all the points which have been brought before me, I see no sufficient ground for unseating Sir George Elliot; and as the learned counsel for the petitioners now says, that having found in fact that the case as presented to him was very different from the case as it came out in evidence, I have every reason to entirely rely upon the words of that learned counsel; and it seems to me that he has taken not only a course which is permissible upon my part, but a proper course, in withdrawing this petition. Of course as far as my decision is concerned the petition must be withdrawn upon the usual terms, that is to say, the costs following the event.

Solicitors for the plaintiffs, *Waterhouse and Winterbotham*.

Solicitors for the respondent, *Henry Edward Brown*.

THE COUNTY OF DURHAM.

(NORTHERN DIVISION) No. 2.

(Before BRAMWELL, B.)

Monday, June 1, 1874.

Intimidation—General intimidation and intimidation at common law—Effect upon a particular district—Effect upon the result of the election.

To constitute intimidation as defined by the Corrupt Practices Prevention Act, individuals must be identified as the objects upon which it was practised, or to whom it was addressed by the candidate or his agent.

To constitute intimidation at common law, the intimidation must be so general and extensive in its operation, that it cannot be said that the polling was a fair representation of the opinion of the constituency in which the intimidation took place.

Where intimidation, not practised upon individuals, is confined to particular districts, so that it can be demonstrated that it could not have affected the result of the election, the return ought not to be avoided.

Where, however, the intimidation is so general and extensive that the result may have been affected, it is no part of the duty of the judge to enter into a kind of scrutiny to see whether possibly or probably even, or, as a matter of conclusion upon the evidence, if that intimidation had not existed, the result would have been different.

A prima facie case of general intimidation being made out, the onus is thrown upon the constituency incriminated to show that such intimidation could not possibly have affected the election, and where this is not shown the election ought to be declared void.

Where there has been so large an amount of intimidation that it is uncertain that the result would have been the same without it, or that it represents the real opinions of the constituency, the election must be held void.

It was proved that a committee room was wrecked, a police office stormed, and prisoners liberated, houses assailed, and individual voters savagely treated.

Held, that under such conditions the election could not have been free, and must be avoided, with costs against the respondents.

THIS was a petition against the return of Messrs. Palmer and Bell, and alleged bribery, treating, and undue influence.

Hawkins, Q.C., Ballantine, Serjt., H. Giffard, Q.C., A. L. Smith, J. E. Gorst, E. L. O'Malley, and Milvain, were counsel for the petitioners.

Parry, Serjt., Herschell, Q.C., Chandos Leigh, Hugh Shield, and Lyulph Stanley represented the respondents.

In the course of the case the learned judge intimated his opinion that the allegations of bribery and treating were not supported, whatever was done not having been done corruptly. The allegation of undue influence remained, and upon that his lordship delivered the following judgment:—

BRAMWELL B.—It now only remains for me to give my judgment, which is a judgment the effect of which is known already, but still I think it is right that I should give my reasons for it. It is the practice of the judges in England to do so; it has been the practice of those who have preceded me in the trial of these questions to do so, and it is a most wholesome practice, because it lays open to public criticism the reasons on which we give our decisions, and I know nothing more valuable. I know nothing more valuable than that the reasons for conduct in which the public is interested should be made known to the public, not that I have any very great hope from past experience that one can make the facts so plain or the legal reasons governing them so intelligible, but that there will be a considerable amount of misplaced criticism on what one does, not merely upon this occasion alone, but upon all other occasions. However I think that the good to be done by a public statement of reasons is such that I ought to deliver them. Now we have disposed of all the particular charges which were brought against the sitting members, the respondents on this occasion, with the exception of one, which may be said to arise out of the conduct of Foxton. Now I may state at once, that I do not believe Foxton's evidence, as he has given it to-day in that box. I am satisfied that he was not telling us the truth, and I think there is scarcely any one who was in court and who listened to him, who would have a doubt about it. He is contradicted by several witnesses; he is contradicted by the police who were called before me. The story almost tells its own tale. He knew—he must have known—that this police station was being wrecked after somebody had used the expression attributed to him. And what explanation does he give why he, the head man of the mob, the ringleader of them, did not go and prevent its being done? Why he gave no explanation that was at all satisfactory to my mind; and I am satisfied that the police were telling the truth, and that he was instrumental in this mischief being done, no matter what the precise words were, and whether he used them, or suffered them to be used. I believe he used them, and it is perfectly certain to me that he could have prevented this mischief being done. I believe he caused it, and I am satisfied he could have prevented it if he had chosen, and he made no effort to prevent it, and gives the foolish excuse that he was too tired. When pushed farther he said that the mob of people, though of course he could see over their heads, prevented him seeing the wreck going on at the committee rooms. He told a variety of other improbable stories, one of which was that various people got a friendly hustling in the crowd, but

that no one was hurt. This account was absurd, because we know it was contrary to the truth. If the question therefore depended on my belief of Foxton, I say at once that I do not believe him. But I cannot see that that is intimidation by the agent of the sitting members within the statute:—not that Foxton is not an agent; but that when the statute is examined, it will be found that it must be intimidation practised upon an individual. I do not mean to say upon some one person, so that it would not do if practised upon two or a dozen, but there must be an identification of some one or more specific individuals affected by the intimidation,—I will not say influenced by it, but to whom the intimidation was addressed, before it could be intimidation within the statute; otherwise it comes under the head of general intimidation. I am satisfied, therefore, that I ought not, upon any of the particular grounds that have been brought before me, to declare that the sitting members have lost their seats through bribery, treating, or intimidation by themselves or their agents. It now remains for me to consider the question of general intimidation, and certainly as it turns out in one sense no good has been done by the adjournment from Saturday, because I must now pronounce my judgment upon the same materials that I had before me then; I do not regret the time that has been spent, because I should have been bound, there being a *prima facie* case made out, to act upon it, unless that *prima facie* case had been answered. Now that it has been, I must proceed to address myself to the remaining question. My judgment, indeed, is known, because the case is a confessed one—confessed not only by the eminent counsel who appear for the respondents, but, I may say, confessed by the respondents themselves. But still, as that was brought about to a considerable extent by my interference in the matter—an interference which I really made for the sake of the respondents themselves, and with a view to save them further trouble and expense, as the case was a hopeless one—I think it right that I should state the reasons why I indicated that opinion. I take it that the law is this. First of all, there is the statutory intimidation, if one may use such an expression, that is intimidation contemplated by the statute, which avoids the seat—that is where a candidate, or his agent, is guilty of it. But besides that there is another intimidation that has been called a common law intimidation, or intimidation at common law, and it applies to a case where the intimidation is of such a character, so general and extensive in its operation, that it cannot be said that the polling was a fair representation of the opinion of the constituency in which the intimidation took place. If the intimidation was local or partial, for instance, if in this case it had been limited to Hetton, I do not think for my own part, indeed I am satisfied and have no doubt about it, that in that case it would have been wrong to have set aside this election, because one could have seen to demonstration that the result could not possibly have been brought about by that intimidation, and the result would not have been different if it had not existed. I do not mean the result of the polling in that particular district, but the general result of the majority for the respondents. But where it is of that general character which I have described, so that the result may have been affected, in my judgment, it is no part of the duty of a judge to

enter into a kind of scrutiny to see whether possibly or probably even, or as a matter of conclusion upon the evidence, if that intimidation had not existed, the result would have been different. What he has to do in that case is to say that the burden of proof is cast upon the constituency whose conduct is incriminated, and unless it can be shewn that the gross amount of intimidation could not possibly have affected the result of the election, it ought to be declared void. Now in questions of this sort one must look, not only to the amount of intimidation, but to the absolute majority which has been obtained. I think I may say I have no doubt about this. It was the opinion of Mr. Justice Willes, and I believe not inconsistent with the opinion of Mr. Justice Keogh, in that celebrated and most useful judgment that he gave—that you are to look at the probable effect of intimidation, which consists of two things, its extent and operation, and the majority which the sitting members have got. Now I think, if it were otherwise—if you were to hold that partial intimidation would void an election, although you were certain that it had not affected the voting, that is to say, that the majority would have existed all the same, the consequence would be that a few mischievous persons might upset every election. On the other hand, if one were inclined to go into a kind of scrutiny, the consequence would be that one might make a very great many mistakes, and I am of opinion that where there has been so large an amount of intimidation that it is uncertain whether the result would have been the same without it, it cannot be said that the election was free, or that it represented the real opinions of the constituency, but it must be held void from that uncertainty. Now was there such intimidation, or such an amount of intimidation here? I have no doubt there was. Of course, I do not take the evidence that has been given to us as literally true, so that it could not be in any way altered. I dare say that some alteration might have been made in it, some part contradicted, and possibly some part extenuated; but I have no doubt that the substance of it was true. I take that to be the case from the admission of the learned counsel, and from the satisfactory manner in which the evidence was given. Here we find it prevailing, not in one place only (it is not local, and whether any more evidence could have been given I am sure I do not know), but we find it prevailing at Hetton, Coxhoe, Seaham Harbour, Durham, and to some small extent at Lancaster. How is it possible to say under these circumstances with certainty, that the result was not affected by this intimidation? So far from being of that opinion I doubt extremely when I look to what the majorities were, whether the result would not have been different if the election had been free and fairly conducted. Now the intimidation that existed at these places was of two kinds, one more venial than the other: I mean the threat to voters that they would lose custom if they did not vote in conformity with the wishes of the persons who waited upon them, and who uttered the threat to them. As Mr. Justice Willes said, I am not sure that it is actually unlawful—in fact I am of opinion it is not actually unlawful. I suppose it is open to a man to say “I choose to deal with you, not in accordance with the merits of the commodities you sell to me, or upon the good qualities you possess as a tradesman, but according to your politics on one side or

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the other." I suppose if one man can do it fifty men may do it. But do not let a mistake be made, it is not unlawful in the sense of being punishable like violence, yet it has undoubtedly this character of illegality about it, that if, as in this case, it prevails to a large extent, it frustrates the object of those who are guilty of it; and though it may not be unlawful, it is a thing to my mind most earnestly to be deprecated; and if I wanted an authority for it, I could not cite you a better, or one who would have more authority with the men who have been guilty of it, than the man who said he had thought it wrong to interfere with voters ever since he knew what liberty was. It is one of the saddest things in the world, it is a feeling which if indulged in would go to the root of society. It would divide mankind into two hostile camps, one entertaining one set of political opinions, and the other entertaining another. It would not only do this, but there would be sub-divisions, and I suppose we should have not two hostile camps merely, but fifty, each one opposed to the other. It is the most mischievous thing in the world, and seems to me most ungenerous and most uncharitable. I cannot help citing a case in the hearing of many of these men publicly, in the hope that my citation will do some good to those who are interested in this matter. It is about six weeks ago since I tried a case at Windsor. There a man, a person of property, in consequence of the election in the beginning of 1869, turned about twenty of his tenants out for no other reason than because they had acted according to their consciences and voted in opposition to him, he being a candidate. I am sorry to say I could not unseat him for it, for this reason, that I could not trace that the intimidation was in operation at the time of the election in 1874, because it did not appear that he had done anything to coerce these people and get their votes, or that he had repeated the threat which had been uttered to them, and no doubt the ballot afforded them protection. But why I cite the case is not so much for the purpose of making this observation upon it, but for asking those who have been guilty of this kind of conduct here what they would think of his conduct. Do they approve of it? Would they think it right in the case of a landlord of a large number of cottages that he should turn them all out, and leave them to shift for themselves, although they were respectable men and had paid their rents, for no other reason than that they did not hold political opinions in conformity with him? You may say there is a difference between the two cases. But what difference is there between the case of a landlord who will not have a man for his tenant, and the case of a customer, who will not have another for his grocer, butcher, or publican, because he differs from him in the opinions which he may entertain upon political subjects? Absolutely none. Of course, one does not ask the people for that which one knows cannot be got. It is no use exhorting people to be better than human nature is capable of being. If it is a question between two persons, I do not at all see why he should not deal with a red, if he is a red, there being no reason why he should not deal with a blue. I do not see why you should deal with a man who does not agree with you. You must choose one, and I do not see any harm in that; but where friendly relations have subsisted between two people, and the customer is satisfied with the tradesman, and the tradesman is

satisfied with the customer, and they have been friends with each other, that they should quarrel, and fall out, and part company, because they do not hold the same opinion, is highly to be deprecated, and I exhort them to remember what was said by one of their own body, that it is wrong for anybody who knows what liberty is. It is due to them that I should say one thing, which is that they have not been nearly so bad as they threatened to be, for I think that with one exception—the case of Henry Todd, who was called, none of the witnesses say that the threats have been carried into execution, or at all events if they have been, they have all of them repented and come back. However, this did exist to a very considerable extent, and to the extent to which it did exist, it prevented this election being a free one. Now the other intimidation is of a different character. As I said before, I do not doubt that the statement made to us was in substance true. It is impossible to doubt that the committee room was wrecked at Hetton, that the police office was stormed, that the prisoners were liberated, that the vicar's house and other houses were assailed in the way described to us; it is impossible to doubt the savage violence at Seaham Harbour and the treatment of men there—the treatment of the publican, which induced him to fire out of the window, and the flinging of the conveyance over the cliffs. These things cannot possibly be doubted; nor can it be doubted that besides this violence to property Smith, the builder, was ill-treated. No contradiction of this has been given; it was not cross-examined to in a way to make it doubtful. The witnesses who have been called on the part of the members to a certain extent, and who are interested in the men who did it, avowed that they knew the statement of Smith to be true, that he was knocked down on the ground by the crowd; and not content with knocking him down, they kicked him across the road from one side to the other, and then they kicked him back again. It really is quite lamentable to think that people could have been guilty of such conduct. If they had done nothing, but in a sort of friendly way hustled him out of the crowd, but not hurt him, but prevented his voting it would have been wrong; but that they should kick, beat, and ill-use a man in the way they did, really fills one with such astonishment that the only thing doubtful about the story is the intrinsic impossibility of it. I cannot understand how men could have done it. I can understand how men in their passions, who have not thought much or reasoned about it, should try to prevent a man's voting. I can understand how they could be ready to fight him single-handed, but that a crowd, a mob of Englishmen, should knock a man down, and then kick him in the ruthless way they did, is really one of "The most wonderful things that can be supposed to exist." I cannot understand it, it is to me perfectly astonishing. One would have thought that they would have had the manliness to have done it in some fashion single-handed—or if they had chosen to make their resistance effectual, that they would have done it without the violence and cruelty which accompanied their conduct on this occasion. If they had had the right, I say, to prevent these people voting, it would have been most reprehensible to exercise it in the way they did. But I cannot help making this remark to them about the injustice of it, an injustice of which I believe they are sensible. A

man who does it has not the excuse of a thief, but he is guilty of a similar act. A man's right to the free exercise of his vote is as much his right as is his right to the coat which he has on his back, or the purse which he carries in his pocket, and those who stop him on the highway and take that right from him, rob him of what is his own, just as much as if they took his coat or his purse. In the case of a thief who does it he possibly may have the excuse that necessity drove him to it, an excuse that cannot exist in the case of people who rob others of their rights in this way. Now if they would reflect upon it, if they would but look to the injustice of what they are doing, and to the unfairness of treating men in a way which they would deeply resent if so treated themselves, I think they would not be guilty of it again; and I think, at all events, that if they were guilty of it, they would not be guilty of it in the cruel un-English and unmanly fashion, in which they were guilty of it in this case. But I cannot help thinking that this conduct is not the natural conduct of the men of this country, but conduct into which they were hurried by some excitement, some mischievous speeches, and the excessive interest of the moment, and that they have repented of it. And I will proceed to say why. When this case was about to be tried I was called upon to say that it should not be tried in this county, but that it should be tried elsewhere. I was told that such was the terror, such was the intimidation, and such was the lawlessness and violence of those who were to be complained of in this petition, that it could not be tried fairly here, that the witnesses could not be brought up, that uproars and disturbances would take place; and it was obscurely hinted to me that even I myself might be in some jeopardy in this court. I could not believe it, I would not believe it, I did not believe it, and I refused to have the case tried anywhere but here. I was certain that it was not the persistent disposition of the people of this county, which had been exhibited, but merely an outbreak; and certainly never was any belief more thoroughly justified than it has been here, because I really do think it due to them to say that I never remember any cause in a court of justice, in which those who were present, deeply interested in the issue as they must be—observed more decorum than has been observed upon this occasion. I know whom we have had as a large portion of our audience. We have been told by witnesses, particularly by Mr. Farrington that the gallery has been full of delegates. One cannot very well judge from this distance, but it appears to me, as well as I can judge (and I am satisfied it is true from the specimens who have been put into the witness box) that they are respectable and intelligent men, and their conduct in that gallery has shown it; and I am satisfied that they, as well as those who have had an opportunity of giving expression to their opinion, must very much regret what has taken place. After listening here to the details of cruelty that they have heard, the tales of injustice to people in depriving them of that right which they so strenuously desire to possess and to exercise for themselves, the mischief done to property, and what is more, when they have seen the unfortunate condition of the witnesses coming into that witness box, solemnly sworn to tell the truth, but who have not dared to tell it for fear of the consequences, who have paltered with their oaths, and

disregarded the dictates of their own consciences—I think that when these respectable men, who have been witnessing this, go back to their own homes to where they are, and where they properly are, of such importance amongst the men, they will do their very best to prevent anything of the sort happening again. Now I will conclude what I have to say with a piece of advice. I am not going to exhort them not to improve their condition. On the contrary, it would be very foolish for me to do it. I am not going to say that their wages are too high or their hours of labour too short. If they can improve their wages, or shorten their hours of labour, or even make their habitations more comfortable than they are, if they can keep their children out of the pits until they have been well educated, I exhort them to do so. But I exhort them to do so by fair means, because my belief is that although people should not exclusively regard themselves, yet the happiness of the world is best consulted by each man striving to mend his own condition, and if he succeeds in doing so the world will be much better for it. But what we must do is each to strive for himself, fairly and equally, not selfishly, and not disregarding the rights of others. Neither do I find any fault with trades unions, though it is not every one I should like it to be supposed I approve of. I think some of the trades unions that we have heard of, the Sheffield Trades Unions and the Manchester Brick-makers were positively shocking. I think that many of the rules of trades unions are very mischievous, where they attempt to limit the number of persons who shall belong to a trade, but I cannot blame the men for joining in a trades union, with a view to give themselves influence, which they would not otherwise possess, and with a view of improving their condition in the world. I should endeavour, I think, if I were a miner of this county to be a trades unionist myself, unless I knew of something which was inconsistent with my conscience, or feeling of right in their rules. Therefore I am not going to exhort them not to join a trades union, nor am I going to say anything in relation to their claim to the franchise in the sense that I complain of it. It would be most unbecoming in me to indicate any opinion as to whether they ought to have it or not. If they think they ought to have it it is my opinion they are not only justified in struggling for it, but like others who think a right is withheld from them, they would be wrong if they did not try to get it. However what I am bound to say is this, that in my judgment they will neither better their condition, nor make their trades' union more popular, nor succeed in getting the franchise given to them by conduct such as that which has been the subject of complaint in this case. Therefore, I must warn them, in a friendly way, not again to be guilty of the mischievous acts of which they have been guilty here in reference to this election. In my judgment the best way for them to attain their object is to be law-abiding, right respecting people, to do that which is right according to the law, and while they assert their own rights to respect the rights of their fellow creatures. Then, I think, they are very much more likely to attain their ends than they would otherwise be. If I might venture to give them one piece of advice, it would be the same that was given by Mr. Palmer himself, that, when the tempting time of an election comes, instead of crowding to the poll, and

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subjecting themselves to the influence and excitement of an election, they had better go to their work and keep away, and so make sure that no mischievous results will take place through their absenting themselves from their work. I have nothing more to say. I have said perhaps more than was necessary, and I have certainly said more than was necessary for the purpose of terminating this case; but I have said it in the hope that some little good may be done by it, that they may hear what I trust is good advice from one who has no motive but to give them the best advice he can. It only remains for me formally to say that this election is avoided, that it seems to me on account of the general intimidation, it was not a fair election, and that the ordinary consequences must follow. It may be hard upon Messrs. Bell and Palmer; it may be hard upon that part of the constituency which has not misconducted itself, that it should have the worry of an election to go through again with possibly a different result; but the only way to get rid of this kind of offence is to visit the consequences of it upon those for whose benefit it was committed. The intimidators cannot be punished, and it follows as a sort of consequence that with the view of preventing similar practices the election must be declared void, and the costs of this inquiry must be borne by Messrs. Palmer and Bell.

Solicitor for the petitioners; *Henry Edward Brown.*

Solicitors for respondents, *Wyatt, Hoskins, and Hooker.*

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROCHER and H. PEAT, Esqrs.,
Barristers-at-Law.

Friday, Nov. 6, 1874.

(Before the LORD CHANCELLOR (Cairns) and the LORDS JUSTICES)

Ex parte OSBORNE; Re GOLDSMITH.

Benefit building society—Mortgage—Power of sale—Future instalments.

A member of a benefit building society obtained an advance on his shares on executing a mortgage in the form prescribed by the rules, by which he covenanted to repay the advance, with interest, by monthly instalments, extending over a period of seven years. The mortgage contained a power of sale in the event of default by the mortgagor in payment of the subscriptions, fines, and other payments which should become due from him in respect of his shares, and of the sum advanced to him; and the trustees of the society were to retain out of the proceeds of sale in the first place, all the costs and expenses occasioned by the non-payment of the subscriptions, fines, and other moneys, and in the next place all subscriptions, fines, and other sums of money and payments, which should be then due, or which would afterwards become due in respect of the shares during the then remainder of the period of seven years, it being agreed by the parties to the deed, that in case any such sale should take place, all the moneys which would at any time afterwards become due from the mortgagor in respect of the shares according to the rules of the society, should be considered as then immediately due and payable; and the surplus (if any) was to be paid to the mortgagor. The mortgagor

made default, and the mortgaged premises were sold by the trustees of the society:

Held (reversing the decision of one of the registrars) that the society were not entitled to retain the full amount of all the monthly instalments for the unexpired portion of the seven years, but only so much thereof as represented principal money.

This was an appeal from a decision of Mr. Registrar Brougham, sitting as Chief Judge in Bankruptcy.

The facts of the case were as follows:—

In 1871 Mr. George Goldsmith was a member of the London and Suburban Permanent Land, Investment, and Building Society.

The object of this society was in the first of its rules stated to be to raise by the subscription of its members and in shares of 50*l.* each, payable by monthly subscriptions of 10*s.* per share, a fund out of which each member should receive the amount or value of his shares for the erecting or purchase of a dwelling house, or other real or leasehold estate.

By the second of the rules of the society it was provided that every person subscribing for a share should be a member.

By the sixth rule members were made liable to a fine, at the rate of 6*d.* per *l.* for each month, or part of a month, during which their subscriptions might be in arrear.

By the eighth rule it was provided that the funds of the society should be advanced to the members, or invested in such manner on mortgage as the board should determine.

By the ninth rule it was provided that every member receiving an advance should repay the same, with interest at the rate which should be determined by the board, by monthly or other instalments.

By the tenth rule it was provided that every member or other person becoming entitled to an advance should execute such a mortgage security of the premises as the solicitors of the society should require.

The prospectus of the society stated that borrowing members, to suit their conveniences, might fix their own time during which the instalments on their advances should be payable according to a scale which varied according to the number of years over which the payments were to be extended, the monthly instalment in respect of a loan of £100 extending over seven years being 1*l.* 12*s.* 2*d.* And the prospectus stated that these instalments amounted in all cases to 5*l.* per cent. per annum for the term selected, added to the principal sum borrowed, and distributed in monthly payments throughout the term.

In March 1871, Goldsmith borrowed 600*l.* from the society, and gave them as security for repayment thereof, a mortgage on certain leasehold houses, situate at Lambeth, in the county of Surrey.

The mortgage deed, which was dated the 4th March 1871, contained recitals that Goldsmith was a member of the society, and had subscribed for twelve shares therein; that by the rules of the society he was entitled to receive an advance of 600*l.* which sum had that day been advanced to him by the trustees of the society, and that he had elected under the rules to repay the 600*l.*, and the subscriptions, fines, and other payments to become due thereon in the period of seven years from the date of the deed. And Goldsmith thereby

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demised the houses to the trustees of the society for the residue of the original term less the last day, and the deed contained a proviso that if Goldsmith should duly pay the subscriptions, fines, and other payments, which should become due from him in respect of his shares, and of the 600*l.* advanced to him by the trustees of the society, and should observe all the rules of the society in respect of the shares (the shares being treated as shares the advance upon which has to be repaid in seven years), and should also pay the rent reserved and perform the covenants contained in the original lease, then the trustees for the time being of the society would indorse on the deed a receipt for all the moneys intended to be thereby secured, or otherwise surrender the mortgaged premises to Goldsmith. But if default should be made by Goldsmith in performance of any part of his agreement, then it was provided that the trustees of the society should have power to sell the mortgaged premises, and out of the money arising from the sale should in the first place retain all the costs and expenses occasioned by the non-payment of the subscriptions, fines, or other moneys, or incurred in the execution of any of the powers of the deed, and should in the next place retain all such subscriptions, fines, and other sums of money, and payments which should be then due, or which would afterwards become due, in respect of the said shares during the then remainder of the said period of seven years, it being agreed by the parties to the deed that in case any such sale should take place all the moneys which would at any time afterwards become due from the said George Goldsmith, his executors, administrators, or assigns, in respect of the said shares according to the rules of the society should be considered as then immediately due and payable; and, lastly, should pay the residue, if any, of the moneys arising from such sale to Goldsmith, his executors, administrators, or assigns.

Goldsmith was adjudicated a bankrupt on the 3rd Oct. 1872.

Default having been made in payment of the monthly instalments, the society, in Dec. 1873, sold the mortgaged premises for 912*l.*

Out of this sum the society claimed to retain their costs and all fines and instalments which had become due before the sale, and also all the instalments which would have become due in respect of the advance of 600*l.*, if the repayment had been made in its natural course by payments extending over the whole period of seven years.

The trustee under the bankruptcy of Goldsmith, on the other hand, while admitting that the society were entitled to be paid their costs and all fines and instalments which had become due before the sale, contended that they could only receive in addition to that so much of the then future instalments as represented the balance remaining unpaid of the principal sum of 600*l.*, and that nothing could be allowed to them in respect of interest accruing after the principal had been repaid.

The Registrar held that the society were entitled to what they claimed. The Registrar, in giving judgment, said: "This is a motion on behalf of trustees, calling upon a building society to pay a sum of 536*l.* alleged to be retained by them out of rents and purchase money received by them in respect of the premises comprised in a certain mortgage deed, of which premises they have taken

possession and sold. All that I have at present to decide is the legal construction of the deed. Although I think the deed might have been drawn more clearly, it appears from the rules of the society and the deed, that Mr. Goldsmith became a subscriber for twelve shares. The deed states that he has 'become a member of the said association, and has subscribed for twelve shares therein, and by the rules and regulations of the said society, duly certified and enrolled, is entitled on entering into security, to receive an advance out of the funds of the said association, in respect of the said shares, of the sum of 600*l.*, which sum has this day been paid.' It appears from the rules which are incorporated with the deed, that 'every member receiving an advance shall repay the same with interest at the rate which shall be determined by the board by monthly or other instalments.' Then we ought to have evidence of what rate of interest and of what instalments, whether monthly or otherwise, have been determined by the board for the repayment of this advance of 600*l.* On behalf of the society it is alleged that when the application for an advance was made to them, the prospectus was handed to the bankrupt, and that he was fully made acquainted by the secretary with the terms set out in the prospectus as being the rate of interest and the repayment sanctioned by the board of directors. At the same time a book was given to him in which his entrance fees are charged, together with a shilling for the book, and the payment of the first subscription, 9*l.* 13*s.*, is entered; and in the same book there is a payment by himself of 9*l.* 13*s.* on the 12th April. Therefore he cannot allege that he did not know that that was the monthly instalment that was to be paid. That clears a considerable proportion of the ground away. It is clear that he agreed to pay by monthly instalments of 9*l.* 13*s.* Then comes the proviso if he shall duly pay up the several subscriptions, fines, and other payments, &c. Now whether this sum of 9*l.* 13*s.* is a subscription or an instalment, it certainly may be included in the words 'other payments.' There are the rules and regulations which give a certain discretion to the board as to repayment, and which he has agreed to. Then if default is made it is lawful for the board to collect the rents, enter upon possession, and sell. As a matter of fact, they did so. A person was appointed to collect the rents, and they have sold; and now the question is, how the proceeds of the sale are to be applied. The deed, says that 'they shall, out of the money arising from such sale, as collected aforesaid, first retain all costs and expenses occasioned by the non-payment of the said subscriptions, fines, and other moneys, &c. Then, in the next place, they shall 'retain all such subscriptions, fines, and other sums of money which shall be then due, or which would afterwards become due in respect of the said shares during the then remainder of the said period of seven years.' A distinction has been attempted to be drawn between this part of the deed and the former part. The words are, 'become due with respect to the said shares.' It does not add, 'with respect to the said £600.' These words are left out. I agree with Mr. Finch that the deed is not prepared with the clearness and accuracy with which, perhaps, it ought to have been prepared to meet a case of this kind; but we must look at the deed as it is, and give a reasonable construction to its

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terms, if we can arrive at a reasonable construction without straining the language in any way. After the best consideration that I can give to the matter, it seems to me that it has been more as an oversight that those words have been left out. It is in respect of his shares that the money has been advanced to him, and I come to the conclusion that the society is entitled to that 9l. 13s. a month, and to all the fines that may be due in respect of any overdue instalments; but an account must be taken clearly showing the amounts received by the society for the rents and profits and the date of such receipts. They being in the receipt of rents must show clearly that they had not sufficient in hand applicable to pay the instalments as they became due. They must show clearly and distinctly the dates and amounts of the rents they have received, and that the fines are properly calculated. Then comes another proviso, that in case of any such sale all the money which would at any time afterwards become due from Goldsmith in respect of the said shares, according to the rules of the said association, shall be considered as then immediately due and payable. Now, having come to the conclusion that, according to the rules of the association, he was bound to pay 9l. 13s. a month for seven years, the sale having taken place, the whole of that amount of 9l. 13s. a month for the rest of the seven years becomes immediately due and payable. There can be no question that that is a very favourable construction for the society, and that by it they make a very good bargain for themselves. The terms of the loan certainly are not exorbitant. They charge merely 5 per cent. upon the amount advanced, and they would say, perhaps, that if they could get anything more than that they run a certain risk. In advancing money, they do so upon a certain valuation of the premises. In this case, as it happened, the premises, instead of depreciating, have increased in value, and they have the benefit of it. The premises might have depreciated, and upon a sale, instead of there being a surplus, there might have been a deficiency, and then the question would have been, if there had been a deficiency, would they have been entitled to come and prove for the prospective instalments at the rate of 9l. 13s. a month? I think they would, according to the true construction of this deed. It is much the same thing as we know takes place in many loan societies where a certain sum is advanced, subject to a large discount, payable by instalments, and there is a proviso in the promissory notes that in case any default is made in the instalments, the whole amount becomes immediately due and payable. I think I am bound to come to the conclusion, having given the subject the best consideration I can, that the society is entitled to 9l. 13s. a month, calculating it in the way they have done; but they must render a full account as to the receipts of the rents and profits."

From this decision the trustee in the bankruptcy appealed.

Little, Q.C. and Bagley, for the appellant.—The registrar's decision gives the benefit building society interest upon their principal after it has been repaid to them. It would take very clear language in the deed to entitle them to that. The society are by the deed entitled to retain out of proceeds of sale all costs and expenses occasioned by the non-payment of the subscriptions,

fines, and other moneys; and in the next place to retain "all such subscriptions, fines, and other sums of money which shall be then due, or which would afterwards become due in respect of the said shares during the then remainder of the said period of seven years." The monthly instalments of 9l. 13s. include interest at 5 per cent. on the advance of 600l., and it cannot be said that those instalments "would afterwards become due" in respect of the shares. We therefore contend that in addition to the sums due at the date of the sale, the society are only entitled to so much of the 600l. as remains unpaid, and interest thereon at 5 per cent.

Finlay Knight and Edward Pollock (of the Common Law Bar), for the respondents.—We submit that we are entitled to retain the full amount of all the monthly instalments which we should have received if the money had remained out for the period contemplated by the mortgage deed. In *Mosley v. Baker* (6 Hare 87; 17 L. J. 257, Ch.; and on appeal, 18 L. J. 457, Ch.), in the case of a mortgage to a benefit building society, whose rules were very similar to those of the society in the present case, it was held that the mortgagor was entitled to redeem only upon payment of all the future subscriptions on his shares until the dissolution of the society, the probable duration of the society to be ascertained by calculation, and the future payments to be treated as if immediately due. They also cited—

Seagrave v. Pope, 1 De G. M. & G. 783.

Without calling for a reply,

The LORD CHANCELLOR (Cairns) said.—The manner in which the mortgage deed is expressed and the rules worded creates a considerable amount of unnecessary obscurity, but I think that no doubt can be entertained as to the real nature of the transaction. Divested of technical terms, it was an advance to Mr. Goldsmith of the money which represented the amount of the shares for which he had subscribed. If the ninth rule of the society be taken in connection with the prospectus, which I think must be done, as there is nothing else to fix the rate of interest, it appears to me to be clear that, for the purpose of this mortgage, Mr. Goldsmith was treated as if he had an advance of 600l., which was to be repaid with interest thereon at 5 per cent. per annum, but the repayment was to be spread over seven years, and was to be made by equal monthly instalments, each of those instalments being made up of a part of the principal and a part of the interest. If that be so, one would, in the absence of any stipulation to the contrary, infer that, in case of default being made in the payment of any instalment, all that was then due in respect of past monthly instalments and fines would have to be paid out of the moneys arising from the sale of the mortgaged premises, and that with regard to the future, the balance of the principal money would be the utmost that could be retained by the society out of the proceeds of sale, and that there would be nothing in respect of which interest could accrue in the future. And the provision contained in the mortgage deed with regard to the application of the proceeds of sale, when construed in a reasonable way, seems to be in accordance with this view. That provision empowers the trustees of the society, out of the money arising from the sale, in the first place to retain all the costs and expenses occasioned by the non-payment of the subscriptions, fines, and other

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moneys, or incurred in the execution of any of the powers of the deed, and in the next place to "retain all such subscriptions, fines, and other sums of money and payments which shall be then due, or which would afterwards become due in respect of the said shares during the then remainder of the said period of seven years, it being agreed by the said parties hereto that in case any such sale shall take place, all the moneys which would at any time afterwards become due from the said George Goldsmith, his executors, administrators, or assigns, in respect of the said shares, according to the rules of the said association, shall be considered as then immediately due and payable." It is quite clear that with respect to the future you cannot construe the words "moneys which would at any time afterwards become due" so as to include fines. Nor can those words be so construed as to include interest which could only accrue if a principal sum remained outstanding and foreborne. The conclusion, therefore, appears to be that upon the sale the costs and all sums then due in respect of past instalments and fines must be paid to the society, and then it must be ascertained how much of the monthly instalments represented principal and how much interest, and the balance of the principal which upon that footing remains unpaid, must then be paid to the society out of the proceeds of the sale. The registrar's order must be varied accordingly.

Lord Justice JAMES.—I am of the same opinion.

Lord Justice MELLISH.—I am of the same opinion. According to the rules of this society an advance does not appear to be made in anticipation of what would be ultimately due to a subscribing member, as it was in other cases which have been before the courts. The eighth rule provides that the funds of the society shall be advanced to the members or invested in such manner on mortgage as the board shall determine, and the ninth rule provides that every member receiving an advance shall repay the same with interest, at the rate which shall be determined by the board, by monthly or other instalments. He is to repay the advance, which may be greater or less than the amount of his shares, with interest. The deed must be construed in accordance with the rules. No interest can possibly become due after the principal has been repaid, and therefore interest after repayment of the principal is not a sum which can ever become due to the society according to the rules. (a)

Solicitor for the appellant, *John Finch*.

Solicitor for the respondents, *Charles Ethington*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Tuesday, Nov. 10, 1874.

EDGWARE HIGHWAY BOARD v. HARROW DISTRICT GAS COMPANY.

District highway board—License to open a road—Consideration for bargain—25 & 26 Vict. c. 61.

Declaration alleged an agreement between plaintiffs and defendants, that, if the plaintiffs would give and grant to the defendants licence and permis-

sion to open a certain public highway in their jurisdiction, the defendants would make good the surface of the road which might be disturbed or damaged thereby, and would pay to the plaintiffs a sum of money.

Held, upon demurrer, that this was sufficient consideration for a valid bargain; and that the Act permitted by the plaintiffs, not being necessarily illegal, the declaration was good.

These were cross demurrers to the first count of the declaration, and to one of the pleas to the second count.

The declaration stated that in the year 1872 certain persons formed themselves into a Gas Company, under the name of the Harrow Gas-light and Coke Company, Limited, for the purpose of supplying with gas the parishes and places of Harrow, Perivale, Northolt, and Pinner, in the county of Middlesex, and generally for carrying on the business usually carried on by gas companies, and such company was duly registered under the Companies Act, 1862; and afterwards, (to wit) on the 27th Jan. 1873, it was agreed by and between the plaintiffs and the said limited company that if the plaintiffs would give and grant to the said limited company their licence and permission to open a certain public highway, the same being within the jurisdiction and management of, and vested in, the plaintiffs, as such Highway Board as aforesaid, that they, the said limited company, would make good the surface of the said road which might be disturbed or damaged thereby, and would pay to the plaintiffs the sum of, to wit, 1s. per yard of the said highway so opened; and the plaintiffs further say that in and by the Harrow Gas Act 1873, after reciting amongst other things that it was expedient that the district within which the said limited company should supply gas should be defined, and that the said limited company should be dissolved and re-incorporated with further powers, it was enacted amongst other things that from and after the passing of that Act, the said limited company should be dissolved, and the several persons and corporations who immediately before the passing of that Act were members of that company, and all other persons and corporations who had subscribed, or who should thereafter subscribe to the undertaking of the company, and their executors, administrators, successors, and assigns respectively should be and were united into a company for the purpose thereafter mentioned, and should be incorporated by the name of the Harrow District Gas Company, and by that name should be a body corporate with perpetual succession and a common seal, with power to purchase, hold, and dispose of lands and other property for the purposes of that Act, and that except as was by that Act otherwise specially provided, all purchases, sales, conveyances, grants, assurances, deeds, contracts, bonds, and agreements entered into or made before the passing of that Act by, to, or with the said limited company or any trustees or persons acting on behalf of the said limited company, or by, to, or with any other person to whose rights and liabilities they had succeeded, and then in force, should be as binding and of as full force and effect in every respect against or in favour of the said company, being the defendants, and might be enforced as fully and effectually as if instead of the said limited company or the trustees or persons acting on behalf of the said limited

(a) See, however, *Matterson v. Elderfield* (20 L. T. Rep. 503; L. Rep. 4 Ch. 207) which was not cited in the argument.

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company, the said company being the defendants, had been a party thereto, and that from and after the passing of that Act, and except as was by that Act otherwise expressly provided, the defendants, the said company, should in all respects be subject to and should discharge all obligations and liabilities to which the said limited company immediately before the passing of that Act were subject, and should indemnify the members, directors, officers, and servants of the said limited company, and their respective representatives, from all such obligations and liabilities, and from all expenses and costs in that behalf; and the plaintiffs say that the said agreement between the plaintiffs and the said limited company was and is a contract binding and of full force against the defendants, as if they had been a party thereto, by the force and operation of the said Act, and within the true intent and meaning thereof, and not excepted in any way from the operation thereof. And the plaintiffs further say that such licence and permission was given and granted as aforesaid by the plaintiffs, and that the said highway was opened under and by virtue of such licence, and permission for divers (to wit) 1476 superficial yards, and in so doing the said highway became and was greatly disturbed and damaged; and the plaintiffs aver performance of all conditions precedent, and that all things have been done, and happened, and all times elapsed before this suit necessary and proper to entitle the plaintiffs, and nothing has been done or happened to disentitle plaintiffs to maintain this action against the defendants, by virtue of the said Act in respect of the breaches hereinafter mentioned. Yet neither the said limited company, nor the defendants did nor would make good the surface of the said highway so disturbed and damaged as aforesaid, nor did nor would pay to the plaintiffs the said sum of 1s. per yard for and in respect of the said 1470 yards so opened as aforesaid, but therein wholly made default, whereby the plaintiffs have been and are greatly damnified and aggrieved, and have been put to great expense in and about making good the said surface of the said highway so damaged and disturbed as aforesaid.

And by the second count the plaintiffs also sued the defendants for money agreed to be paid to the plaintiffs by the said company, limited, and payable by them, and since the passing of, and by virtue of the said Act, payable by the defendants to the plaintiffs, for the leave and licence, and permission given by the plaintiffs to the said company, limited, to open for divers (to wit) 4000 yards, a certain public highway under the control and management of, and vested in, and within the jurisdiction, of the plaintiffs, and under and by virtue of such licence, and permission opened by the said limited company, and for money found to be due from the said limited company to the plaintiffs, on accounts stated between them. Whereby and by reason of the premises in this count mentioned, and by virtue and operation of the said Act, the defendants have become, and are liable to pay the same money to the plaintiffs, yet the said limited company has not, nor have the defendants paid the same, or any part thereof, but have therein wholly made default.

The defendants, for a fifth plea to the second count, said that the said debts and causes of action therein contained respectively, arise under and in respect of the same identical contract and

agreement as is alleged in the said first count, and not otherwise.

This plea raised, on the second count, the question of the validity of the first count, and the two grounds of demurrer to the declaration were (1) that there was no consideration for the defendants' alleged promise; and (2) that the plaintiffs' alleged licence and permission were given for the purpose of the defendants doing an illegal act.

Baylis (with him *Daniel*) argued for the plaintiffs.—The question is whether the declaration discloses either no consideration for the contract, or a contract which is necessarily illegal. [MELLOR, J.—Is there any statutory authority to the board to allow a nuisance?] Perhaps not; but what the defendants were permitted to do need not have been a nuisance. [BLACKBURN, J.—Probably it was not necessarily a nuisance, and therefore the contract would not be illegal. But how can you show a consideration?] Some consideration is all that is required; the *quantum* is of no consequence. There was some consideration in the grant of the licence, because the plaintiffs could otherwise have prevented the defendants from opening the highway. 25 & 26 Vict. c. 61 provides for the formation of boards in highway districts, and by sect. 11 "All such powers, rights, duties, liabilities, capacities, and incapacities (except the power of making, assessing, and levying highway rates) as are vested in or attached to, or would but for this Act have become vested in or attached to any surveyor or surveyors of any parish forming part of the district, shall vest in and attach to the highway board." By sect. 17 "The highway board shall maintain in good repair the highways within their district, and shall, subject to the provisions of this Act as respects the highways in each parish within their district, perform the same duties, have the same powers, and be liable to the same legal proceedings as the surveyor of such parish would have performed, and had been liable to, if this Act had not passed." Amongst others of the surveyor's powers, sect. 73 of 5 & 6 Will. 4, c. 50, enables him to give notice to remove any rubbish or other matter or thing whatsoever, which has been laid upon a highway so as to be a nuisance, and if not removed he may clear it away and dispose of it. By sect. 103, penalties, which are imposed by sect. 72 upon persons destroying or injuring the surface of any highway, are to be paid one-half to the informer, the other half to the surveyor to be applied to the repair of the district highways. The highway board clearly had authority to prohibit the opening of this highway.

Philbrick, Q.C. (with him *Fitzgerald*) for the defendants.—First, the agreement as alleged in the declaration discloses no consideration issuing from the plaintiffs. Secondly, the act licensed is actually prohibited by law. The powers of a surveyor, which are transferred by the Act of 1862, to the Highway Board, may be gathered from sect. 41 of the Act of 1835. Amongst them there is no authority to grant a licence to open a highway. [BLACKBURN, J.—I should like to know something about a surveyor before the Highway Act.] It appears from *Wellbeloved on Highways*, at p. 105, that it is the business of surveyors "to superintend the repair of highways, and to enforce under the regulations contained in the Acts that duty of repairing which is imposed by law in the manner already described." This duty of surveyors was

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also recognised in *Young v. Davis* (7 H. & N. 760, in error 2 H. & C. 197), but it was there held that no action lay against a surveyor for not repairing. The remedy against the defendants for opening the highway was by indictment, and the Board had no power to prevent that remedy from being adopted. [LUSH, J.—Consideration for a promise may be either a benefit to the person who promises or a detriment to the person to whom the promise is made. Here the duty to maintain the road has been laid upon the board, and if the licence to open it be no benefit to the defendants, yet it must be a detriment to the plaintiffs, by enabling the defendants to interfere with their duty and cause them liability.] The liability caused by opening the highway would rest only upon the defendants; *Reg. v. Longton Gas Company* (2 E. & E. 651) is an authority that it is an indictable nuisance to obstruct, or to employ others to obstruct a public highway or footway by placing earth and bricks thereon, taking up the pavement, and opening trenches for the purpose of laying down service pipes, for the supply of gas from public mains to private houses, unless those who do or authorise such acts have parliamentary powers for the purpose. This decision renders that of *Reg. v. Betts* (16 Q. B. 1022), by which it was held that whether an obstruction to a highway was necessarily a nuisance, inapplicable to the present case. In *Reg. v. Sheffield Gas Consumers' Company* reported in a note to *Ellis v. Sheffield Gas Consumers' Company* (18 Jur. 146), Lord Campbell in his judgment referred to "the licence of the surveyor of highways; but unless he has authority to license an obstruction of the highway, his authority is nought in this case, because these were not acts done for repairing the highway." [BLACKBURN, J.—I agree that if a surveyor had sanctioned an obstruction, the sanction would have been illegal; but it does not seem to me that the alleged agreement must necessarily cause such an obstruction as would amount to a nuisance.] At all events the board could not protect the defendants from an indictment, nor from penalties for what they proposed to do, and, therefore, their sanction was useless and void.

Baylis was not heard in reply.

BLACKBURN, J.—I think our judgment on this demurrer must be for the plaintiffs, who, being a Highway Board, are, by force of the Highway Act of 1865, in the same position as a surveyor before that Act. The surveyor had the control of the highways in his district, and could prevent anything being done injurious to the parish, which was not the right of the party doing it. Here the declaration alleges that it was agreed that, if the plaintiffs would give and grant to the defendants their licence and permission to open a certain public highway, the defendants would make good the surface of the road which might be disturbed or damaged thereby, and would pay a certain sum to the plaintiffs. This agreement on defendants' part, not being under seal, requires some consideration to make it binding. It is a sufficient consideration to support a promise, if the person promising obtain thereby some benefit for himself, or put the other person with whom he is dealing to some inconvenience or loss. Here the defendants had the advantage by this agreement of protection from any steps in the way of prosecution which the plaintiffs might otherwise have instituted against them, and at the same time, by

availing themselves of this licence, they put the plaintiffs to the risk of liability for the intermitence of their duty to maintain the road in repair. It is contended, however, that if there had been any liability on the plaintiffs' part, the agreement must have been to license an illegal act. There might have been a possible risk of indictment against the Board; and yet the obstruction of the road need not necessarily have been a nuisance, or illegal; and it seems to me that it does not follow that a jury would find the opening of a road for the purpose required by the defendants necessarily a nuisance, although it could not, perhaps, fail to be a temporary obstruction. I think a bargain was sufficiently made according to the statements in the declaration, and I do not think the necessary result and object of it was the performance of an illegal act.

MELLOR, J.—I am of the same opinion. I had some doubt at first, but I am now satisfied that what the defendants were licensed to do was not necessarily an indictable offence, nor an illegal act at all. Clearly, the plaintiffs might have taken steps to prevent it; and I think if a person authorise an act which he has the power to prevent, he gives a sufficient consideration for a promise by the person authorised. I think this amounts to a valid agreement, and the objection to it is not only insufficient, but, as it seems to me, it raises a very shabby defence.

LUSH, J.—I am of the same opinion. This appears to me a clear case. First it is alleged that this is *nudum pactum*. Now it has been held that where a depression has occurred in a road, it is the duty of persons who have the charge of maintaining the road, to repair it. By this licence the plaintiffs incurred the risk of having to repair the road, and that appears to me to be ample consideration for the promise made by the defendants. This licence, besides, was also a benefit to the defendants as well as a detriment to the plaintiffs, because the former thereby obtained protection from prosecution by the latter. Further, it was said that the licence was void, because it authorised an illegal act; but even if opening the road should amount to an obstruction, it is not necessarily a nuisance. There is nothing, therefore, to invalidate this agreement, and the declaration is good.

Judgment for plaintiffs.

Attorneys for plaintiffs, *Tilley and Iggins.*

Attorney for defendants, *J. M. Weighman.*

Saturday, Nov. 14, 1874.

BARTON v. PIGGOTT.

Highway—Surveyor's accounts—Use of team and materials—Allowances of illegal charges—Justices' discretion.—5 & 6 Will. 4, c. 50. ss. 44 & 46.

The accounts of the respondents, who were surveyors of highways, were duly, under sect. 44 of the Highway Act 1835, laid before and approved by the parishioners in vestry assembled; and also laid before justices, who upon complaint of appellant, a ratepayer, examined one of the respondents on oath and allowed the accounts. Some of the charges allowed had been incurred for team and materials provided by the said respondent without a previous written order, for which by sect. 46 a surveyor is liable to a penalty. The justices, how-

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ever, found that the required work of the highway could not otherwise have been done, that no fraud had been committed or contemplated by the respondents, that the works had been well and economically performed, and that the expenses charged were bona fide incurred.

Held, upon a case stated, that sect. 46 prohibits bargains for and use of a surveyor's horses and materials, without previous written order, altogether, and makes them absolutely illegal and void, so that charges for them cannot be enforced in any way; and that the discretion to justices given by sect. 44 does not enable them to allow such charges.

THIS was a case stated by two of Her Majesty's Justices of the Peace, in and for the county of Stafford, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them as hereinafter stated.

At a special sessions for the highways in the petty sessional division of Penkridge, in the county of Stafford, held in and for the said division on the 29th July, 1872, a complaint preferred by Thomas Cash Barton, of Hednesford, in the said county, a person chargeable to the highway rates for, and an inhabitant of the township or liberty of Hednesford, in the said division (hereinafter called the appellant), against the accounts of the respondents, Francis Piggott and Thomas Eskrett, as the late surveyors of the highways of the said township or liberty, and of the application of the moneys received by them during their tenure of office, which expired on the 3rd June then last, and which complaint was stated as follows:

1. That of the amount stated in the said accounts to have been paid to one Wm. Simcox 6*l.* 16*s.* 6*d.*, part thereof has not been paid.

2. That of the amount stated in the said accounts to have been paid to one John Peake, no part thereof has been paid.

3. That of the amount stated in the said accounts to have been paid to one Bartholomew Bate 2*l.* 6*s.* 6*d.*, part thereof, has not been paid.

4. That the said late surveyors are not entitled to take credit in their said accounts for the sums not so paid, nor for the sum of 26*l.* 18*s.* credited in their said accounts as payment to the said Francis Piggott for team work, and materials alleged to have been done and supplied by him:—was heard and determined by the said justices being then present, and upon such hearing they dismissed the said complaint and allowed the said accounts.

And whereas the appellant being dissatisfied with their determination, upon the hearing of the said complaint as being erroneous in point of law, pursuant to sect. 2 of the said statute (20 & 21 Vict. c. 43) duly applied to the justices in writing to state and sign a case setting forth the facts and the grounds of such their determination as aforesaid for the opinion of this court, and duly entered into a recognizance as required in the said statute in that behalf; but the justices being of opinion that the application of the appellant was merely frivolous, refused to state and sign such case, and at his request signed and delivered to him a certificate of such refusal; and whereas Her Majesty's Court of Queen's Bench at Westminster, has since granted a rule calling upon them to state such case,

Therefore the said justices in obedience to the

said rule and the provisions of the said statute, stated and signed the following case:

At the hearing of the said complaint at the said special sessions, the said Francis Piggott, one of the respondents, produced the said accounts which were signed by himself and the co-respondent; and being examined on oath he stated that the said accounts presented to the justices for allowance (and which appeared on the face of them to have been submitted to and allowed at the annual vestry for allowing such accounts, which vestry was numerous attended, and which accounts were signed by the chairman and many of the ratepayers as being allowed by them) contained the whole of the moneys received and expended by the said respondents, as surveyors of the highways for the liberty of Hednesford; that the sum of 26*l.* 6*s.* 6*d.* therein charged for gravel, was for gravel supplied from his own pit, but that he had charged nothing for it beyond royalty; that the amount of 26*l.* 18*s.* charged for team work in the said accounts was for work done by his own horses, and part of Peake's bill; that all the work charged for was done, and that he only employed his own horses when he could not get other horses; that the several sums stated in the said account as having been paid to John Peake, Thomas Salt, and William Simcox, and for which vouchers signed by them were produced, had not been so paid to them by the said surveyors, but that the vouchers were obtained to meet any question of irregularity, if the account appeared in the respondent's (Francis Piggott's) name. That inasmuch as the respondent Francis Piggott had used his own horses for team work, without the order of the justices, as required by law, the charges were illegal, and could not be allowed by them. No attempt was made by the appellant to show that the goods had not been supplied, or that the work had not been done, but only that it had been done illegally. The appellant's attorney stated that there was no desire to inculpate the respondent Thomas Eskrett in the charge of having acted illegally, but that he should be exonerated altogether from blame in the matter, and they were prepared to give an undertaking to that effect.

The respondents did not deny the irregularities complained of, but the respondent Francis Piggott stated that in some of the vouchers produced the items charged were partly supplied by the persons signing the same and partly by himself, and that when the accounts were made out they were charged for in the names of the several parties as set forth in the complaint and receipted by them; that unless the respondent Francis Piggott had used his own horses, the required work would not have been done, and great inconvenience would have arisen; that the objections raised by the appellant to the said accounts were not raised in order to show that the said liberty, or the ratepayers therein, had been defrauded in any way or from any sense of public duty, but solely out of private pique towards the respondent Francis Piggott (the acting surveyor); because, as was proved before the justices, a presentment had been made by the respondents (or rather by Francis Piggott as such acting surveyor) against the appellant for an encroachment on one of the highways in the said liberty in the erection of a building.

The justices, therefore, considering that no fraud

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had been committed or contemplated by the respondents, and that the statements as to the impossibility of obtaining horses for team and other work on the said highways were correct, and that the said accounts had been audited and allowed by a meeting of the ratepayers of the said liberty, and on the justices being informed, in reply to an inquiry made by them of the agents of two of the largest ratepayers in the liberty who were then present, that the work had been well and economically done, and believing the reason assigned for the appellant's objection to the accounts to be true, the justices allowed and passed the said accounts.

The opinion of the court is therefore asked, whether, under the circumstances, the justices' opinion was correct.

Anstie argued for the appellant.—In making the rule absolute, this court (which was composed of Cockburn, C. J. and Archibald, J.) held that the appellant's objection was not frivolous, and in effect expressed a decision on this point. By sect. 46 of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), "in every parish the surveyor may, and is hereby authorised, with the consent of the inhabitants in vestry assembled, to contract for purchasing, getting, and carrying the materials required for the repair of the highway; and if any surveyor shall have any part, share, or interest, directly or indirectly, in any contract or bargain for work or materials, to be made, done, or provided, upon, for, or on account of any of the highway or other works whatsoever under his care or management, or shall upon his own account, directly or indirectly, use or let to hire any team, or use, or sell, or dispose of any materials to be used or employed in making or repairing such highway, or other works, as aforesaid (unless licence in writing for the sale of any such materials, or to let to hire any such team, be first obtained from two justices of the peace in special sessions assembled), he shall forfeit for every such offence, on conviction, any sum not exceeding ten pounds, and be for ever after incapable of being employed as a surveyor with a salary under the authority of this Act." This provision renders these charges absolutely illegal for all purposes; and as the expenses here objected to were incurred by the respondent without a previous licence in writing, the justices were wrong in allowing them. It was held in *Smith v. Mawhood* (14 M. & W. 452) under a similar provision in the Excise Acts, that where it appears the intention of the Legislature to prohibit a contract, even although it be only for purposes of revenue, the contract is illegal and void, and no action can be maintained upon it. So in *Taylor v. Crowland Gas and Coke Company* (10 Ex. 293) words similar to these in 44 Geo. 3, c. 98, s. 14, which impose a penalty on any unqualified person who acts as a conveyancer, were held to be prohibitory; and therefore such person cannot recover for conveyances drawn by him. Parke, B. is reported at p. 296 to have said, referring to the case of *Smith v. Mawhood*, and other cases, "The question in all these cases is whether, looking at the statute, the object of the Legislature in imposing a penalty was to prohibit the particular Act, or whether it was for a different purpose." There can be no doubt about the object of the Legislature in sect. 46 of this Act:

Staveley Hill, Q. C. (with him *Bosanquet*), for the respondent.—The justices have found in the

last paragraph of the case that no fraud had been committed or contemplated by the respondents, that it was impossible otherwise to obtain horses for team and other work necessary for the highways, that the accounts had been allowed by the ratepayers and that the work was well and economically done. This being so the act of the justices was within the discretion vested in them by sect. 44 of the Highway Act, which provides "That within fourteen days after the election or appointment of surveyor as herein directed, the accounts as aforesaid made in writing and signed by the surveyor, district surveyor, or assistant surveyor, for the year preceding, of all money received and disbursed by virtue of this Act, ending on the day of the election or appointment of surveyor shall be made up, balanced, and laid before the parishioners in vestry assembled, who may, if they think fit, order an abstract thereof to be printed and published; and within one calendar month after the election or appointment of surveyor as herein directed, the said accounts shall be signed by the surveyor, district surveyor, or assistant surveyor for the year preceding, and laid before the justices of the peace at a special sessions for the highways, holden at the place nearest to the parish or district for which such surveyor shall have been appointed; and such justices are hereby authorised and required to examine him as to the truth of the said accounts or of any charge contained therein. Provided always, that if any person chargeable to the rate authorised to be made by this Act has any complaint against such accounts or the application of the moneys received by the said surveyor, it shall be lawful for any such inhabitant to make his complaint thereof to such justices at the time of the verification of such accounts as aforesaid; and the said justices are hereby required to hear such complaint, and, if they shall think fit, to examine such surveyor upon oath, and to make such order thereon as to them shall seem meet." [BLACKBURN, J.—Can that section give the justices discretion to allow illegal expenses?] Sect. 46 does not make these expenses illegal, it merely imposes a penalty upon the surveyor who incurs them. Even if the effect of the 46th section is to prevent an action being brought for these charges, there is nothing in it to forbid justices from allowing them in their discretion under such circumstances as these. This was perhaps an illegality on Piggott's part; but so far as the two surveyors are concerned, both of whom are respondents here, it cannot be more than an irregularity which is cured by the allowance of the ratepayers and the justices.

Anstie in reply:—It was not suggested when cause was shown against the rule ordering this case to be stated that this could be within the justices' discretion; nor was the point raised in two other cases in which similar rules were obtained, in both of which the court must have considered it was competent to review allowances of illegal expenses. In *Townsend v. Reed* (30 L. J. M. C. 223 & 245) the complaint was in respect of legal expenses claimed by a surveyor under sect. 111 of the Highway Act, and allowed by the justices under this sect. 44. A preliminary objection was taken to the jurisdiction of the court, but it was held that it was a proper question upon which to state a case. So in *Taylor v. Stansfield* (6 L. T. Rep. N. S. 26) no objection was taken to the

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competency of the court to review an allowance by justices under this same sect. 44, on the ground suggested on behalf of the respondents here. [BLACKBURN, J.—In both those cases the court held the justices to be right; they might well have done that without considering this point. Those decisions do not touch the question whether the justices' discretion as given by sect. 44 is wide enough to cover the allowance of illegal expenses.] This court will review even the exercise of discretion, if the decision be clearly illegal and improper.

BLACKBURN, J.—I think our judgment must be for the appellant, and the justices have arrived at an erroneous decision. By the 46th section of the Highway Act any surveyor who shall have any part, share, or interest, directly or indirectly, in any contract or bargain for work or materials for his highway, or shall, upon his own account, use, or let to hire any team, or use, sell, or dispose of, materials in any works which he is required to carry on, "shall forfeit for every such offence, on conviction, any sum not exceeding 10*l.*, and be for ever after incapable of being employed as a surveyor with a salary." Now, the first question which arises is whether the intention of the Legislature was merely to impose a penalty upon a surveyor who used his own team or materials, or whether it was to declare by this section that all such contracts or charges should be absolutely illegal. It seems to me that it was intended to prohibit such charges altogether, and to make them illegal and void, so that they cannot be enforced in any way. Clearly the charges complained of in this case were of this kind, and they may be said to be admittedly illegal, for it was attempted to bolster them up by false vouchers. This being so, the next question is whether sect. 44 gives the justices power to allow these expenses: the words are, "the justices are hereby required to hear such complaint, and, if they shall think fit, to examine such surveyor upon oath, and to make such order thereon as to them shall seem meet." The order which to the justices here seemed meet, was to allow certain illegal expenses against the parish, which are expressly forbidden to be incurred at all. The words by which their discretion is created cannot possibly cover such an allowance as this. These expenses must be disallowed.

MELLOR, J.—I have come to the same opinion, but I was anxious at first to see how far by sect. 44 the discretion of the justices extended. I am now satisfied that the Legislature could not have intended that justices should allow expenses which are strictly and expressly forbidden by another section of that Act. The penalty is not sufficient to enforce the object of the 46th section, and I think by this decision we are furthering what was clearly the intention of the Legislature.

ARCHIBALD, J.—I am of the same opinion. We are bound to put a consistent construction, so far as we can, upon the various provisions of this Act. Sect. 46 makes these expenses absolutely illegal, and therefore sect. 44 cannot enable the justices to legalise them by finding they are necessary. They have a wide discretion, but not wide enough to allow illegal charges.

Judgment for appellant—Case to go back to justices for further inquiry in accordance with the opinion of the court.

Attorneys for appellant, agents for Duignan, Lewis, and Lewis, Walsall.

Attorneys for respondents, Sharp and Ullithorne.

COURT OF COMMON PLEAS.

Reported by ETHERINGTON SMITH and J. M. LELY, Esqrs.,
Barristers-at-Law.

Friday, Nov. 13, 1874.

UTTLEY AND ANOTHER v. TODMORDEN LOCAL BOARD.

Award of compensation for land taken for public purposes—Construction of sewer—Lump sum awarded—Action for nonpayment—Pleas that various items improperly included—Prospective damage—Public Health Act 1848 (11 & 12 Vict. c. 63), ss. 43, 46, 47, 123, 144.

Arbitrators determining compensation under the Public Health Act 1848 may take into account all prospective damage to the land taken for the purposes of the Act.

By sect. 47 of the Public Health Act 1848 "no building may be erected over a sewer of the local board of health without the written consent of the board, first had and obtained."

By sect. 144, "full compensation shall be made to all persons sustaining any damage by reason of the execution of the powers of the Act."

To a declaration for nonpayment of a sum awarded to the plaintiffs as compensation for the construction by the defendants of a sewer under the land of the plaintiffs, in execution of the powers of the Act, the defendants pleaded that, in making up the said sum, the umpire under the arbitration had taken into consideration, first, the improbability that the defendants would give the plaintiffs leave to build under sect. 47; secondly, the defective construction of the sewer; and, thirdly, the stench proceeding from the sewer:

Held, bad pleas.

DECLARATION, that one John Knowles was seised in his demesne as of fee of certain lands in the district of the defendants, and the defendants proposed to construct a certain public sewer in the said district; that it had been duly reported to the defendants that it was necessary to carry the said sewer into, through, or under certain lands belonging to the said Knowles, and that the defendants gave notice to the said Knowles that within a reasonable time after that notice, viz., after the expiration of ten days, they would cause such sewer to be constructed into, &c., the said land, and that compensation would be made to Knowles for any surface damage which he might sustain by reason of such works; that the plaintiffs were devisees in trust of the said land, under the will of Knowles; that the plaintiffs, as such devisees, gave notice to the defendants (after reciting the notice of the defendants to Knowles, and further reciting that the defendants had entered the said lands in the lifetime of the said Knowles, and executed certain works therein and thereunder, in alleged execution of the said notice, and that the defendants had not paid compensation to the said Knowles or the plaintiffs, and that the defendants had refused to permit the plaintiffs to construct any buildings whatsoever over the said sewer, constructed in, &c., the said lands) that it was their desire that the amount to be paid to them in respect of the premises should be settled by arbitration; that an arbitration was had and proceeded with accordingly, and that the umpire in the said arbitration awarded unto the plaintiffs the sum of 173*5*l.* 19*s.* 3*d.* "as compensation for the said entry by the said defendants on the said lands of the said plaintiffs, and for all surface and other damage occasioned and then continuing in respect*

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or by reason of the construction by the defendants of such public sewer into, upon, through, or under a part of such lands," with the taxed costs of the reference, amounting to 570*l.* 9*s.* 4*d.*

Averment of conditions precedent.

Breach: That the defendants had not paid the said sums of 1735*l.* 19*s.* 3*d.* and 570*l.* 9*s.* 4*d.*, or either of them.

Pleas: Thirdly, that the said sum of 1735*l.* 19*s.* 3*d.* was awarded as a lump and indivisible sum, and that in awarding the said sum the umpire proceeded on the assumption that the plaintiffs would not be able to build and would be prevented by the defendants from building, and would be unable to procure the consent of the defendants to build on the said lands over the said sewer, and that the said sum of 1735*l.* 19*s.* 3*d.* was awarded to the plaintiffs by the said umpire as compensation, among other things, for the plaintiffs so not being able to build on the said land, and so being prevented from building thereon, and so being unable to procure such consent, and the said costs were incurred for and in respect of the said matters in respect whereof the said sum of 1735*l.* 19*s.* 3*d.* was so awarded; fourthly, that the umpire proceeded on the assumption that the plaintiffs were entitled to compensation by reason of the sewer having been constructed in a defective manner; fifthly, that the umpire proceeded on the assumption that the plaintiffs were entitled to compensation by reason of certain manholes having been constructed by the defendants having existed in the said sewer at the time when the said umpire was appointed, but which said manholes had ceased to exist, and had been removed by the defendants before the said award was made, and that the said sum of 1735*l.* 19*s.* 3*d.* was awarded to the plaintiffs by the said umpire as compensation, among other things, for the said manholes, on the assumption that the said manholes were in existence at the time of making the said award, and would always continue to exist on the said lands; and, sixthly, that the said umpire proceeded on the assumption that the plaintiffs were entitled to compensation by reason of stench proceeding from the said sewer.

Demurrer to pleas, on the ground that they did not show the award to be bad.

Replication to plea 6: that the stench was divers offensive and pestilential stench caused by the defendants to run through the said sewer over adjoining lands of the plaintiffs, which were thereby rendered unhealthy and less fit for the erection of houses thereon, and thereby deteriorated in value.

Demurrer to replication, on the ground that the umpire could not take, and ought not to have taken, into consideration the stench in question.

Joinders in demurrer.

The plaintiffs' points were: that the several matters in the several pleas respectively mentioned, and in respect whereof compensation was awarded, as in the several pleas respectively mentioned, were respectively the subject of compensation under the reference and under the provisions of the Public Health Act 1848; that nothing appeared or was stated by the several pleas respectively to disentitle the plaintiffs to compensation in respect of the matters therein respectively mentioned; and that the sewer should have been so constructed as to prevent stench injurious to health from proceeding therefrom, but failed to do so, and that compensation was properly awarded in respect thereof.

The defendants' points were: That sect. 47 of the Public Health Act 1848, does not entitle the local board arbitrarily to withhold such consent as is therein mentioned(a), and, consequently, that the plaintiffs were not entitled to compensation on the basis mentioned in the third plea; that, assuming that the local board is entitled arbitrarily to withhold such consent, the power of withholding such consent does not arise, and cannot be exercised until application is made for leave to erect some specific building, and that the compensation must be made in respect of the refusal to consent to the erection of such specific building; that assuming the plaintiffs to have sustained damage by reason of the sewer having been constructed in a defective manner, their remedy was by action and not by compensation under the Act; that damage to be sustained by the plaintiffs in the future, by reason of the continued existence of the manholes, was not, under the circumstances stated in the fifth plea, the subject of compensation under the Act; that if the damage for the defective construction, and the manholes, is the subject of compensation, it only becomes such when the damage has actually arisen; and that the damage referred to in the sixth plea, and the replication thereto, is the subject of an action and not of compensation.

Manisty, Q.C. (*Forbes* with him), for the plaintiffs in support of the demurrers, referred to sects. 43, 46, 47, 123, and 144 (b) of the Public Health Act 1848 (11 & 12 Vict. c. 63). [*KEATING*, J.—Is not the test whether an action will lie? Certainly; and there is nothing in these pleas to show a right of action. He was then stopped.

Herschel, Q.C. (*Cave* with him), for the defendants, in support of the pleas.—The complaint of the defendants is, that the umpire has proceeded on the assumption that the plaintiffs never could build on their land. The plaintiffs might, notwithstanding that they had got compensation, build all the same. [*KEATING*, J.—The pleas do not show that the umpire assumed facts without ascertaining them. It may be that, commercially speaking, the plaintiffs would be unable to build over the sewer.] In *The Southampton and Itchin Floating Bridge and Road Company v. Southampton Local Board* (28 L. J. 41, Q. B.), it was held upon demurrer that an action lay against the defendants for negligently constructing a sewer so as to cause a nuisance by its discharge. [*LUSH*, J.—The pleas do not allege a nuisance, and the plea as to the stench could be proved by showing that stench arose for a short time during cleansing.]

KEATING, J.—I am of opinion that these pleas are bad, and that the umpire took into consideration no more than he ought to have done. It seems to me, for instance, that he had a perfect right to take into consideration the deterioration of the land arising from the necessity of obtaining consent to build, and from the improbability that the defendants could ever, consistently with the effective maintenance of the sewer, give their permission for the land to be built upon. As to the

(a) By sect. 47, "It shall not be lawful to cause any sewer or drain to communicate with or be emptied into any sewer of the local board of health, nor to cause any building to be newly erected over any such lastmentioned sewer . . . without the written consent of the said local board first had and obtained."

(b) By sect. 144, "Full compensation shall be made . . . to all persons sustaining any damage by reason of the exercise of any of the powers of this Act."

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fourth plea, there is a little more doubt it. Mr. Herschel argues, that inasmuch as the defective construction of a sewer would be actionable, it is therefore not the subject of compensation. But the umpire may have considered that the sewer was under the circumstances defective, and yet not so far and in such manner defective as to render the defendants liable to an action. If it had been the intention of the defendants to insist that the umpire had in his mind an actionable defectiveness, they ought to have said so more plainly in their plea. The fifth plea being abandoned, I will pass it over in silence. Coming to the sixth plea I think the matters set out in this plea were very properly considered by the umpire.

LUSH, J.—I am of the same opinion. I think that the umpire was bound to take into consideration all damage both present and prospective.

DENMAN, J.—I am of the same opinion. As far as I can see, the umpire steered exactly the right course between considering too much and considering too little. It would have been easy enough to plead pleas raising a defence, if there be any defence.

Judgment for the plaintiffs.

Attorneys for the plaintiffs, Shaw and Tremlen.

Attorneys for the defendants, Rickards and Walker, for J. Stansfield, Todmorden.

Nov. 16, 18, and 20, 1874.

PARR (pet.) v. HARTSHORNE AND ANOTHER (resps.).

The Corrupt Practices (Municipal Elections) Act, 1872, 35 & 36 Vict. c. 60, s. 19—Rule 55 of Michaelmas Term, 1872—Payment of costs how enforced—Indorsement by the registrar of the determination of the barrister respecting costs upon the petition—"Rule of court ordering the costs to be paid"—Practice.

The barrister who tried a municipal election petition duly certified his decision under sect. 15, par. 4 of 35 & 36 Vict. c. 60, in writing, and he also orally determined that the petitioner's costs were to be paid by one respondent.

The registrar indorsed on the petition, "Election void, petitioner's costs to be paid by the respondent, R. A. S."

Held, that such indorsement was to be treated as the certificate of the barrister, and could be made a rule of court in the ordinary way, so as to enable the petitioner to issue execution upon it as "the rule of court ordering them to be paid" in the manner provided by Rule 55 Michaelmas Term 1872.

A PETITION against the return of Messrs. Hartshorne and Sylvester as councillors at the Municipal Elections of the borough of Nottingham was tried before Mr. Dowdeswell, the barrister appointed, in Jan. 1874. On 24th Jan. he gave his decision declaring the respondents not to have been duly elected, and directing the costs of the petition to be paid by the respondent Sylvester. The judgment was oral.

Cave now moved for a rule calling on the respondent Sylvester to pay to the petitioner the taxed costs. The 19th section of 35 & 36 Vict. c. 60, *The Corrupt Practices (Municipal Elections) Act 1872*, sub-sect. 2 enacts: "The costs may be taxed in the prescribed manner, but according to

the same principles as costs between attorney and client in a suit in the High Court of Chancery, and such costs may be recovered in the same manner as the costs of an action at law, or in such other manner as may be prescribed," and rule 55 made under the above Act says, "Costs shall be taxed by the Master or at his request by any Master of a superior court, upon the rule of court or judge's order by which the costs are payable, and costs when taxed may be recovered by execution issued upon the rule of court ordering them to be paid; or if payable by the order of a judge, then by making such order a rule of court in the ordinary way and issuing execution upon such rule against the person by whom the costs are ordered to be paid, &c." In the present case, the costs have been taxed without any order or rule, and the petitioner wants to obtain payment of them. But as the order of the barrister was merely verbal, it does not seem to be such an one as is contemplated by the 55th rule. [Lord COLERIDGE, C.J.—There seems to be a little confusion as the 55th rule appears to have been taken from the Parliamentary Election Rules, and does not follow sect. 19 of the Municipal Election Act.] The master's allocatur is dated Aug. 9th, and is the petitioner to be allowed to issue execution upon that? It will be seen that if this court make an order for the costs to be paid, following the 55th rule, it will be necessary to tax over again. An application was made before Blackburn, J., in chambers to stay taxation, but he refused to make an order to do so.

Lord COLERIDGE, C.J.—We will consult Keating, J., as he was one of the judges who drew up the rule of Michaelmas Term, 1872.

Nov. 18.—The court said that they were of opinion that the barrister who tried the petition must be asked to certify in writing his decision as to the payment of costs, and then that certificate might be made a rule of court in the ordinary way upon which execution might issue.

Nov. 20.—Cave made a further application, stating that the barrister had under sect. 15, paragraph 4, of the Act 35 & 36 Vict. c. 60, certified in writing his determination to the superior court, but in that certificate he made no mention of the costs. He, however, did determine under sect. 19, that the costs were to be paid by the respondent Sylvester, and the registrar indorsed upon the petition these words, "Election void; petitioner's costs to be paid by the respondent R. A. Sylvester." The barrister on being applied to now in accordance with the suggestion of the court says, that he has done all that he is required by the Act to do, and is *junctus officio*. The question seems, therefore, to be, can the *postea* indorsed by the registrar be made a rule of court? The practice of judges in Parliamentary petitions appears to vary, some indorsing the petition themselves, others permitting the registrar to do so. [GROVE, J.—In the Taunton case it was certainly mentioned, when the question of costs arose in consequence of the dissolution of Parliament just at the time I gave my judgment, that the registrar had made a minute on the petition.]

Lord COLERIDGE, C.J.—We are all agreed that the endorsement made by the registrar upon the petition stating the determination of the barrister as to the payment of the costs must be treated as the certificate of the barrister which may be made

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a rule of court, and upon which execution may issue in accordance with the 55th rule.

Attorneys for the petitioner, *Torr, Janeway, Tagart, and Janeway.*

Tuesday, Nov. 17, 1874.

LEWIS (app.) v. EVANS (resp.).

Parliament—County vote—6 Vict. c. 18, ss. 7 and 100—Notice of objection sent by post—No postal delivery at place of abode of person objected to.

Notice of objection was sent by post addressed to W., the place of abode of the person objected to, and the objector fulfilled all the requirements of s. 100 of 6 Vict. c. 18. The notice was posted on August 18th, and would reach the post office nearest to W., in the morning of the 19th. There was no delivery of letters thence to W., and the notice could only reach the person to whom it was addressed at W., by some private accidental conveyance.

Held, that the above facts were no evidence that the notice would be delivered on or before Aug. the 20th, and that, therefore, the 7th section of 6 Vict. c. 18, was not complied with, and the requisite notice of objection had not been given to entitle the objector to raise his objection before the revising barrister.

This was an appeal from the decision of a revising barrister.

At the court for the revision of the register of voters for the county of Carmarthen, the appellant objected to the respondent's name being retained on the register, and the former was required to prove that he had complied with the provisions of 6 Vict. c. 18, s. 7, and 28 & 29 Vict. c. 36, s. 4, which require the objector on or before Aug. the 20th, to give notice in writing of the objection to the person objected to. By sect. 100 of 6 Vict. c. 18, it is enacted "that it shall be sufficient, in every case of notice to any person objected to in any list of county, city, or borough voters, &c., and also in the case of county voters, to the occupying tenant whose name and place of abode appears in such respective lists as aforesaid, if the notice so required to be given as aforesaid shall be sent by the post." The statute then specifies certain requisites (one of which requires the notice of objection to be delivered to the postmaster in duplicate, who thereupon stamps the duplicate and returns it to the objector, and forwards the notice to its address by the post), and continues, "And the production by the party who posted such notice of such stamped duplicate shall be evidence of the notice having been given to the person at the place mentioned in such duplicate on the day on which such notice would, in the ordinary course of post, have been delivered to such place."

The question was in this case whether due notice of objection had been given to the respondent. The revising barrister stated the case in the following terms: "The place of abode of Evan Evans as described in the list of voters was Wern. The stamped duplicate of the notice of objection was produced before me by the person who posted it, and it was directed as follows: 'To Mr. Evan Evans, of Wern.' Wern was the place of abode of the said Evan Evans, as described in the said list of voters. Evidence was given before me, and it is to be taken as a fact

that the notice in the ordinary course of post would reach the post office at a place called Efailwen (which is the nearest post office to Wern) on the 19th Aug., at ten in the morning. Evan Evans' place of abode, the said Wern, as described in the said list is two miles from Efailwen, and there is no delivery by post at Wern, and unless by some private accidental conveyance Evan Evans would not have received the notice."

The revising barrister held that due notice of objection had not been given, and allowed the vote.

Grantham, for the appellant.—The whole question is, whether there was any evidence of the notice of objection having been given to the respondent, at Wern, before the 20th Aug., the facts being that the person objected to lives within a mile or two of the post office, and that there is no postman, must the objector do more than is required by the Act of Parliament, viz., post his notice in time for it to reach the place which is the post office for the residence of the person to whom it is sent? The objector has here done all that is required by the 100th section of 6 Vict. c. 18. [BRETT, J.—The difficulty is, that the words which make the production of the duplicate evidence, make it evidence of the notice having been given on the day on which, in the ordinary course of post, it would have been delivered to such place.] The post office for the place must be taken for this purpose to be the place itself, otherwise the section is misleading and does not give the facilities which it professes to do. [BRETT, J.—The section is in the nature of an indulgence; but if you choose to avail yourself of it, to exercise your option of using the post instead of a messenger, you must be careful.] *Bishop v. Helps* (2 C. B. 45) is in favour of carrying out what I contend is the spirit of the Act. It is not defeated because of actual accidental delay. Tindal, C.J., in giving judgment, disposes of the argument that the notice must be effectually sent, in the sense of its being sent and delivered. He says, "It is evident that some privilege is meant to be conferred by sect. 100 on a mode of dealing with the notice, which is so carefully provided for. And we think the meaning of the Act is this—when all these conditions are complied with, such sending shall be a sufficient substitute for giving the notice to the person objected to or leaving it at his abode." And again, "Supposing it was insisted that the evidence of the stamped duplicate is not conclusive as to arrival, and was answered by proof of the contrary, it makes no difference as to the right of the objector, as the fact so disproved is not material to his right." [BRETT, J.—When you have done all that is required, you gain a privilege; but what is that privilege? It is only that the duplicate shall be evidence that the letter was delivered on the day on which in the ordinary course of post it would be delivered.]

No counsel appeared for the respondent.

BRETT, J.—On the facts stated in this case, I am of opinion that the objector had fulfilled all the conditions laid upon him in the 100th section of the Act; and therefore by their fulfilment he had given all the evidence which by that section the things which he had done are evidence of. It is an artificial kind of evidence, and it is admitted only by the express statutory provision, and is limited by the words of the statute. It is, "evidence of the notice having been given to the person at the place mentioned in such duplicate on

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the day on which such notice would in the ordinary course of post have been delivered at such place." Then it becomes a question what is the day, if any, on which it would be delivered, and the evidence here shows that it would not have arrived at the place on any known day which we can name. This is, therefore, no evidence that it would have been delivered on the 20th of Aug.; and so the 7th section of the Act is not satisfied, although the 100th is. The decision of the revising barrister will therefore be affirmed.

DENMAN, J., concurred.

Decision affirmed.

Attorneys for the appellant, Prior, Bigg, Church, and Adams.

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Parliament—Borough vote—30 & 31 Vict. c. 102, s. 3—31 & 32 Vict. c. 76, s. 2—37 & 38 Vict. c. 29, s. 3—Staff sergeant of militia required to occupy an assigned house—Occupation as tenant.

A staff sergeant of militia occupied as such one of a set of houses built by the county for the purpose, and adjoining the militia stores, of which the staff sergeants have the charge. The house was assigned to him on his appointment by the commanding officer of the regiment, and he could not exchange it or leave it without permission; to do so would be a breach of discipline entailing dismissal from the service. He could, however, have performed his duties equally well had he lived elsewhere, and permission to do so had actually been granted in the case of another staff sergeant. A deduction was made from the pay of each occupier of these houses in respect of the occupation, but if he resided elsewhere such deduction continued to be made nevertheless. It was in the power of the commanding officer to turn any occupier of these houses out at any time. Held, that the occupation under these circumstances was not the occupation of a tenant so as to confer the franchise under s. 3 of the Representation of the People Act, 1867.

Dobson v. Jones (5 M. & G. 112) approved and followed.

APPEAL from the revising barrister for the borough of Devizes.

The case set out by the revising barrister was as follows:

"Edward Dally is a sergeant on the permanent staff of the Wiltshire militia, and as such occupies a house in the Bath-road, Rowde, in the borough of Devizes.

This house, with others similar to it, was built while at the same time others were purchased by the justices of the peace for the county of Wilts under the provisions of the Militia Law Amendment Act 1854 (17 & 18 Vict. c. 105).

The said houses stand in close proximity to the buildings and premises in which the arms, accoutrements, and clothing of the Wiltshire militia are stored.

They are separate houses, containing sufficient accommodation for the families of the sergeants who occupy them, and the wives and families of the sergeants live there with them.

In support of his objection the appellant refers to the 2nd section of the Militia Pay Act (31 & 32 Vict. c. 76), which enacts "that except when

employed as thereafter provided every member of the permanent staff of the regular militia when disembodied shall reside in such places as shall be sanctioned by the Secretary of State for War, and every such member shall forfeit his pay for any period during which he shall be absent, except when employed as thereafter provided, or when absent by leave of the colonel or commandant of the regiment, battalion, or corps, which shall not except in case of certified sickness extend beyond three calendar months in one year, nor to a greater proportion than one-third of the non-commissioned officers and men at the same time.

Under sect. 3 of the Militia Law Amendment Act 1870, the above Act has ceased to be of any force as an Act of Parliament, but has the same effect as if Her Majesty had embodied the provisions thereof in a royal warrant.

The buildings and quarters, including the houses occupied by the respondent and twenty-three other persons whose names appear in the schedule to this case, have been duly sanctioned by the Secretary of State for War.

Upon the appointment of the respondent as a sergeant, the house which he occupies was assigned to him by the commanding officer of the regiment. It is an advantage to him to live there, as he could get no other place of equal size for the same rent.

He could perform the duties required of him equally well if he were living elsewhere, which he might do by the permission of the commanding officer.

One of the sergeants by such permission does live elsewhere and pursues the avocation of a market gardener besides fulfilling his military duties.

Two shillings and fourpence per week is deducted out of the pay of the occupier of each cottage, but if he resides elsewhere, he does not receive the said sum of 2s. 4d. extra.

Before the new buildings were erected, each sergeant was allowed 4d. a day lodging money which has not been allowed since, but if any sergeant were billeted elsewhere by reason of there being no house for his use, he would be allowed the sum of 4d. a day lodging money.

When appointed by his commanding officer to a particular house, should he leave that house without asking permission of his commanding officer, it would be a breach of discipline, for which he probably would be dismissed from the service.

The commanding officer would have the power of turning any occupier of these buildings out.

The grates, boilers, and other fixtures in the houses are the property of the county of Wilts.

All repairs are done by the county.

The duties of the sergeants are to look to the clothing, arms, accoutrements, and stores required by the Militia during the whole year.

They are liable to be engaged every day on this duty if ordered.

The sergeants parade at the stores twice a week and are drilled there.

At different times a sergeant has resided out of these buildings by leave of the commanding officer.

Sergeant Arter, above mentioned as being away from the buildings, does not receive any allowance for lodging money.

Although the said Sergeant Arter resides away from the stores, he can as an individual perform all the duties required of him.

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No sergeant could exchange quarters with another without the leave of the commanding officer or the adjutant.

The cottages were expressly built adjoining to the stores for the accommodation of the men employed in looking after them and the safe custody of the said stores.

The rate books for the parish of Rowde were produced and therein the name of the respondent, Edward Dally, appears thus :

Name of occupier.	Name of owner.	Description of property.	Name or situation of property.
Edward Dally.	County.	Buildings and land.	Bath-road, The Stores.

but the rest of the spaces are left blank, no assessment having been made on the premises, and no rate has ever been paid (because never asked for) either by Edward Dally as occupier, or by the county as owner in respect of the said premises.

It was, therefore, further contended on behalf of the appellant, that the said Edward Dally did not occupy as owner or tenant within the meaning of 2 Will. 4, c. 45, or the Representation of the People Act 1867, and that if he did so occupy, he ought to have been rated and to have paid rates in respect of the premises occupied by him.

I decided :

First, that the said Edward Dally did occupy as tenant within the meaning of the statute.

Secondly, that the premises he so occupied being exempted from the payment of rates (as they are under the Militia Act of 1854, by which it is specially enacted that no place provided for the purpose of keeping militia stores, nor any buildings or premises appurtenant thereto, shall be liable to be assessed to any county, borough, parochial, or other rates or assessments) the said Edward Dally was, although not rated, entitled to be on the list notwithstanding.

The names of twenty-three other persons, a list of whom are set out in the schedule attached hereto, were objected to under similar circumstances, and I retained each of the said names on the list of voters.

Due notice of appeal from my decision was given, and I directed the appeal against such decision in all the above mentioned cases to be consolidated.

Should the decision of the Superior Court be against retaining the said names upon the register of voters for the borough of Devizes, the register is to be amended by erasing the names of the said Edward Dally, and of the said twenty-three other persons from the same list."

Then followed the schedule of persons.

Sir H. James, Q.C. (*A. Charles* with him) for the appellant.—The question here turns entirely upon the construction of the 3rd section of the Representation of the People Act 1867, and is in effect whether the respondent occupies as tenant, and whether he has fulfilled the rating requirements. The 2nd and 3rd subsections are as follows: "Is on the last day of July in any year, and has during the whole of the preceding twelve calendar months been, an inhabitant occupier, as owner or tenant of any dwelling house within the borough; and has during the time of such occupation been rated as

an ordinary occupier in respect of the premises so occupied by him within the borough, to all rates (if any) made for the relief of the poor in respect of such premises." Now the respondent here occupies his house under the 2nd section of the Militia Pay Act, and it has been assigned to him by the direction of his commanding officer; he is required to live there and cannot leave without committing a breach of discipline. The store house and the quarters for the permanent staff are provided by the county under section 2 of 17 & 18 Vict. c. 105, and that section shows that the staff are properly required to live near to the stores of arms and accoutrements which they have in their charge. It is true, that it is found in this case, that the respondent could perform his duties equally well if he lived elsewhere than in one of these cottages, but being required to live there, can he be held to occupy as tenant? The tests which ought to be applied to determining this are to be found in two cases especially. The first is *Hughes v. The Overseers of Chatham* (5 M. & G. 54). There a master rope-maker in the royal dockyard had as such a house in the dockyard of which he had the exclusive use without paying rent, as part remuneration for his services; the house belonging to the Lords Commissioners of the Admiralty. If he had not had that house, he would have had an additional allowance for a house. He was held to occupy as tenant within the Act of Will. 4. Now an examination of the judgment of Tindal, C.J., will show that there were four tests or requirements applied to the occupancy, all of which being present, the claimant was held to be a tenant. The liability to render service does not necessarily prevent the relation of landlord and tenant existing, and the occupation of a house may be part of the payment for the service rendered. A lower salary in consequence of having a house allowed, though not decisive, is in favour of an occupancy as tenant, and so is a permission to occupy as opposed to a requirement to do so. But in this case it is expressly found that the respondent was required to occupy, and he occupied in order to the performance of his duty. It is true that he might have performed his duties equally well if he had lived elsewhere, but the fact remains that these houses were built and were occupied as being conducive to the performance of the service required from the respondent as one of the permanent staff, and though a deduction was made from his pay in respect of having the house allowed, yet no counter allowance would have been added to his pay had he obtained leave to live away from the stores. Two, therefore, of the tests in the *Chatham* case are absent here, and that distinguishes the case from the present. The second case is *Dobson v. Jones* (5 M. & G. 112), where the facts are very similar to those here before the court, and the case in principle is undistinguishable. This falls within the second division of Tindal's, C. J., judgment, where he explains the distinction drawn in the *Chatham* case. He says: "We drew the distinction between those cases where officers or servants in the employment of Government are permitted to occupy a house belonging to the Government as part remuneration for the service to be performed, and those in which the places of residence are selected by the Government, and the officers or tenants are required to occupy them with a view to the more

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efficient performance of the duties or services imposed upon them. Upon that occasion we declared our opinion to be, that those officers or servants who fell within the first description might properly be considered to occupy as tenants, although the residence was allotted to them as such officers or servants, &c., whilst at the same time we stated the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where that appropriation was made, with a view not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service required from such officer or servant." Surely the present case is controlled by this enunciation of the law. The cottages here were clearly appropriated to the accommodation of the permanent staff; the sergeants were required to live there, they could not refuse to do so; and the houses themselves could not be assigned to any other purpose, the justices could not let them. That being so, it cannot be contended that the respondent is brought within the first proposition of Tindal, C. J., viz., that he was living there by permission. It is not enough that the revising barrister has found, as a fact, that the respondent was tenant, because he has given his reasons, and so submitted the propriety of his decision to the court. [See per Keating, J., in *Norris v. Pilcher* (19 L.T. Rep. N.S. 563; 1 Hopw. & Colc. 173)]. Then there is the case of *Clark v. The Overseers of Bury St. Edmunds* (1 C.B., N.S. 23) where the claimant was a keeper of the Guildhall, in the borough, and his residence was assigned to him by the corporation, and he was required to live there. The judgments of Cresswell and Crowder, JJ. are based on the ground that the claimant was required to occupy as necessary to the performance of his duties, and that he was therefore a servant, not a tenant. [Lord COLERIDGE, C.J.—Cresswell, J., seems to say that although required to occupy, a man may yet occupy as tenant.] The result of the case really is, that if the man be required by his master to reside, or if it be necessary for him, in view of the performance of his duties, to reside (without, however, being required), he is not a tenant. There is also *Bridgewater v. Durant* (5 L. T. Rep. N. S. 491; 11 C. B., N. S., 7), where Erle, C. J., says that occupation for purposes connected with services to be performed is not sufficient to qualify, citing the *Greenwich Hospital* case [DENMAN, J.—That decided that the claimant was neither owner nor tenant, and does not add much to the argument.] He was then stopped upon the rating question, as on the first point the court called upon

Lopes, Q.C. (*Edward Clarke* with him).—The real question is, was the occupation of the respondent that of tenant or servant. The revising barrister has found as a fact that the occupation was that of tenant, and the practice of the court is always to confirm the decision, if there was evidence on which the revising barrister might rightly act. He has distinctly found that it was not necessary for the respondent to live in this house for the efficient discharge of his duties; he was not therefore in truth required to live there, because he could perform his service equally well if he lived elsewhere. *Hughes v. The Overseers of Chatham* (*ubi sup.*) will be found, if carefully looked at, to be on all fours with the present case. He then read the facts of that case. [BRETT, J.—

In the second case, which, as they were consolidated appeals, must be read into the first, it is stated that he is not compelled to live in the house, but has full liberty to live elsewhere.] But I say that is also the fact here. Sergeant Arter was allowed to live elsewhere, and so the respondent might be allowed to do so, as the case finds in terms that residence away from the stores would make no difference in his capacity for efficiently discharging his duty. The court will not look behind the case, and assume that residence was requisite, when it is stated not to be so. The point of the judgment in the *Chatham* case is that to constitute an occupation that of a servant and not a tenant, a man must be "required to occupy in performance of his contract to serve his master." This requisite is negatived here. [BRETT, J.—The passage in the judgment is in the disjunctive; any one of those tests occurring, the decision would have been the other way.] In *Dobson v. Jones* (*ubi sup.*) the tendency of the judgment is the same, it is "with a view to the more efficient performance of the service and duties imposed on them" that the residence is spoken of as being required. [BRETT, J.—No, the emphasis is on the italicised words "permitted" and "required."] There was, however, no finding there that the claimant might live elsewhere, and yet perform his duties, and upon the express finding here, I draw the distinction between the present case and that. Then *Bridgewater v. Durant* (*ubi sup.*) was decided on the ground that there were documents which were not brought before the revising barrister, so it is inapplicable. But *Collier v. King* (5 L. T. Rep. N. S. 674; 31 L. J. 80, C. P.) is in point to show that a question of this sort is dealt with as a question of fact by the revising barrister, and properly decided by him. Erle, C. J., says that the revising barrister had the duty cast upon him of stating what inference he drew from the premises before him, and although he might have inferred one thing, it was not a necessary inference. So here I say the revising barrister was not necessarily compelled to infer that the respondent occupied as a servant and not as tenant. Lastly, if this interpretation of the word required be upheld it might apply to private individuals, for a man might be required to occupy a particular farm, or not to sublet; and is the character of his occupation to be determined by such a requirement? [BRETT, J.—One test is the existence of the relations of employer and employed, where there is authority one side, and obedience on the other.]

Lord COLERIDGE, C. J.—I am of opinion that the judgment of the revising barrister was wrong and must be reversed. The case has been fully argued on one of the two points submitted to the court, and our opinion upon that renders any discussion upon the other unnecessary. The claimant, it appears, was a sergeant on the permanent staff of the North Wilts Militia, and occupied a house in the borough of Devizes. The house stood close to the barracks where the stores of the Wilts Militia were kept, and it seems that several houses were built or provided by the justices of the peace for the county, for the accommodation of the militia, and its permanent staff, and this is one of such houses. Now it is possible for a man to occupy such a house either as a tenant or not; there may be the incidents of a tenancy attaching to his occupation or not; the

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mere statement of the facts so far proves nothing conclusively one way or the other with respect to the kind of occupation. Let us see then what the case finds. There is an Act of Parliament which enacts that every member of the permanent staff of the regular militia, when disembodied, shall reside in such places as shall be sanctioned by the Secretary of State for War, and the provisions of this Act, by a later statute, are continued in force as a royal warrant. These houses, one of which the respondent occupies, are a place which has been duly sanctioned by the Secretary of State for War. It further appears that the house in which the claimant resides, was, on his appointment as sergeant, assigned to him to live in by the commanding officer of the regiment; and also that if he left it without leave it would be a breach of discipline for which he would be liable to be dismissed from the service, and also that the commanding officer might turn him out of the house at any time. Under these circumstances we are asked to affirm that there is a tenancy; we are asked to hold that where a house is so occupied, having been assigned to the man, and he being required to live there and unable to leave it, and yet liable to be turned out, such person is nevertheless a tenant. I am of opinion that he is not. It seems to me that there are no incidents of a tenancy, and I should be prepared if it stood alone, and there were no authorities bearing upon the matter, to hold that the occupation was that of a servant and not of a tenant, had I to decide what was the character of the occupation. But it is not necessary for me to say anything more than that it is not the occupation specified in the 3rd section of the statute, it is not certainly the occupation "as owner," and it is not the occupation "as tenant." But the matter is not without authority; there are two leading cases which are governing authorities, and which have been cited time after time on the question of the character of an occupation by persons who are in some sort under a contract to render service to another, and where the house occupied is apparently connected with the terms of such service. These cases are both contained in the same volume of reports, and were both decided by the same judge, and they are very well known as the *Chatham* and *Greenwich* cases respectively. These judgments have always been considered as laying down the principles on which the court will act, and as supplying what were the true tests of occupation under the old Act, the Reform Act of Will. 4, but which are still applicable in reference to similar words in the existing Act. These cases have been fully discussed before us in argument, but not more fully than they deserved. In the one case the occupation by a rope maker of a house in the royal dockyard was held to be the occupation of a tenant, in the other the occupation by a surgeon of the infirmary house, in Greenwich hospital was held not to be the occupation of a tenant. The latter case is, I think, the more important case, not because its result and its circumstances coincide with the case before us, but because it is the later case, and because in it Tindal, C.J., distinguishes the *Chatham* case from it with some care, and shows that the authority of the one though unimpeached is not a binding authority in the other. As my brother Brett observed in the course of the argument, the writer of the judgment in *Dobson v. Jones* (*ubi sup.*), must have had

his attention drawn to the distinction between "permitted" and "required," and therefore the meaning is perfectly clear and is expressly in point in reference to the present case. The passage is this, "In delivering our opinion upon a former case, in which Hughes was the appellant and the Overseers of Chatham were the respondents, we laid down at some length the principle upon which we thought the class of cases to which the present appeal belongs ought to be decided; and we drew the distinction between those cases where officers or servants in the employment of Government are permitted to occupy a house belonging to Government as part remuneration for the services to be performed, and those in which the places of residence are selected by the Government, and the officers or servants are required to occupy them, with a view to the more efficient performance of the duties or services imposed upon them." Under that last head, where the place of residence was selected by the Government, and the servant required to occupy, the court held that the case of the surgeon fell. That being so, it is important for us to see why the court so held, and what were the facts in reference to the surgeon. They were that "the house which he occupies is the infirmary, and he occupies as surgeon . . . that he was placed there nineteen years ago . . . and lastly, it is found that by the regulations the officers of the hospital, having apartments, are to inhabit those assigned to them, and that no exchanges or other appropriations are to be made without permission." Those are the circumstances stated in the written judgment, by which the court say that the case is brought within the second category, viz., that residence was required with a view to the efficient performance of the duties. Now, what is the case here? The place was selected by the Government, the person is required to occupy it, he may not leave it without permission, if he does, he is dismissed the service, and he may be turned out at any moment by the Government acting through the commanding officer. I am unable to see any circumstances here different from those in the *Greenwich* case, so as to take it out of the rule to be derived from that case. Mr. Lopes has very properly insisted on the distinction, that here the revising barrister has found in terms that this person, the respondent, could perform his duties equally well if he had lived elsewhere; but I must point out that in the *Greenwich* case it was not found that it was essential, in the sense of being an absolute *sine qua non* to the performance of his duties, that the surgeon should live in the hospital; but the orders of the Lords Commissioners of the Admiralty are set out to the effect that the surgeons are to live in the hospital if they can, and if they cannot, that they are to have an allowance of 15s. per week; showing clearly that although desirable, yet residence was not necessary in the sense of being a *sine quid non*. I might therefore say that, even in the *Greenwich* case, the distinction which Mr. Lopes has attempted to draw is without foundation, but it is better, perhaps, to say that I am prepared to hold that the necessity of residence, though a material circumstance, is not of the essence of the distinction in determining the position of a person in respect to the franchise in these cases. What is of the essence, is well put by Mr. Justice Cresswell and Mr. Justice Crowder, taking their two judgments together in *Clark v. the Overseers of Bury St.*

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Edmunds (ubi sup):—"It may be that the party occupies as tenant, and that he is required to occupy; but it may also be that he occupies as servant, and that he is required to occupy because he is a servant. The house was built for the residence of the hall keeper, and it was a place where it was not only convenient, but necessary that he, as the servant of the corporation, should reside. From the very nature of his appointment, as stated in the case, it must have been so; and I think the revising barrister has sufficiently found it, for he states it to be his opinion that the occupation of the said house by the claimant was necessary to the due performance of his duty as hall-keeper, and that he was required to occupy it." If either incident, therefore, exist, if on the one hand it be necessary, for the performance of his duties, that he should reside, or on the other, if he be required to reside, then we gather that either of those incidents will be, I do not say conclusive, but a very important ingredient for our consideration in arriving at the conclusion that the occupation of the person is not the occupation of a tenant. Here, the person is ordered to reside to perform his duties, though he could do them equally as well if he were residing elsewhere, but we must, of course, take the finding to be a reasonable one, that is to say, that elsewhere means within a reasonable distance, yet the fact remains that it certainly is convenient, to say the least of it, for the staff sergeants to be near to the place where the arms and accoutrements, of which they have the charge, are stored. I therefore think, both on principle and on the authority of the three cases cited, which are all binding on us, and are all more or less in point, that the occupation of this man has in no respect the incidents of the occupation of a tenant, and as the section under which he claims speaks of an occupation either "as owner or tenant," I hold that he occupies as neither, and his claim must be disallowed. On the question arising in respect of the rating qualification, I give no opinion, as it is rendered unnecessary for me to do so by my decision on the first point.

BRETT J.—In this case the revising barrister has found and stated several facts absolutely, and he has then also stated a mixed finding of law and fact, and this not absolutely, but for our consideration of his view upon it. If we think that his judgment was wrong, we must reverse it; if upon consideration the matter remains doubtful, we must uphold his finding, and it is therefore incumbent on the appellant here to show certainly that the revising barrister was wrong. The question here arises on the 3rd section of the Representation of the People Act 1867, but it might equally well arise on the old Reform Act of Will. 4. It is a question which cannot arise where the claimant is owner; it can only arise where there is an occupation, and where there is some service to perform, and duties to fulfil, and where the question becomes really one as to whether the person claiming occupies as tenant or as servant. The principles to guide us are to be found in the *Chatham* case which was explained afterwards in *Dobson v. Jones (ubi sup)*, and still further in *Clark v. The Overseers of Bury St. Edmund's (ubi sup)*. The three cases are to be read together, and all the tests to be applied are these: Where a person in the position of the claimant here is *permitted* to occupy a house as being part payment or a reward

for his services, or to perform his duties, then the occupation is not that of a servant but of a tenant. But if he be *required* to occupy in the performance of his service, and he occupy in consequence of that requirement, or if it be necessary for the performance of his service that he should occupy, though he be not required specifically in terms to do so in the contract of service, then, in either of these cases, he occupies as a servant and not as a tenant. The question then is, under which head the claimant here is brought. It seems upon the facts found that it is not a case where he is permitted to occupy one of these houses if he is so minded. By the authority of the Queen, exercised by means of the sanction given by the Secretary of State for War to the houses, these persons, of whom the respondent is one, are directed to occupy these houses. And they are directed in this way: The houses are assigned to them by the commanding officer on their appointment, they may not occupy others than those assigned without permission, and if they do so they will be dismissed the service, and so the result most clearly is that they occupy if the authorities are so minded that they should. We must admit that here residence in the house was not necessary for the respondent unless he had been required to reside, but nevertheless he is a person who has been required to reside in a particular house to perform his duties, and so he is within the category which requires the court to say that he does not occupy as tenant. We are therefore bound to overrule the revising barrister, and his decision must be reversed.

DENMAN, J.—I am of the same opinion. The revising barrister has at the end of his statement of the facts, said, "I decided first that the said Edward Dally did occupy as tenant within the meaning of the statute." I apprehend that thereby he has decided a mixed question of law and fact, and then leaves it for the court to say if he was wrong or not. He intends, therefore, I think, to leave it to the court to say if his decision was upon the whole case right or wrong. For the reasons given by the Lord Chief Justice and my brother Brett, and holding that *Dobson v. Jones (ubi sup)* is a distinct authority upon the case before us, I hold that here there was not as between the respondent and the country the relation of landlord and tenant. The only finding which was at all in favour of Mr. Lopes' contention was that part of the case set out by the revising barrister which stated that the respondent could perform his duties equally well if he were living elsewhere. But I think that that is an immaterial finding, having regard to the other circumstances of the case, because he was residing in that house for the reason that he was ordered to do so, and as part of his duty. He was not therefore a tenant; he occupied in some other capacity, it matters not what, we need not specify it, but it was not as tenant, and so the revising barrister was wrong, and his decision must be reversed. *Decision reversed.*

Attorneys for the appellant, *Bower and Cotton*.

Attorneys for the respondent, *W. A. Willoughby for Hulbert and Son, Devizes*.

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[C. CAS. R.]

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 14, 1874.(Before KELLY, C.B., LUSH, BRETT, and QUAIN, JJ.,
and POLLOCK, B.)

REG. v. HAZELTON.

*False pretences—Authority to draw cheques on banks—Obtaining goods by worthless bankers' cheques.**Goods were fraudulently obtained by giving for them in payment as cash, cheques on some banks where the prisoner had only trifling sums, and some others where his account was overdrawn; and it was found by the jury that when the prisoner gave the cheques he did not intend to meet them, and that he intended to defraud.**The indictment charged that the prisoner falsely pretended that he then had money in the banks to the amount of the sums mentioned in the cheques, and that he had authority to draw the cheques on the banks; and that the paper writings (the cheques) which he so gave were good and valid orders for the payment of the amounts thereof:**Held, that the above evidence did not support the first false pretence that he then had money to the amount of the cheques; but that it did the other two that he had authority to draw the cheques, and that they were good and valid orders for the payment of the amounts thereof.*

Case reserved for the opinion of this court by the Common Serjeant of London.

At the October Sessions of the Central Criminal Court William Hazelton was tried on an indictment for obtaining goods by false pretences.

First count: That the defendant, on the 4th April 1874, did unlawfully and knowingly falsely pretend to Robert Young and another that he then had money, to the amount of 5*l.*, in a certain bank called the Birkbeck Bank, at Nos. 29 and 30, Southampton-buildings, Chancery-lane, in the county of Middlesex. That he then had authority to draw a cheque upon that bank for the sum of 5*l.*; and that a certain paper writing which he then produced and delivered to the said Robert Young and another then was a good and valid order for the payment of money, to wit for 5*l.*, and that by means of those false pretences he unlawfully and fraudulently obtained from them thirty-three shirts, with intent to defraud.

Second count: Obtaining from the same persons, on the 7th April, forty shirts, by exactly similar false pretences, in respect of a cheque for 8*l.* 8*s.* given by him.

Third count: Obtaining, on the 29th Aug., a pair of boots from Edward Sayer and another, by falsely pretending to them that he then kept a banking account with the Islington Branch of the London and County Bank; that he then had money to the amount of 2*l.* 9*s.* in that bank; that he then had authority to draw a cheque upon that bank for 2*l.* 9*s.*, and that a certain paper writing which he then produced and delivered to Sayer and another was then a good and valid order for the payment of 2*l.* 9*s.*

Fourth count: Obtaining from the Wood-street Warehouse Company, six dresses called costumes, on the 31st Aug., by falsely pretending to them that he then kept a banking account with the Islington Branch of the National Provincial Bank

of England. That he then had money, to the amount of 3*l.* 9*s.*, in that bank. That he then had authority to draw a cheque upon that bank for 3*l.* 9*s.*; and that a certain paper writing which he then produced and delivered to the company then was a good and valid order for the payment of 3*s.* 9*s.*

Fifth count: Obtaining, on the 1st Sept., from the said Wood-street Warehouse Company, thirteen dresses called costumes and nineteen petticoats, by exactly similar false pretences to those in the fourth count, in respect of a cheque for 9*l.* 11*s.* 6*d.* which he then gave in payment.

Sixth count: Obtaining on the 1st Sept., from W. Marshall Candy and another, thirteen shawls, by exactly similar false pretences, in respect of a cheque for 2*l.* 14*s.* 2*d.*, which he then gave them in payment.

Seventh count: Obtaining on the 2nd Sept., from the said Wood-street Warehouse Company, 112 petticoats, by exactly similar false pretences, in respect of a cheque for 19*l.* 6*s.* 1*d.*, which he then gave in payment.

Eighth count: Obtaining on the 2nd Sept., from the said W. M. Candy and another, 126 shawls, by exactly similar false pretences, in respect of a cheque for 22*l.* 11*s.* 6*d.*, which he then gave in payment.

It was proved in evidence that the prisoner opened an account at the Birkbeck Bank on the 30th June 1873, with a payment to his credit of 22*l.* 10*s.*, and had a cheque book given to him for his use containing fifty blank cheques. That on the 9th Dec 1873, the balance in his favour in the Birkbeck Bank was 5*s.* 3*d.*, and that the account remained unaltered up to the 27th June 1874, when he applied to the Birkbeck Bank for a new cheque book, which they refused, and then he withdrew 5*s.* He could have had the 3*d.* That thirty-three of his cheques were honoured and about seventeen refused by the Birkbeck Bank. That he would not have been allowed to overdraw his account at the Birkbeck Bank.

It was also proved that the prisoner opened an account at the Islington Branch of the London and County Bank, on the 2nd June 1874, with a payment to his credit of 27*l.*, and had a cheque book given to him containing twenty-five cheques. That on the 6th July following, a balance of 7*s.* 4*d.* stood there to his credit. That on the 29th Aug. following the account was, by accident, allowed to be overdrawn, and that transaction was the last. His cheques on that bank were afterwards presented and dishonoured.

It was also proved that, on the 8th July last, the prisoner opened an account at the Islington Branch of the National Provincial Bank of England, with a payment to his credit of 30*l.*, and had a cheque book given to him containing twenty-four cheques. He drew out 25*l.* by a cheque in favour of Mrs. Hazelton, and on the 23rd July his account was overdrawn by 22*s.* On the 24th July notice in writing was given to him by the bank that his account was overdrawn, and requesting his attention to it. The account was unaltered until the 3rd Sept., when he paid in 2*l.* 15*s.* and 15*l.* 5*s.*, leaving 16*l.* 18*s.* to his credit. On the next day (4th Sept.) the sum of 14*l.* 16*s.* was drawn out by a cheque in favour of his wife, leaving 2*l.* 2*s.* to his credit. Seven of his cheques, altogether, were paid, of which five were in favour of his wife, Mrs. Hazelton. Some other of his cheques were presented and dishonoured.

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The following evidence was also adduced :

On the 2nd April 1874 the prisoner went to Messrs. Young and Rochester's and ordered over two dozen shirts, and called again for them about two o'clock in the afternoon of the 4th, and said he wished to pay ready money; and an invoice was made out, and discount deducted from the invoice, making the sum of 7*l.* 5*s.*, and prisoner gave a cheque on the Birkbeck Bank for 5*l.*, and paid the balance of 2*l.* 5*s.* in cash.

The 4th April was Saturday, the 5th was Sunday, and the 6th a Bank Holiday, so that the prisoner's cheque could not be presented for payment until the 7th. Early in the morning of the 7th, before ten o'clock, a.m., the prisoner went again to Young and Rochester's, and ordered other goods to the amount of 8*l.* 8*s.*, and said he wished to pay ready money, and discount was allowed to him. He gave his cheque on the Birkbeck Bank for the amount, and took away the goods.

Both the above cheques were presented to and dishonoured by the Birkbeck Bank.

Some of the above goods were pawned by prisoner, in the name of Williams, on the 13th and 17th April, for 1*l.* 6*s.*, with a pawnbroker who knew him well for two or three years before in that name, and who said his dealings were satisfactory, and that the goods pawned by him were usually redeemed; but at the time of the trial before me that pawnbroker had 35*l.* worth of goods in pawn by the prisoner.

Other of the above goods were pawned by prisoner on the 30th April, 15th Aug., and 9th Sept., with another pawnbroker, to whom prisoner was known for two years, and who said that he usually redeemed the goods pawned.

Other of the same goods were pawed with another pawnbroker to whom prisoner was known, and who said that he in all cases redeemed the goods pawned by him; but that he (the pawnbroker) had, at the time of the said trial before me, goods to the amount of 12*l.* in pawn by the prisoner.

On Saturday, the 29th Aug. last, the prisoner went to Messrs. Sayer and Healeys and bought for ready money, with discount, two pairs of boots for 2*l.* 9*s.*, and gave his cheque for that sum on the London and County Bank, Islington, which was dishonoured on presentment on the 31st Aug. He afterwards returned one pair of the boots, saying that they were too heavy for him.

On the 1st Sept. last, the prisoner went to Messrs. Candy and Co., and bought, as a cash transaction, with discount, thirteen shawls, in payment for which he gave his cheque for 2*l.* 14*s.* 2*d.* on the Islington Branch of the National Provincial Bank of England; and on the 2nd Sept. last, at 5.30 p.m., he again went to Candy's, and saying that he had sold some of his previous day's purchase from them, he bought as a cash transaction, with discount, 10½ dozen of shawls, in payment for which he gave his cheque on the same bank for 22*l.* 11*s.* 6*d.* Both these cheques were dishonoured, and the greater portion of the shawls were pawned by the prisoner on the 3rd Sept., and afterwards redeemed and repawned with pawnbrokers to whom he was well known.

On the 31st Aug., and on the 1st and 2nd Sept. last, the prisoner went to the Wood-street Warehouse Company and bought, on each occasion as cash transactions, certain dresses and skirts, and took them away with him, and gave in payment on

those days respectively, three cheques on the Islington Branch of the National Provincial Bank for 3*l.* 9*s.*, 9*l.* 11*s.* 6*d.*, and 19*l.* 6*s.* 1*d.*, each of which was dishonoured.

On the 3rd Sept. he pawned 103 of the skirts with a pawnbroker to whom he was known, for 13*l.* 10*s.*

The prisoner, after the dishonour of the foregoing cheques, said to the several holders that he had been disappointed in his expectations of receiving money, and that he would take up the cheques in a few days.

Evidence was also given of the dishonour of about twelve other cheques drawn and given by the prisoner in payment for other goods bought by him, and of his unperformed promises, after dishonour, to the holders of the cheques to take them up.

A detective police officer proved that he went to prisoner's house on the 15th Sept., and got in at the back through the garden; that the prisoner tried to escape, but was apprehended. He was told he was taken for obtaining goods from Candy's, and he replied: "It's a debt not a fraud, and you can't make a fraud of it." Being asked if he had any duplicates in the house, he said, "No." The officer found, however, on search, 185 duplicates and pawnbrokers' contract notes, representing together pawnings and deposits to the amount of about 330*l.* The officer also found invoices from various firms, and the prisoner's cheque books on the three above-mentioned banks, and his pass book of the Birkbeck Bank. Scarcely a single article of furniture was found in the house, but amongst the duplicates found were some for household furniture pawned by prisoner.

It appeared, therefore, by the evidence, that at the time he gave in payment the two cheques on the Birkbeck Bank for 5*l.* and 8*l.* 8*s.*, mentioned in the first and second counts, the prisoner's account there was still an open one, but the balance in that bank to his credit was 5*s.* 3*d.* only, and that his cheques for sums exceeding that balance were dishonoured, and he would not have been allowed to overdraw.

That at the time he gave in payment the cheque for 2*l.* 9*s.* on the London and County Bank, mentioned in the third count, his account there was overdrawn, and his cheques on that bank had been dishonoured.

That at the time he gave in payment the cheques for 3*l.* 9*s.*, 9*l.* 11*s.* 6*d.*, 2*l.* 14*s.* 2*d.*, 19*l.* 16*s.* 1*d.*, and 22*l.* 11*s.* 6*d.*, on the Islington Branch of the National Provincial Bank, mentioned in the fourth, fifth, sixth, seventh, and eighth counts, his account there was overdrawn, and he had notice of it; that his account remained overdrawn from the 23rd July to the 3rd Sept., when he paid in 18*l.*, and on the 4th Sept. drew out 14*l.* 16*s.* for his own use, leaving two guineas to his credit, subject to the payment thereout of some small charges. His cheques, mentioned in the indictment, on that bank, were dishonoured.

It also clearly appeared that many of the prisoner's cheques, other than those mentioned in the indictment, on the before-mentioned banks, had been and were afterwards dishonoured.

I doubted, upon the decided cases, whether in point of law a man who gives a cheque in payment, under the circumstances before mentioned, does by the mere fact of giving the cheque without saying more than that he wishes to pay ready money, make either of the false pretences alleged

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in the indictment, viz.: First, that he then has money to the amount of the cheque in the bank upon which it is drawn; secondly, that he then has authority to draw upon the bank for that sum; thirdly, that the cheque which he gives is a good and valid order for the payment of its amount; fourth, that he then has a banking account with the bank upon which his cheque is drawn, and where his account is overdrawn.

I summed up the case to the jury, and they found that the prisoner did not intend, when he gave the respective cheques mentioned in the indictment, to meet them, and that he intended to defraud.

A verdict of guilty was thereupon recorded, and I abstained from passing judgment, and reserved for the opinion of the court for consideration of Crown Cases Reserved, the question whether there was any evidence to go to the jury of the prisoner having made any of the false pretences mentioned in the indictment? If there was, the conviction is to be confirmed. If there was not, it is to be reversed.

THOMAS CHAMBERS,

Common Serjeant of London.

No counsel appeared to argue for the prisoner.

Bealey, for the prosecution.—The conviction is right. The jury have found that the prisoner did not intend, when he gave the several cheques to meet them, and that he intended to defraud. [LUSH, J.—It can hardly be maintained that a person, by giving a cheque, conveys the representation that he has, at the moment of giving it, funds to the amount of it in the bank.] Each case depends on its own circumstances. In this case, the prisoner knew that the cheques would not be met. In *Rex v. Jackson* (3 Camp. 371), Bayley, J., said: "The point had been recently before the judges, and they were all of opinion that it is an indictable offence fraudulently to obtain goods by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid." [BRETT, J.—There is no doubt here of the fraudulent intent. The question is, whether the prisoner made a fraudulent representation.] The indictment alleges that the prisoner falsely represented that he then had authority to draw a cheque upon the bank, and also that the cheque was a good and valid order for the payment of money. The giving of the cheques fraudulently proves those representations. In *Reg. v. Giles* (34 L. J. 53, M.C.), Blackburn, J., says: "It is not requisite that the false pretence should be made in express words, if the idea is conveyed." [POLLOCK, C.B.—You may contend that the giving of the cheque was a representation that it would be honoured when presented, whereas he well knew that it would not.] Certainly; for the prisoner, when he gave the cheque, said that he wanted to pay cash, and so obtained a discount. In *Lockett's case* (Leach C. C. 53) it was held that a forged draft on a banker was an order for the payment of money. In *Reg. v. Parker* (2 Moo. C. C. 1; 7 Car. & P. 825) the majority of the judges held that a count which charged that the prisoner pretended that a certain paper writing which he then produced and was as follows [Then setting out a cheque:] was a good and genuine order for payment of the sum of, &c., was proved in the following facts: the prisoner went and bought a watch of the prosecutor, and gave in payment of it a post-dated cheque on a bank where he had no funds, falsely representing to the prosecutor that he had

an account with the bankers on whom the cheque was drawn, and that he had a right to draw the cheque, though he postponed the date for his own convenience. So, in the present case, the prisoner fraudulently represented in each transaction that he wished to pay ready money, and gave the cheques. It is submitted, therefore, that the second and third false pretences charged were substantially proved.

KELLY, C.B.—I am of opinion that the conviction must be affirmed. Two questions arise in the case. The first is, whether, on the facts and documents proved, the prisoner has expressly or impliedly fraudulently made the representations on which the goods were obtained; the second, whether any one of the representations alleged is false. The indictment alleged three false representations: First, that the prisoner falsely pretended that he then had money to a certain amount in the bank; secondly, that he then had authority to draw a cheque upon the bank for that amount; thirdly, that a certain paper writing was a good and valid order for the payment of that amount. If the case had rested upon the first pretence alone, there would have been considerable difficulty in supporting the conviction, because there are many cases in which no such representation can be implied from the mere giving of a cheque as a general rule, for persons of undoubted substance and respectability often draw cheques exceeding the balance to their credit at their bankers, and which are paid by the bankers. We may, therefore, put that representation out of the case. The second alleged pretence is, that the prisoner then had authority to draw a cheque upon the bank for the amount. That is an important representation, and arises when a man gives a cheque in payment for goods or in satisfaction of any other demand; and I think that false representation was proved in this case. But if there is any doubt about the case it is removed when we look at the third pretence, that the proper writing produced by the prisoner was a good and valid order for the payment of the sum therein mentioned. Then comes the main question: is it to be implied from the facts proved that the prisoner made all or any of these false representations? As regards the second and third false pretences, it is perfectly clear that the prisoner knew at the time when he gave the cheques that he had no authority to draw cheques for the amounts specified therein, and that he well knew that they would not be paid. Those false pretences were, therefore, proved, and the conviction must be affirmed.

LUSH, J.—I am of the same opinion. I also think that the mere giving of a cheque does not convey a representation that the drawer has money to the amount of the cheque in the banker's hands at the time of giving it. Many persons give cheques exceeding their balance at the bank at the time, in the expectation of their being able to pay in money to meet them before they are presented. In this case the prisoner ordered and obtained goods, saying he wished to pay ready money; invoices were made out and discount deducted, and prisoner gave cheques for the amount. I think that amounted to a representation that the cheques were equivalent to cash, and, therefore, that the false pretence that the cheques were good and valid orders for the payment of money was proved.

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BRETT, J.—I am of the same opinion. The learned Common Serjeant in this case doubted, upon the decided cases, whether in point of law a man who gives a cheque in payment, under the circumstances before mentioned, does by the mere fact of giving the cheque, without saying more than that he wishes to pay ready money, make either of the false pretences alleged in the indictment. The question reserved for us is, therefore, pointed to that part of the necessary proof on the trial of an indictment for false pretences—the proof of a false representation of a fact which, if it had not been false, would have been an existing fact. The Common Serjeant has pointed to the facts on which he wants the opinion of this court. Now, the meaning of the representation to a third person, cannot depend upon the state of mind of the person making the representation, but must depend on what idea he conveys to the mind of the third person. It is common knowledge that persons have authority from a bank to draw cheques to a considerable amount, when they have no money at the bank. I am of opinion, therefore, that the mere giving of a cheque does not convey a representation that the drawer has money at the bank. Then, as to the second false representation, that the prisoner had authority to draw upon the bank for the amounts in the cheques. Now, if the giving of a banker's cheque does not mean that, what does it mean? Then, as to the third false representation, but for the case of *Rex v. Parker*, I should have doubted whether the mere giving of a cheque was a representation of an existing fact, that the cheque was a good and valid order for the payment of money.

QUAIN, J.—I am of the same opinion. I think that the giving of the cheques in this case amounted to a representation that they were good and valid orders for the payment of the sums therein mentioned, on the authority of *Rex v. Parker*, which was decided by a majority of the judges. The only difference in the facts is, that the prisoner in that case had no funds at all at the bank, whereas in this he had a few shillings.

POLLOCK, B.—I am also of opinion that this conviction should be affirmed. I think that there was evidence that the prisoner made the false representation thirdly charged; that the cheques when given were good and valid orders for the payment of the sums specified therein.

Conviction affirmed.

Saturday, Nov. 14, 1874.

(Before KELLY, C.B., LUSH, BRETT, QUAIN, JJ., and POLLOCK, B.)

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Misdemeanor—Attempt to commit—Indictment.

A count in an indictment charged that the prisoner unlawfully, wickedly, and indecently did write and send to H. a letter, with intent thereby to move and incite H. to attempt and endeavour, feloniously and wickedly to commit an unnatural offence, and by the means aforesaid did unlawfully attempt and endeavour to incite H. to attempt to commit the crime aforesaid:

Held, that the count charged an indictable misdemeanor.

The evidence was, that H. was a boy at school, and that he had received two other letters from the prisoner, which he read, but that when he received

the one mentioned in the above count he did not read it, nor was he in any way aware of its contents, but handed it over to the school authorities: Held, that the sending the letter proved the attempt to incite, although it might be doubtful whether it could be said to amount to inciting or soliciting, inasmuch as H. was not aware of its contents.

CASE reserved for the opinion of this Court by Bramwell, B.

The prisoner was tried at the September Sessions of the Central Criminal Court 1874, upon the following indictment:

First count.—That at the time of committing the offence hereinafter in this count mentioned, one William D'Arcy Gardiner O'Halloran was a youth of the age of fourteen years, and was a scholar in the school of Christ's Hospital, and was under the care, custody, and control of the Governors of Christ's Hospital, in the City of London, and was then being educated in the said school in the principles of religion, morality, and virtue, with the object that he might thereafter, when beyond the care and control of the said governors, enter into the society of his fellow men, and be received by them as a man of honourable, manly, and virtuous habits, and that Edward Ransford, being a person of wicked, immoral, and depraved mind and disposition, with intent to debauch the said William D'Arcy Gardiner O'Halloran, and to vitiate and corrupt his mind, on the 5th Sept. 1874, unlawfully and wickedly did write and send, and cause and procure to be written and sent to the said William D'Arcy Gardiner O'Halloran, a certain lewd and indecent letter, in the words and figures following, that is to say:

Henderson's, Oakley-square, 5th Sept. 1874.

Dear O'Halloran,—The fates have hitherto prevented us from meeting, owing to my engagements. On Wednesday next, all being well, I shall meet you positively in the South Transept of St. Paul's. I shall be there between 2½ o'clock and 2½: we can then settle where to go. How long can you stay out in the evening? Answer by return.

Yours truly,

P. DE LA B. HARRISON.

I shall only be here to-morrow, and therefore a post-office is my safest address.

(The conclusion of the letter is unfit for publication.)

That the said Edward Ransford, in manner and by the means aforesaid, did unlawfully and wickedly endeavour to corrupt the morals of the said Wm. D'Arcy Gardiner O'Halloran, and to incite in the mind of him the said William D'Arcy Gardiner O'Halloran, lewd, immoral, and wicked inclinations and desires, and to induce and persuade him to commit fornication and divers other immoral and wicked acts and practices, he the said William D'Arcy Gardiner O'Halloran then being such scholar as aforesaid, and so being under the care, custody, and control of the said governors, in manifest violation and corruption of the morals of the said William D'Arcy Gardiner O'Halloran and other liege subjects of our said lady the Queen. To the evil example, &c.

Second count.—That at the time of committing the offence hereinafter in this count mentioned, there was and yet is a certain body corporate called the Mayor and Commonalty and Citizens of the City of London, governors of the possessions, revenues, and goods of the hospitals of Edward, late King of England, the Sixth, of Christ Bride-well and St. Thomas the Apostle, as Governors of Christ's Hospital, and the said body corporate had under its charge, care, and control, a

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certain school, called and known as Christ's Hospital, wherein divers large numbers of children of tender years, and lads and young men under the age of twenty-one years, were under the said care, charge, and control of the said body corporate, being instructed in the principles of virtue, religion, and morality. And that the said Edward Ransford, being a person of wicked, immoral, and depraved mind and disposition, and seeking to debauch, vitiate, and corrupt the minds and morals of the children and other young persons being scholars in the said school, and so to hinder and prevent the said body corporate in their endeavours to instruct the said children and young persons in the principles aforesaid, on the day and in the year aforesaid, unlawfully and wickedly did write and send, and cause and procure to be written and sent to the said school, a certain lewd and indecent letter, addressed to one William D'Arcy Gardiner O'Halloran, then being one of the scholars in the said school, and which letter was and is the letter set forth in the first count of this indictment, and so the jurors aforesaid, upon their oath aforesaid, say that the said Edward Ransford, in manner and by the means aforesaid, did unlawfully and wickedly endeavour to corrupt the morals of the said William D'Arcy Gardiner O'Halloran, and divers others of the scholars then being in the said school, so as to prevent the said body corporate, in their endeavours to educate the said children and young persons in the paths of religion and virtue, and to render the religious and moral training of the said children and young persons of no effect, to the great damage of the said body corporate, in manifest violation and corruption of the morals of the said William D'Arcy Gardiner O'Halloran and other children and scholars in the said school. To the evil example of all others, &c.

Third count.—That at the time of committing the offence hereinafter in this count mentioned, William D'Arcy Gardiner O'Halloran was a lad of the age of fourteen years, and was a scholar and inmate of Christ's Hospital in the City of London, and was under the care, custody, and control of the Governors of Christ's Hospital aforesaid. That the said Edward Ransford, being an evil disposed person, and of wicked, immoral, and depraved mind and disposition, afterwards, to wit, on the same day and in the year aforesaid, unlawfully and wickedly did write and send, and cause and procure to be written and sent to the said William D'Arcy Gardiner O'Halloran a certain letter, to wit, the letter mentioned and set forth in the first count of this indictment, and did attend at the premises of the said Christ's Hospital in London aforesaid, with the avowed object and design of procuring a personal interview with the said Wm. D'Arcy Gardiner O'Halloran, and by false representations and fraudulent means to take and remove him the said William D'Arcy Gardiner O'Halloran from and out of the care, custody, and control of the said governors, and to get him the said William D'Arcy Gardiner O'Halloran into the custody and control of him the said Edward Ransford, with the view and intent that he the said Edward Ransford, while he the said William D'Arcy Gardiner O'Halloran was so in his custody and control, should commit a certain felony with him the said William D'Arcy Gardiner O'Halloran, to wit, feloniously, wickedly, diabolically, and against the order of nature, to commit and perpetrate with

each other the detestable and abominable crime of buggery, against, &c.

Fourth count.—That the said Edward Ransford afterwards, to wit, on the day and in the year aforesaid, unlawfully and wickedly did solicit and incite the said William D'Arcy Gardiner O'Halloran feloniously to commit and perpetrate with him the said Edward Ransford, the abominable, horrid, and detestable crime of buggery, against, &c.

Fifth count.—That the said Edward Ransford afterwards, to wit, on the day and in the year aforesaid, unlawfully and wickedly did solicit and incite the said William D'Arcy Gardiner O'Halloran unlawfully to attempt and endeavour to commit and perpetrate with him the said Edward Ransford, the abominable, horrid, and detestable crime of buggery, against, &c.

Sixth count.—That the said Edward Ransford afterwards, to wit, on the same day and in the year aforesaid, unlawfully, wickedly, and indecently did write and send, and cause and procure to be written and sent to the said William D'Arcy Gardiner O'Halloran, a certain letter, to wit, the letter mentioned and set forth in the first count of this indictment, with intent thereby to move and incite the said William D'Arcy Gardiner O'Halloran feloniously and wickedly to commit and perpetrate with him the said Edward Ransford, the detestable crime of buggery, and by the means aforesaid did unlawfully and wickedly attempt and endeavour to incite the said William D'Arcy Gardiner O'Halloran feloniously to commit and perpetrate with him the said Edward Ransford, the detestable, horrid, and abominable crime aforesaid, against, &c.

Seventh count.—That the said Edward Ransford afterwards, to wit, on the same day and in the year aforesaid, unlawfully, wickedly, and indecently did write and send, and cause and procure to be written and sent to the said William D'Arcy Gardiner O'Halloran, a certain letter, to wit, the letter mentioned and set forth in the first count of this indictment, with intent thereby to move and incite the said William D'Arcy Gardiner O'Halloran to attempt and endeavour, feloniously and wickedly, to commit and perpetrate with him the said Edward Ransford, the detestable crime of buggery, and by the means aforesaid did unlawfully and wickedly attempt and endeavour to incite the said William D'Arcy Gardiner O'Halloran to attempt to commit and perpetrate with him the said Edward Ransford, the detestable, horrid, and abominable crime aforesaid.

Eighth count.—That the said Edward Ransford afterwards, to wit, on the day and in the year aforesaid, unlawfully, wickedly, and indecently did write and send, and cause and procure to be written and sent to the said William D'Arcy Gardiner O'Halloran a certain letter, to wit, the letter mentioned and set forth in the first count of this indictment, with intent thereby to move and incite the said William D'Arcy Gardiner O'Halloran unlawfully to commit and perpetrate with him the said Edward Ransford, divers unnatural and sodomitical acts and practices, and by the means aforesaid did unlawfully and wickedly attempt and endeavour to incite the said William D'Arcy Gardiner O'Halloran to commit and perpetrate with him the said Edward Ransford, the said unnatural and sodomitical acts and practices.

Ninth count.—That the said Edward Ransford, being a person of wicked and abandoned mind and

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disposition, and wholly lost to all sense of decency, chastity, and morality, and unlawfully and wickedly devising, contriving, and intending, as much as in him lay, to vitiate, debauch, and corrupt the minds and morals of the liege subjects of our said lady the Queen, and to poison and infect the minds of the youth of this kingdom, on the 23rd March, in the year aforesaid, unlawfully and wickedly did write and publish, and cause and procure to be written and published, a certain wicked, indecent, and obscene libel, in the form of a letter, directed and addressed to one William D'Arcy Gardiner Halloran, by the name and description of

Master Wm. O'Halloran,
Christ's Hospital, Newgate-street, E.C.

He the said William D'Arcy Gardiner O'Halloran then being a scholar in a public school called Christ's Hospital, in London aforesaid, and which said wicked, indecent, and obscene libel was and in part thereof according to the tenor and effect following, that is to say:

My dear Fellow,—I write one note for inspection, if necessary. If I come on Wednesday what would you like to do? Would you like to go with me to a quiet house where—(The rest of the letter was set out in the indictment.)

P. DE LA R. H.

To the common nuisance of the youth, &c.

Tenth count.—That the said Edward Ransford, being such person as aforesaid, and unlawfully and wickedly devising and intending as aforesaid, afterwards, to wit on the 7th Sept. in the year aforesaid, unlawfully and wickedly did write and publish, and cause and procure to be written and published, a certain wicked, indecent, and obscene libel, in the form of a letter directed and addressed to the said William D'Arcy Gardiner O'Halloran, by the name and description of

Master Wm. O'Halloran,
Christ's Hospital, Newgate-street, E.C.

He the said William D'Arcy Gardiner O'Halloran then being a scholar in the said public school, and which said wicked, indecent, and obscene libel was and is according to the tenor and effect following, that is to say: (setting out the letter in first count, *supra*)—

To the common nuisance, &c.

The following facts were proved:

The prisoner sent, knowing their contents, three letters to a boy of the age of fourteen years, and the boy received the same.

The first was as follows:

King's Cross Station, N.W., Friday.

Dear O'Halloran,—Probably you don't know me, or my name. Your father was once very kind to me, and I should like to show a little kindness in return. I have only just learned you are at Christ's Hospital, and as I am passing through London, and staying till to-morrow night, perhaps you could get leave to go out with me to-morrow (Saturday). I am not quite certain of my movements, nor where I shall be staying to-morrow, but if you were to meet me at St. Paul's Cathedral, North Transept, at 2:45, we could then spend the afternoon till the time comes for you to be back at your school. I do not know you even by sight, but if I see a "Blue" in the church at that time I shall take it for granted it is you.

Faithfully yours,

P. DE LA ROCHE HARRISON.

The second was as follows:

23rd March 1874.

My dear Fellow,—I write one note for inspection if necessary. If I come on Wednesday what would you like to do? Would you like to go to a quiet house where we can each have . . . on the quiet? If so, say yes in your letter, and then I can make arrangements. I know most boys at school like that when they have a chance.

P. DE LA R. H.

And on a separate paper, but in the same envelope:—

9, South-parade, Battersea, S.W., Sunday.

My dear O'Halloran,—I am awfully sorry not to be able to keep my appointment on Saturday. I hope you did not get leave, and so had not to wait for me. I was kept till five o'clock by a lawyer. I leave to-morrow (Monday), but hope to be in town on Tuesday evening, to leave again on Wednesday evening. Will you send me a line by return in the inclosed envelope, saying if I shall find you at Christ's Hospital on that day about 2:30 p.m.? If I am not there by 2:45, I shall not be able to come at all; I shall have to wait for another opportunity. Hoping you were not inconvenienced,

Truly yours,

P. DE LA R. HARRISON.

The above is only a temporary address at a boarding-house. I'll call or send for the letter at the P.O.

The above letters were read by the boy.

The third was the one set out in first count.

The last two letters were each on two pieces of paper—one such that it might be shown by the boy to anyone, the other intended to be read by the boy only. He read the first and second letters. He did not read the third, nor either part of it, nor in any way know its contents, handing both parts unread to the authorities of the school where he was.

It was objected that the counts were bad, and that there was no evidence in support of them.

The jury found the prisoner guilty.

I respite judgment, and reserve for the opinion of the Court of Criminal Appeal whether any one or more, or all of the counts, is or are good, and whether there is evidence in support of any good count.

If there is no good count, or no good count in support of which there is evidence, the conviction is to be quashed; otherwise it is to stand as to such count or counts as is or are good, and in support of which there is evidence.

(Signed) G. BRAMWELL.

No counsel appeared for the prisoner.

Straight (Gill with him) for the prosecution.—The conviction ought to be affirmed. It is submitted that the letter of the 5th Sept., with its inclosure, justified the verdict of guilty. The first three counts allege that O'Halloran was a boy of tender years at Christ's Hospital School, and was under the care and custody of the governors thereof, and was there being educated in the said school in the principles of religion, morality, and virtue. [LUSH, J.—What does that matter; the offence would be the same if the boy had not been at school. KELLY, C.B.—Without discussing the validity of those counts, have you not some counts which will raise the point distinctly, whether what the prisoner did was an attempt to commit a misdemeanor?] The 4th count charges that the prisoner did solicit and incite O'Halloran to commit an unnatural offence. [KELLY, C.B.—The difficulty upon that count is, is it a solicitation to address a letter to a person which is not read by the person to whom it is sent, and by whom it is received? It is stated in the case that the boy did not read the letter of the 5th Sept., nor either part of it, nor in any way know its contents, but handed both parts unread to the school authorities.] In *Rex v. Higgins* (2 East, 5) it was held, that to solicit a servant to steal his master's goods is a misdemeanor, though it is not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. That case was recognised as law in *Reg. v. Gregory* (L. Rep. 1

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C. C. R. 77; 36 L. J. 60, M. C.), where it was held that to solicit and incite a person to commit a felony, though no felony be in fact committed, is a misdemeanor. [POLLOCK, B., referred to *Reg. v. Welham* (1 Cox Crim. Cas. 193).] Here the solicitation was complete as soon as the letter was posted. [BRETT, J.—The allegation is, “did incite.” How can that be sustained, when the boy to whom the letter was addressed neither read it nor knew its contents?] At all events the seventh count is free from this objection; that charges that the prisoner sent the letter with intent to incite O’Halloran to commit an unnatural offence, and that he did unlawfully attempt and endeavour to incite him to attempt to commit an unnatural offence. [POLLOCK, B.—In *Reg. v. Higgins*, Grose, J., said: “It is said, however, that there is no instance of a mere solicitation to another to commit a felony being adjudged a misdemeanor: and it was attempted to be distinguished from the case of *Reg. v. Scofield*, but that case, though not immediately in point, is in truth much stronger than the present, for there an attempt to commit a misdemeanor was holden indictable; and the cases of *R. v. Vaughan* and *R. v. Plympton* were expressly recognised, which come still nearer to the present. Nor was the case of *R. v. Johnson* denied to be law, which was a solicitation to commit a perjury, and which had been cited in the course of the argument. All these cases prove that inciting another to commit a misdemeanor is itself a misdemeanor; *a fortiori*, therefore, it must be such to incite another to commit felony.”] In *Reg. v. Roderick* (7 Car. & P. 795) it was held by Parke, B. that an attempt to commit a misdemeanor is a misdemeanor, whether the offence is a statutable or a common law one. And so in *Reg. v. Phillips* (6 East, 464), it was held that it is an indictable misdemeanor to endeavour to provoke another to commit the misdemeanor of sending a challenge to fight. Upon these grounds, it is submitted that the seventh count was proved, both in law and fact.

KELLY, C.B.—I am clearly of opinion, in point of law, that any attempt to commit a misdemeanor is itself a misdemeanor, and I am also of opinion that to incite or even solicit another person to commit a felony or to do any act with intent to induce another person to commit such offence, is a misdemeanor. The seventh count charges a valid offence, for it alleges that the prisoner did write and send a certain letter with intent to incite the boy to commit a felony, not that he did actually solicit the boy, as to which there might be some doubt, for the letter was not read by the boy, and the boy, therefore, might be said not to have been solicited. But the seventh count is free from any difficulty of that nature, as the charge therein is that the prisoner endeavoured to solicit or incite the boy to the commission of a certain offence. That being so, we have only to consider whether the evidence given sustained the count. On the first and second letters I forbear to make any observation, but on the third letter, with its inclosure, I think there was evidence to sustain the count. The construction of that letter, with its inclosure, was a question for the jury, and they have put the construction on it that the prisoner, by writing and sending it, intended to incite the boy to commit the offence alleged in the count. I am further of opinion that the verdict was right, and that the seventh count was proved and supported by that evidence. It

must not be supposed that I am expressing any opinion inconsistent with any of the other counts being sustainable in point of law. The conviction will be affirmed.

LUSH, J.—I entirely agree with the Lord Chief Baron as to his observation on the other counts, and I am of the same opinion with him as to the seventh count. It is well established by the authorities that an attempt to commit a misdemeanor is itself a misdemeanor. The seventh count charges such a misdemeanor, for it alleges that the prisoner did write and send a letter with intent thereby to incite the boy to attempt and endeavour to commit an unnatural offence.

BRETT, J.—The inciting a person to commit a felony is a misdemeanor. The case in 2nd East Reports, is an authority for that point. The seventh count, therefore, is good, and the evidence establishes that the prisoner did attempt to commit the misdemeanor therein charged. I express no opinion upon the other counts of the indictment.

QUAIN, J.—I am of the same opinion.

POLLOCK, B.—I am clearly of opinion that the seventh count is good. In *Schofield's case* (Cald. 397), Lord Mansfield, C.J., says: “So long as an act rests on bare intention, it is not punishable, but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done, and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.” Was, then, the third letter, with its inclosure, an act done with a criminal intent? I think that the sending of it to the boy with a criminal intent was as a criminal act done, though it was not seen by the boy, within the above dictum of Lord Mansfield.

Conviction affirmed.

COURT OF QUEEN'S BENCH.

Reported by J. SHORRITT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Saturday, Nov. 14, 1874.

REG. v. HARVEY.

Shutting up a highway—Certificate—Omission to state surveyor's authority—Metropolitan parish—Power of quarter sessions to amend—5 & 6 Will. 4, c. 50; 18 & 19 Vict. c. 120; 12 & 13 Vict. c. 45. A party, desirous of stopping up a highway in a Metropolitan parish, required the vestry of the parish, pursuant to sect. 84 of 5 & 6 Will. 4, c. 50, and sect. 9 of 19 & 20 Vict. c. 112, to give notice to and direct the clerk of the said vestry to convene and assemble a meeting of the said vestry for the special purpose of considering her desire. All the other steps preliminary to stopping up a highway, as required by sects. 84 and 85 of the former Act, were duly carried out, but the two justices who viewed the highway omitted to state in their certificate that the surveyors had first duly obtained the consent of the inhabitants of the parish in vestry assembled, or were acting under an order of the chairman;

Held, in a case stated upon appeal to quarter sessions, that this technical objection to the form of the certificate did not invalidate the order of sessions by which the highway was shut up.

Quære, whether this omission could be affected by the fact that the vestry are the surveyors of the

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parish in this case, under 18 & 19 Vict. c. 120, s. 96.

Semble, if this omission had been important, the court of quarter sessions might have amended the certificate under 12 & 13 Vict. c. 45, s. 7.

Reg. v. The Justices of Worcestershire (3 E. & B. 477); dictum of Coleridge, J., disputed.

THIS was an appeal against a certificate under the hands of two justices of the peace for the county of Middlesex, relative to the stopping up of a certain public footpath or highway, situate in the parish of St. Matthew, Bethnal Green, in the county of Middlesex.

The appeal was tried at the General Sessions in and for the county of Middlesex, holden at the Sessions House for the said county, on the 12th May 1873, when that court heard the appeal and confirmed the said certificate, subject to the opinion of the Court of Queen's Bench on the following case.

The appeal having been called on, and the clerk of the peace having read in open court the certificate of William Dollin Alexander and Henry Robarts, Esquires, two of her Majesty's justices of the peace in and for the said county of Middlesex, dated the 10th April 1873, and it appearing that the proofs and plan annexed thereto and referred to therein, had been duly lodged at the office of the said clerk of the peace, and service of ten days' notice of appeal having been admitted, counsel for the appellant, pursuant to one of the grounds of appeal, objected that the certificate was insufficient, and bad upon the face thereof, by reason of its omitting to state that the surveyors, at whose request it is alleged the said justices viewed the highway sought to be stopped up, had first duly obtained the consent of the inhabitants of the parish in vestry assembled to the proposed stopping up of the said highway, after a notice in writing from the party desirous of stopping up the same, requiring the said surveyors to convene a meeting of the said vestry, for the purpose of obtaining such consent; or that the said surveyors were, at the time of the said request to view, in possession of and acting under an order in writing of the chairman of a meeting of the said inhabitants in vestry assembled.

A copy of the said certificate, proofs, and plan, accompanied this case.

The court, after consideration, overruled the said objections, and held the certificate to be good, and confirmed the same, and made an order for stopping up the said highway accordingly, subject to a special case for the opinion of the Court of Queen's Bench on the point above stated.

If the Court of Queen's Bench should be of opinion that the certificate was not insufficient or bad on the face thereof on the grounds above stated; then the certificate was to be enrolled, and the order so made was to be confirmed; and an order should be made by this court for payment by the appellant to the respondents of the costs of this case. If the court should be of opinion that the said certificate was insufficient and bad on the face thereof on the grounds above stated, then the order so made was to be quashed, the certificate not to be enrolled, and the said appeal to be allowed and remitted to the court of quarter sessions, that the said court may thereupon make such order as to the costs of the appeal as to the said quarter sessions shall seem fit; and an order of this court was to be

made for the payment by the respondents to the appellant of the costs of this case.

The following is a copy of the proceedings and order on appeal, and certificate:

Middlesex. At the general session of the peace of our lady the Queen, holden in and for the county of Middlesex, at the Sessions House for the said county on Monday, the 12th May 1873, and from thence continued by several adjournments to and holden at the said Sessions House on Friday, the 23rd May 1873:

Whereas, a certain certificate under the hands of Wm. Dollin Alexander and Henry Robarts, Esquires, two of her Majesty's justices of the peace acting in and for the said county, bearing date the 10th April last past, together with the depositions, proof and plan, and other documents thereto annexed, were on the said 10th April lodged with the clerk of the peace for the said county, of which certificate, depositions, proof and plan, and other documents, the following are copies, that is to say, viz.:-

To her Majesty's justices of the peace for the county of Middlesex, assembled in general sessions of the peace for the said county, we Wm. Dollin Alexander and Henry Robarts, Esquires, being two of her Majesty's justices of the peace acting in and for the county of Middlesex, do hereby certify under our hands as follows: That an application having been made to us on behalf of the vestry of the parish of St. Matthew, Bethnal Green, in the county of Middlesex (who by the 96th section of the Metropolitan Local Management Act 18 & 19 Vict. c. 120 are the surveyors of the highway of the said parish), by the clerk to the said vestry, to view a certain highway leading from the Old Ford-road into Victoria Park-square, and being a certain footway abutting west and south next the terrace in Victoria Park-square, all in the said parish of St. Matthew, Bethnal Green, we did on the 21st Feb. last jointly view the said highway or footway, and that it appearing upon such view by us that the said highway or footway is unnecessary, we thereupon directed, in manner prescribed by the 85th section of 5 & 6 Will. 4, c. 50, intitled "An Act to consolidate and amend the laws relating to highways in that part of Great Britain called England;" that the notice required by the said section should be affixed and advertised as by the said section is prescribed. And proof has been given to us to our satisfaction that such notice has been duly affixed and advertised, as required by the said section, and such proof has been given by the several affidavits of Robert Voss, the vestry clerk of the said parish of St. Matthew, Bethnal Green, and John William Burrows, the beadle of the said parish. That a plan, particularly describing the said highway or footway, and also showing those parts of Old Ford-road aforesaid and the road in Victoria Park-square aforesaid, from and into which parts respectively the said highway or footway leads, has been delivered to us, and the said plan has been verified by the affidavit of William Mundy, the surveyor of the said vestry. That the said highway leading from Old Ford-road to Victoria Park-square, and being a footway abutting west and south on the terrace aforesaid, is unnecessary; and the reason why it is unnecessary is, that it furnishes no additional accommodation beyond that afforded by the said Old Ford-road and the road in Victoria Park-square, inasmuch as the highway hereby certified to be unnecessary is only a footway which (as appears by the said plan) goes along the south and west sides of the said terrace in Victoria Park-square, while the said Old Ford-road and the road in Victoria Park-square aforesaid, which are footways and carriage-ways, go along the east and north sides of the said terrace. And it is therefore as convenient for any person going to or from Victoria Park-square to continue along or go by the said Old Ford-road as to make use of the highway or footway hereby certified to be unnecessary.

W. D. ALEXANDER.
HENRY ROBARTES.

Dated 1st April 1873.

The proceedings also set out the depositions above-mentioned, from which it appeared that Robert Voss, the clerk to the vestry of the said parish of St. Matthew, Bethnal Green, received a notice dated the 13th Nov. 1872, signed by one Sarah Natt, and addressed to the vestry, by which she duly required the vestry, pursuant to sect. 84 of 5 & 6 Will. 4, c. 50, and sect. 9 of

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19 & 20 Vict. c. 112, to give notice to and direct the clerk of the vestry to convene and assemble a meeting of the vestry for the special purpose of considering her wish that the public highway should be entirely stopped up. It also appeared that all the steps required by sects. 84 and 85 of the said Highway Act were duly and properly carried out and completed, according to the provisions therein contained. And the proceedings went on to state that William Harvey, the appellant, duly made his complaint by appeal, and the justices at the said sessions duly impanelled a jury in pursuance of the said Act, who returned a verdict that the said highway, so intended to be stopped up, was entirely unnecessary. The justices thereupon dismissed the appeal, and ordered the highway to be stopped up, and the appellant to pay costs, subject to the decision of the Court of Queen's Bench on the points of law raised by the special case.

Philbrick, Q.C. and Poland, for the respondents, the Vestry of St. Matthew, Bethnal Green, showed cause against the side bar rule to quash the order of sessions confirming the certificate, and stopping up the highway.—There is no question upon the merits or facts; the preliminaries are admitted to be complete, and the only point reserved is, whether the certificate is good on the face of it. This is a Metropolitan parish, within the meaning of the Metropolitan Local Management Act 1855 (18 & 19 Vict. c. 120). By sect. 96 the powers and duties of surveyors of highways are transferred to vestries and district boards in certain parishes, of which this is one. These district boards and vestries are incorporated by sect. 42, and the nature of a vestry's constitution appears from the 8th section, which provides that "the vestrymen, upon the first election, shall forthwith be deemed to constitute the vestry of such parish, and shall supersede any existing vestry therein, and exercise the powers and privileges held by such existing vestry, save as in this Act otherwise provided." In consequence of this provision it follows that in this parish the requirement of sect. 74 of the Highway Act 1835 are satisfied by this certificate. The words of that section (5 & 6 Will. 4, c. 50) are: "That when the inhabitants in vestry assembled shall deem it expedient that any highway should be stopped up, diverted, or turned, either entirely or reserving a bridleway or footway along the whole or any part or parts thereof, the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to two justices to view the same, and shall authorise him to pay all the expenses attending such view, and the stopping up, diverting, or turning such highway, either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of this Act: Provided nevertheless that if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid, for the purposes aforesaid; and in such case the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under this Act; and the said surveyor is hereby

required to make such application as aforesaid." The following (the 85th) section contains the details of what the justices are required to do after the surveyor has applied to them to view the highway. What they are required to certify is also expressly stated in the section, viz., the fact of their having viewed the highway; that the proposed new highway was nearer or more commodious to the public, and how much and why respectively; and if the highway is unnecessary, the reason why. This is all the certificate need contain, and not only is there nothing in the section requiring the certificate to state the preliminaries which the surveyor must complete, but no means are suggested by which the justices can investigate or discover how the 84th section has been carried out. So far, therefore, as the statute is concerned, the certificate here would be good, even if the surveyor and the inhabitants in vestry assembled were not the same. But it will probably be contended on the other side that it has been already held by this court that the omission to state in the certificate that the surveyor was authorised to make application to the justices is material to the validity of the certificate; the head-note of *Reg. v. The Justices of Worcestershire* (3 E. & B. 477) seems to support this contention: "Held, also, that the certificate was defective, as not showing that the preliminaries necessary to give the two justices jurisdiction to certify, had been complied with;" but reference to the case itself shows, not only that this decision was unnecessary for the conclusion of the case, but further that the remark made in the considered judgment of Coleridge, J., upon which the head note was based, was not consistent with the reported opinions of the judges, as expressed during the arguments. This is certainly the same objection as that which the court of quarter sessions held there to be valid; but the appellant applied to the Queen's Bench to remedy the decision against him by *mandamus*. At the end of the arguments Lord Campbell, referring to the ground upon which the court below granted the certificate, said: "It is impossible to contend that the objection is so clearly wrong and frivolous that we should say it could not be the subject of judicial decision. The case is, therefore, reduced to the question whether the sessions have jurisdiction to inquire into the validity of the certificate, or their appellate jurisdiction is limited—which is a question of difficulty and importance." The court discharged the rule for a *mandamus*, on the ground that the sessions were competent to consider objections to the certificate itself; but in the commencement of the written judgment, Coleridge, J., speaks generally of the objections to the appeal apparent on the face of the certificate. He proceeds: "The court had entertained these objections, heard arguments on both sides, decided in favour of the appellants on one, and refused thereupon to proceed any further towards the enrolment. We had no doubt, upon the argument, that the decision of the court upon this objection was correct, and that the point on which it arose was a substantial one, disposing of the appeal on its legal merits. Nor was this matter in the end very seriously contested, but it was very strongly urged that since the passing of stat. 5 & 6 Will. 4, c. 50 (The General Highway Act), the sessions had no jurisdiction to inquire into defects on the face of the certificate." The judgment then goes on to discuss only this second point which had been urged, and it was

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not, therefore, necessary for the court to have come to any conclusion concerning the first. And the only effect of the decision of this court was, that whether the quarter sessions were right or wrong, the appellant had no remedy by *mandamus*. [BLACKBURN, J.—I see that case was reported by me, but the decision scarcely goes as far as the head note.] The effect of that decision was discussed in *Reg. v. Maule* (23 L. T. Rep. N. S. 859; 41 L. J. 47, M.C.); and the court, consisting of Keating, Lush, and Hannen, JJ., declined to follow that head note, or to support this technical objection. [BLACKBURN, J.—In that case the notice of appeal was insufficient, and it became no more necessary to determine the validity of this technical objection than it was in *Reg. v. The Justices of Worcestershire*.] The certificate, however, in this case, the surveyor being the vestry in parish assembled, may be good consistently with the decision in *Reg. v. The Justices of Worcestershire*. [BLACKBURN, J.—I cannot see that the Act of 1856 makes such a difference between highways in country and metropolitan parishes.] The certificate states that an application had been made to the two justices, on behalf of the vestry, by the clerk. The vestry being a corporate body, could act only at a meeting, and being also surveyors of the parish, must have duly directed the application to the justices to view the highway. All that is required even by the head note in the *Worcestershire* case, is, therefore, contained in the certificate. Further, if the quarter sessions had considered this objection fatal, it would have been in their power to amend it; and as it was not on the hearing necessary to obtain a reservation of this point, this court may, if it considers the certificate bad, amend it now. By sect. 87 of the Highway Act 1835, it is provided, "That in the event of any appeal being brought against the whole or any part or parts of any order or certificate for diverting more highways than one, it shall be lawful for the court to decide upon the propriety of confirming the whole or any part or parts of such order or certificate, without prejudice to the remaining part or parts thereof." And by sect. 7 of 12 & 13 Vict. c. 45, it is enacted: "That if upon the trial of an appeal to any court of general or quarter sessions of the peace against any order or judgment made or given by any justice or justices of the peace, or if upon the return to any writ of *certiorari* any objection shall be made on account of any omission or mistake in the drawing up of such order or judgment, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justice or justices making such order or giving such judgment to have authorised the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudge thereupon as if no such omission or mistake had existed." [BLACKBURN, J.—That does not give us power to amend.] In *Rees v. Bingley* (4 B. & Ald. 567), the court, under a similar provision in 5 Geo. 2, c. 19, s. 1, sent the case back to the sessions to be amended. [BLACKBURN, J.—That Act says, justices shall, and they are thereby required to cause any defect of form to be rectified and amended. It seems that if this certificate is bad, you must now start afresh.]

E. Clarke and Roscoe, for the appellant.—This case is concluded by the considered judgment of

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the court in *Reg. v. The Justices of Worcestershire*; and if it were *res integra*, the Highway Act clearly renders this objection fatal to the certificate. [BLACKBURN, J.—We should like to be satisfied on this second point, and it will be well, therefore, to consider it first.] Sect. 84 provides two different modes by which action may be commenced, and sect. 88 requires a different course to be adopted upon appeal in the different cases. So also by sect. 90, the cost of an appellant may be obtained either against the surveyor or the private individual who has set the proceedings in motion. There is, therefore, an important distinction between the two origins of the proceedings. [BLACKBURN, J.—That is so, but why should the certificate state how they commenced? There is no power given to the two justices in sect. 85 to inquire about preliminary matters. ARCHIBALD, J.—There is nothing in the 84th section about proof of the acts required, as there is in the 85th about the matters to be certified.] At all events, this is not merely a technical matter, and there is nothing to prevent the justices from satisfying themselves from the surveyor's statements that their jurisdiction is properly constituted. As to the other point, the words of this objection are the very same as those in *Reg. v. The Justices of Worcestershire*. [MELLOR, J.—What words ought the certificate to have contained?] It should have recited the facts stated in the affidavits, Sarah Natt's notice to the vestry, the vestry meeting and their resolution. The proper form of making a certificate in a case where the inhabitants in vestry commenced proceedings is to be found in *Reg. v. The Justices of Surrey* (26 L. T. Rep. 22). *Reg. v. Maule* decides a different point from that here raised, and the authority of the *Worcestershire* case is recognised upon this point in the judgments. There are many examples of the strictness required in these certificates;—e.g., *Reg. v. Jones* (12 A. & E. 684).

BLACKBURN, J.—In this case I think the certificate is right, and the judgment of quarter sessions must be affirmed. I do not proceed to this conclusion upon the ground of any distinction between a country and a metropolitan vestry, but on the ground that the two justices are not required by sect. 85 of the Highway Act to certify any of the preliminary matters required by sect. 84. What they have to do by the 85th section is, first, to view the highway; they must then satisfy themselves upon the view either that the diversion proposed will make the highway nearer or more commodious, or in the case of a proposal to close a highway, that the highway is unnecessary; they then direct the surveyor to publish certain notices. After the publication of these notices, proof of which must be obtained, and also proof of the correctness of the plan to be provided, the justices then certify that they have done all the things required, and state in their certificate the distance saved by the new highway or the reasons why it is more commodious, or why the old highway is unnecessary. They are expected to certify all they have to do, and the certificate should contain everything concerning the matter which is within their knowledge. But whether the inhabitants in vestry assembled have proceeded at their own instance or upon the suggestion of some other party, is a matter about which the justices are not required to obtain proof, and they have no means of knowing themselves. An appeal is given to anyone aggrieved, and I cannot doubt that any breach of

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the 84th section, or insufficiency in the surveyor's authority, would be a good ground for refusing to grant the application to quarter sessions. This, however, need not appear in the certificate, and the omission to mention the preliminary matters required by sect. 84, cannot, if they are properly carried out, invalidate the order of the court. We must now see if the judgment in *Reg. v. The Justices of Worcestershire* conflicts with the interpretation of the statute. I do not think it amounts to a decision of the court upon this point. The facts of that case were similar to the present, and the quarter sessions held the same technical objection as this, viz., the omission in the certificate of any statement concerning the matters required by the 84th section, to be fatal to the validity of the certificate. But the appellant, who was the party desirous of diverting the highway, applied to this court for a *mandamus* to compel the sessions to enrol the certificate, and relied not upon their decision concerning the omission, but on their want of jurisdiction to entertain such an objection. If the point had been reserved by the sessions, as it is here, the court must have decided upon the form of the certificate, and could not have given judgment against the appellant without concurring in the opinion formed by the sessions; but as the question was raised, the appellant's case failed as soon as this court held that *mandamus* was not the proper remedy, and it became then of no importance whether the sessions were right or wrong. The contention of the appellant seems to have necessarily been that the objection was so clearly wrong and frivolous that the court should say it could not be the object of judicial decision. With this Lord Campbell found it impossible to concur, but no opinion of the court is reported to have been expressed during the arguments concerning the validity of the objection to the certificate. Then an elaborate judgment was delivered by Coleridge, J., on the point at issue; and he certainly prefaces it by saying what must be taken to be his opinion on the matter, that the court had no doubt upon the argument that the decision of the sessions upon this objection was correct. With all respect to that learned judge, that opinion so stated is not binding upon us, especially when besides being unnecessary to the conclusion of the case, it is not borne out by what had been said in the argument by Lord Campbell. Our decision upon this technical point is of far less importance to other cases from the fact that such an omission, if considered material, might, by 12 & 13 Vict. c. 45, s. 7, be amended by the quarter sessions. It is not necessary to decide whether it could make any difference to the form of a certificate that the vestry in a particular case is situated in London or the country; I have, however, great doubt on this point, and I am much inclined to think that the churchwardens, wherever the parish may be situated, must assemble the inhabitants in vestry for the special purpose of considering the wish of the party desirous of diverting a highway. Our judgment will be for the respondent.

MELLOR, J.—I am of the same opinion. Upon an appeal to quarter sessions, the validity of a certificate might depend upon whether the surveyor had been rightly set in motion, but the simple question for us is, whether it is necessary for the justices to state this matter in their certificate. They could only know anything about it in a loose way from the surveyor, for they have no means of

making judicial investigation concerning it, and no such proofs are required to be adduced before them. Therefore, all that is necessary to appear upon the certificate, in order to initiate the justices' jurisdiction, is a statement of all that is required of them. With regard to the case referred to, I agree with my brother Blackburn. As reported, it is certainly an authority justifying the appellant in raising this objection; but when considered carefully, it is not even a decision of Coleridge, J., on this point. With the greatest possible respect for him, I do not hesitate, under the circumstances, to dispute this mere dictum, and I don't think by so doing we overrule his judgment.

ARCHIBALD, J.—I also am of opinion that the judgment of the sessions should be affirmed. There is an omission in the certificate of all reference to the preliminary matters required by the 84th section of the Highway Act. Although not necessary to decide the question, I think it may be that the omission is cured by the vestry being in this case the same as the surveyor; but in any case it seems to me that no mention of these preliminaries need appear in the certificate. The difference of language between the 84th and 85th sections satisfies me that, although important with reference to the jurisdiction of the justices, they need not certify what had been done before they commenced to do the things required of them by the Act. The dictum of Coleridge, J., in *Reg. v. The Justices of Worcestershire*, should be treated with respect, but it was unnecessary for the decision to which the court arrived, and need not be followed by us.

Judgment for respondent.

Attorneys for appellant, *Horne and Hunter.*

Attorneys for respondent, *Walker and Battiscombe.*

Saturday, Nov. 14, 1874.

REG. v. FENNER.

Tithe—Exemption—Lessee of part of rectory house
—37 Hen. 8, c. 12—27 & 28 Vict. c. cclxviii, s. 7.

By the London City Tithes Act 1864, sect. 7, an occupier of property which, although subject to poor rates, is exempt from tithes, shall continue to be exempt in the same manner as if this Act had not been passed.

In 1856, the rector of one of the parishes subject to this Act leased the basement, yard, ground floor, and first floor of his rectory house for twenty-one years, reserving to himself the upper part of the house for his own residence:

Held, upon an appeal against a tithe rate under this Act, that the occupiers of the leased part of the rectory were not exempt from liability.

THIS was an appeal to the Court of General Quarter Sessions for the City of London, against a tithe rate, made in pursuance of the statute 27 & 28 Vict. c. cclxviii, being An Act for the Commutation of Tithes in certain Parishes in the City of London, and for other purposes.

Nathaniel John Fenner and Henry Fenner were the appellants, and the Churchwardens and Overseers of the parish of St. Martin Outwich were the respondents.

The said parish of St. Martin Outwich is one of the parishes named in the 2nd schedule to that Act, by the 17th section of which power is given to the parishioners assembled in vestry to agree with the incumbent for the commutation of the tithes, or sums of money instead of tithes, growing due

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under the provisions of the Act 37 Hen. 8, c. 12; and by the decree made in pursuance thereof an annual fixed sum, to be paid by the parish, and to be raised by a tithe rate, is to be assessed and levied as therein provided.

By the 6th and 7th sections of the said Act, it is enacted that the tithe rate shall be levied on the persons and in respect of the property by law rateable to poor rates, but that every occupier of property who, although subject to the payment of poor rates is exempt from tithes, shall continue to be exempt.

The appellants were occupiers of certain premises, being the lower portion of the rectory house of the parish of St. Martin Outwich, in the City of London.

The rector remains in actual occupation of the upper portion of the said rectory house, but in the year 1856 he demised the said lower portions of the said rectory to one Nelson, who subsequently sublet the same to the appellants.

The appellants were in occupation of the said premises for a long time before the parish adopted the Act as hereinafter stated.

The rector occupied the entire house prior to the granting of the said lease.

No tithes have ever been received by the rector, or demanded by him from the tenants of the said portions of the rectory house.

The Act 27 & 28 Vict. c. cclxviii, was duly adopted by the parish in the year 1871, and a tithe rate has now been levied by the churchwardens, to raise the sum agreed to be paid to the rector.

In levying this rate the churchwardens have levied certain sums upon the occupiers of the portion of the rectory house so demised as aforesaid. The appellants, who are some of the said occupiers, appealed.

The appeal was heard before the Common Serjeant, the Deputy Recorder of the City of London, a copy of whose judgment is hereunto annexed; who decided that the rate was properly imposed and assessed, and the sessions gave judgment for the respondents with costs, with leave for the appellants to appeal.

It was agreed between the parties that the court should be at liberty to refer to any documents bearing upon the question, in addition to those annexed to this case.

The sole question for the court was whether, under the circumstances aforesaid, the occupiers of the said demised portion of the rectory house were liable to contribute to the tithe rates.

The following is a copy of the judgment of the Common Serjeant and Deputy Recorder:—This was an appeal against a rate made in pursuance of the statute 27 & 28 Vict. c. cclxviii, which Act was adopted by the parish in 1871. That Act provides (sect. 7) that all tithes, and payment in lieu of tithes growing due under the Act 37 Hen. 8, c. 12, may be commuted by agreement of the incumbent, the parishioners, and others, and shall cease on a day named, and thenceforth the incumbents shall receive annual fixed tithes, by way of commutation, to the amount mentioned in the agreement. An agreement for commutation of the tithes in the respondents' parish was duly made under the above cited section. Up to Christmas 1856 the rectory house of the parish was occupied by the rector, and had, of course, been exempt from the tithes which, before the adoption of the statute of Victoria by the parish in 1871, had been collected

under the 37 Hen. 8, c. 12. By indenture, dated 27th Sept. 1856, the rector leased the basement and yard, the ground floor, and first floor of the rectory house to one Nelson for twenty-one years, reserving to himself the upper part of the house for his own residence. Upon the portions of the house so demised a tithe rate has been levied, and the appellants are the occupiers under Nelson, the lessee. The question is, whether the property is liable to be rated, and I am clearly of opinion that the rate is properly imposed and assessed; and that, in the hands of a lessee or tenant the house becomes rateable, the exemption being a personal exemption of the incumbent, and not an exemption of the house when it is demised to a tenant. Judgment, therefore, must be given for the respondents, with leave for the appellants to appeal.

Webster, for the parish, argued in support of the decision of the quarter sessions.—The tithe is imposed by 37 Hen. 8, c. 12, which by the first section provides that the decree, afterwards set out as part of the statute in the Statutes at Large, is to stand as an Act of Parliament. By sect. 2 of the statute "the citizens and inhabitants of the said City of London and liberties of the same for the time being, shall yearly, without fraud or covin, for ever pay their tithes to the parson, vicars, and curates of the said City, and their successors for the time being, after the rate hereafter following, that is, to wit," &c., according to the "rent by the year of all and every house and houses, shops, warehouses, cellars, stables, and every of them within the said city and liberty of the same." The exemptions in this decree were considered in the case of *Warden of St. Paul's v. The Dean* (3 Eagle & Young's Tithe Cases, 809), where it was held that the Dean of St. Paul's was liable to the payment of tithes to the warden and minor canons, as parsons of St. Gregory, and was not exempt in respect of the maxim *ecclesia ecclesiarum decimasolvere non debet*, which is confined to the parson and vicar of the same parish church. In *Lagden v. Flack* (2 Haggard's Consistory Reports, 303), Sir William Scott, referring to this exemption claimed there, said, at p. 307: "Supposing that Trinity College could be deemed a spiritual foundation, still the court would, I think, set afloat all established law, which it has always understood on this point, if it decided that the vicar is not entitled to the tithe of this glebe. It has been constantly held that if land has no discharge of itself, it is discharged only in the hands of the ecclesiastical owner, under the maxim, *ecclesia decimas non solvit ecclesiarum*, a maxim that is binding as long as the land is actually held by an ecclesiastic; but if it is transferred into the hands of laymen it becomes liable" . . . "the privilege being only personal, does not travel from the parson to the lay-lessee." So, according to *Harris v. Cotton* (Brownlow & Goldesborough's Reps. part 1, p. 69), "As long as the vicar occupies his glebe land in his own hands, he shall pay no tithes; but if he demises it to another, the lessee shall pay tithes to the parson that is inappropriate."

Bayford, for the appellants.—I admit it is clear, from the authorities, that if a parson lets his glebe, he can get tithes from it; but I have to argue concerning tithes in the City of London which are imposed upon houses only and not upon lands, and which are not governed, therefore, by the authorities concerning glebes. The agreement, too, which was entered into between the rector and the parish,

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and confirmed by the London City Tithes Act 1864, must also be considered. By sect. 7 of this Act, "Every occupier of property in any of the said parishes which, although subject to the payment of poor rates, is exempt from tithes" . . . "shall continue to be exempt" . . . "in the same manner as if this Act had not been passed." It is found as a matter of fact that the occupier of this property was exempt from, and as a matter of law he could not be liable for tithes, at the time the Act was passed. [BLACKBURN, J.—How so?] The effect of the decision of *Blinco v. Barksdale* (Cro. Eliz. 578) is that there can be no division of property so as to affect the liability of part of it to pay tithes. Popham, J., there said, "But if the land were discharged from the payment of tithe by reason of an unity (which was the case here at the passing of the Act), it shall then be discharged by the statute in the hands of the patentee; for that privilege runs with the possession." There is no authority that a rectory house can be liable to tithes under any circumstances, and when part of such a house is still occupied by the parson, there is authority against any liability. Further, under the Act 37 Hen. 8, c. 12, these rooms which the appellants occupy cannot be liable, for they are neither a house or houses, nor a shop, warehouse, cellar, or stable. [BLACKBURN, J.—Why not a house?] It is but part of a house.

BLACKBURN, J.—I have not the smallest doubt that the Common Serjeant was right, and for the reasons which he gives. There is no occasion to repeat them.

MELLOR and ARCHIBALD, JJ., concurred.

Judgment for respondents.

Attorneys for appellants, *Bridger and Collins.*

Attorney for respondents, *John Combs.*

Thursday, Nov. 19, 1874.

Ex parte TARBATH.

The Licensing Act 1872—New licence—House closed for three years—Appeal against refusal—Jurisdiction of quarter sessions.

A new occupier of an inn licensed under 9 Geo. 4, c. 61, was refused a transfer of the licence, on the ground of a conviction for drunkenness. Three years afterwards, at the first licensing meeting after the owner was able to obtain possession of the premises, the present applicant applied for a renewal of the previous licence, and was refused on the ground that the neighbourhood did not require it.

Upon appeal, the quarter sessions, without hearing the merits, decided that this was an application for a new licence, and that they had no jurisdiction under 35 & 36 Vict. c. 94:

Held, upon a rule for a mandamus, that the quarter sessions were right, and that the definition of renewal of a licence in sect. 74 of the Act of 1872 refers only to a licence existing during the previous year.

This was a motion on behalf of the occupier of the Bridge Inn, Bromyard, for a rule nisi calling upon the justices of Herefordshire to show cause why a writ of mandamus should not be granted to compel them to hear an appeal to quarter sessions.

For a long period before 1871 the said Bridge Inn had been every year duly licensed under 9 Geo. 4, c. 61, as an alehouse for the sale of spirits,

wine, and beer. During that year one Allen obtained a transfer of the house from the then licensed occupier, and carried on the business until the next licensing meeting of the justices. During this time, however, the said Allen was convicted of being drunk in the streets of Bromyard, away from his house; and on the 7th Sept. 1871, at the licensing meeting, when Allen applied for a transfer of the previously existing licence, the justices refused his application, on the ground of his said conviction. The house was then shut up, and Allen went away. He had, however, entered into certain mortgages of the premises, and the owner had been unable to obtain possession of the house until May 1874. During this time, from Sept. 1871 to May 1874, the Bridge Inn had been entirely closed, and no one had held any licence to sell intoxicating liquors in it. The house, however, continued to be structurally adapted and fitted up for such a purpose, and the applicant, who now desired to become the licensed tenant of the house, was a person of unexceptionable character.

On the 7th Sept. 1874, at the first licensing meeting after Allen and his mortgagees had ceased to be interested in the premises, the applicant applied for a renewal of the licence for the Bridge Inn, which had existed before Allen was refused a transfer. For the sake of greater precaution, the necessary notices for a grant of a new licence were also given by the applicant. The justices, however, refused to grant any licence at all for the Bridge Inn, on the ground that the neighbourhood did not require it.

Against this decision the applicant appealed to the quarter sessions; but that court, without entering into the merits, held that this was an application for a new licence, and therefore they had no jurisdiction to hear the appeal.

Pritchard, in moving for the rule, contended that this was such a refusal by the licensing session to renew a licence, for which an appeal to quarter sessions was reserved by 35 & 36 Vict. c. 94. The second schedule, which contains the statutes and part of statutes repealed by that Act, enumerates the appeal sections of 9 Geo. 4, c. 61, viz., the 27th, 28th, and 29th sections, and proceeds, "except in so far as the three last-mentioned sections relate to the renewal of licences, or to the transfer of licences under sects. 4 and 14 of the same Act." Sect. 74 of the Act of 1872 defines "a new licence" as a licence granted at a general annual licensing meeting in respect of premises not theretofore licensed for the sale of intoxicating liquors. This definition does not relate to the application which the justices have refused. By the same section, "the renewal of a licence" means a licence granted at a general annual licensing by way of renewal. That this latter definition is intended for something wider than the mere renewal of a licence of the previous year appears from sect. 56, which gives an owner of licensed premises power to appear at a petty sessions and appeal against an order disqualifying any licensed premises, on the ground, amongst others, that he could not legally have evicted the tenant who has committed two offences in the interval between the commission of the offences.

COCKBURN, C.J.—I think we cannot grant this rule. The question whether an appeal to quarter sessions exists in this case turns upon whether the application refused at the licensing meeting was

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one for a new licence or the renewal of a licence. The house had not been licensed for three years before the application, and in that time the previous licence must be taken to have been abandoned and to be entirely gone. The quarter sessions, therefore, had no jurisdiction to hear an appeal, and there can be no *mandamus* to compel them to do so.

BLACKBURN, J.—I think the words in the definition of “the renewal of a licence” mean no more than the words defined. There is an appeal, therefore, only against a refusal to renew a licence which existed during the year before.

QUAIN and ARCHIBALD, JJ. concurred.

Rule refused.

Attorney for applicant, G. A. Hall, for A. W. Knott, Worcester.

ROLLS COURT.

Reported by G. WELBY KING and S. H. S. LOFTHOUSER, Esqrs.
Barristers-at-Law.

June 29, 30; July 1, 6, 7, 8, 13, 14, 15, 20, 21, 22, 27, 28, 29; Aug. 1, 2, 3; Nov. 4, 5, 6, 9, 10, 24, 1874.

THE COMMISSIONERS OF SEWERS OF THE CITY OF LONDON v. GLASSE.

Right of common of pasture—Forest waste—Immemorial usage—Inclosures by lords of manors—Injunction.

The plaintiffs filed a bill claiming, on behalf of themselves and all other the owners and occupiers of lands and tenements within the forest of Essex, other than the waste lands of the forest (except such of them as were defendants, or alleged to be represented by the defendants), a right of common of pasture upon all the waste lands of the forest for cattle, levant and couchant, upon their respective lands and tenements within the forest, as appendant or appurtenant to their several lands and tenements within the forest:

Held, that such a claim might be made out by showing that for sixty years and upwards this right had been exercised, thereby proving immemorial user, which would imply a grant; but that such right might be defeated by showing the origin of the user, and that it was not in accordance with the right claimed.

Held also, upon the evidence that such user was proved, and, the defendants having failed to show that the origin of the user was not in accordance with the right claimed, that the plaintiffs were entitled to an injunction restraining the defendants, the lords of the manors within the forest, from inclosing any of the waste lands of the forest, or destroying the herbage growing thereon, so as in any manner to interfere with the plaintiffs' rights.

The plaintiffs filed their bill on behalf of themselves, and all other the owners and occupiers of lands and tenements lying within the Forest of Essex, otherwise Waltham Forest or Epping Forest, other than the waste lands of the said forest, except such of them as were defendants, or were alleged to be sufficiently represented by the defendants, or some of them, against the lords of the several manors within the forest, and two persons named Lake and Williams, who claimed to be owners and occupiers of waste lands which had been enclosed, and the Attorney-General. The bill alleged that the plaintiffs were seised of a farm called Aldersbrook, within the boundaries of the

Forest of Essex, which was a royal forest, and that such farm was partly in their own occupation. That the whole of the inclosed as well as the waste lands within the forest had been from very ancient times subject to rights reserved by the Crown on the grants of the several manors and lands lying within the forest, for enabling the Crown to maintain the forest as a royal forest for hunting, and subject also to the ancient forest laws made from time to time for enforcing and regulating those rights; and that the Crown so reserved, and had from time immemorial claimed and exercised, for those purposes an absolute right of disposition over the deer and certain other wild animals within the forest under the name of venison; and over the woods, underwoods, and coverts under the name of vert; and over the pasture, turf, gravel, and soil of the waste lands of the forest. That the government of the forest was formerly administered by the Lord Warden of the Forest and other subordinate officers, and that the forest laws were executed by the Forest Courts, one being the Court of the Chief Justice in Eyre. That the jurisdiction of these courts embraced all matters touching the preservation and exercise of, and all infringements upon, the rights of the Crown in the forest, to which rights the manorial, common, and other rights within the limits of the forest, were subordinate. That the offices of Lord Warden of the Forest, and of the Chief Justice in Eyre, had been abolished, and that the powers belonging to those offices were vested in the First Commissioner of Woods and Forests, who, however, had not exercised, and refused to exercise the same. That the owners of lands within the bounds of the forest were restricted by the forest laws from the full use and enjoyment of their lands, and, amongst other things, were prohibited from inclosing their lands with fences above a certain height, or made so as to impede the free passage through the forest of the deer and other wild animals, and that they were prohibited from stubbing up, cutting, or selling without licence, the woods and underwoods growing upon their said lands, and from hunting and hawking thereon without licence; and that the crops and produce growing upon their said lands and the fences standing thereon, were subject to great destruction and damage from the deer and other wild animals with the said forest; and that the said laws were in these and other respects grievous and burdensome to the owners of lands and tenements and the inhabitants within the said forest.

That the forest laws also forbade the inclosure of any of the waste lands within the forest, and the erection of any fences or obstructions thereon; and that the lords of the manors within the forest were not, nor ever were, able of their own authority, or merely by the consent of the homages of their respective manors, to inclose or grant to any other person a right to inclose any part of the waste lands of their respective manors lying within the forest.

That the owners of lands and tenements within the royal forests, and particularly within the said forest, by virtue of ancient forest laws made by the Crown in exercise and derogation of its said forest rights, and recognised and confirmed by divers statutes of the realm, had, from very ancient times, enjoyed and still ought to enjoy, by way of compensation for the burdens and restrictions so imposed upon them by the said forest laws

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(amongst other rights and privileges), rights of common of pasture over the waste lands within the said forest, subject to regulations from time to time made and enforced by the said forest courts; that the said rights of common were recognised by the *Charta Foresta* made by King John, whereby it was provided that all forests which King Henry, the then king's grandfather, had afforested, should be viewed by honest and lawful men, and if any other wood than his own demesne had been afforested to the loss of him whose wood it was, forthwith it should be disafforested; and that if he had made forest of his own wood, then it should remain forest, saving the common of herbage, and of other things in the same forest to them which before were accustomed to have the same; that the said charter was confirmed by the *Charta Foresta* made in the ninth year of King Henry III., wherein was contained a like saving of rights of common of pasture in the forest, and the last mentioned charter was confirmed by a Parliament held in the twenty-eighth year of the reign of King Edward I., and by another Parliament held in the forty-second year of the reign of King Edward III.

That the rights of common of pasture so granted or permitted as aforesaid had from time immemorial been enjoyed by the owners and occupiers of lands and tenements lying within the forest, whose cattle had always been depastured on such of the wastes of the said forest as for the time being had been found most convenient, without regard to the boundaries of the parishes or manors in which their lands and tenements were situate, and subject only to the regulations made by the said forest courts, and particularly by the Court of Attachments, by divers orders of which court the reeves of the several parishes lying within the said forest were frequently ordered to distinguish the cattle commoning within the said forest belonging to the inhabitants of the different manors and parishes, by marking them upon certain days appointed by the said court with various brands provided for that purpose; and the reeves were required to make, and did make, returns to the said court of the cattle so marked by them, and of the owners' names, and the number of cattle belonging to them respectively, and the value of their rents.

That the plaintiffs and their predecessors in title, and their respective tenants, and the other owners and occupiers of lands and tenements lying within the said forest, had, in fact, from time immemorial enjoyed, as of right and without interruption, by virtue of the forest laws, as appendant or appurtenant to their respective lands and tenements lying within the said forest, common of pasture for all manner of cattle, commonable within the said forest, *levant* and *couchant*, upon their respective tenements, over the waste lands of the forest.

That the defendants, as lords of the said manors or reputed manors respectively, or in some other capacity, pretended to be entitled to inclose the waste lands of the forest, and to dig up and destroy the pasture, turf, and other herbage growing thereon; and that in and during several years now last past, they had respectively inclosed, or authorised or sanctioned the inclosure, of large tracts of the said wastes, which were specified in the Bill; and the Bill also set forth certain acts of destruction to the herbage.

That the inclosures and other acts complained of were purprestures and encroachments on the forest, and that the plaintiffs and the other persons entitled as aforesaid were, by reason thereof, deprived or impeded in the use of their common rights over the waste lands. That the defendants alleged that they respectively and their respective predecessors in title had sold and granted, or conveyed to various persons divers pieces of the lands so inclosed and dealt with as aforesaid, and that buildings had been erected upon some part of the said lands, and in particular that the defendants Glasse and Collyer-Bristow, or their predecessors in title, had sold and granted or conveyed to the defendant Lake a certain piece of inclosed waste land, and that the defendant Maitland, the Lord of the Manor of Loughton, had sold and granted or conveyed to the defendant Williams a certain piece of inclosed waste land; and that a considerable part of the waste lands so inclosed, and the proceeds of the sales of such as had been sold were in the possession of the defendants, the lords of the several manors.

That the Crown rights of forest, free chase, and free warren upon and over some of the inclosed and waste lands within the forest had been sold by Her Majesty's Commissioners of Woods and Forests, under statutory powers, but the Crown rights of forest had never been extinguished, and as to the greater part of the forest, they were still vested in the Crown; and the sales had not, as against the plaintiffs, or the persons on whose behalf they sued, disafforested any part of the forest, or taken away or affected their rights of common; and that, except as to the Forest of Hainault, the forest laws were still subsisting over the whole of the forest.

The bill prayed that it might be declared that the plaintiffs and the other owners and occupiers of lands and tenements lying within the forest, other than the waste lands of the forest, were entitled in right of, and as appendant or appurtenant to, their several lands and tenements within the forest, to a right of common of pasture upon all the waste grounds within the forest for all manner of cattle commonable within the forest, *levant* and *couchant*, upon their respective lands and tenements within the forest; and for an injunction to restrain the defendants from fencing in or inclosing, or building upon, or permitting or suffering to be or to remain fenced in or inclosed or built upon, any part of the waste lands of the forest which were subject to the commonable rights; and from carrying away, selling, digging up, or destroying the loam or soil of the waste lands; or the pasture, turf, or herbage growing thereon, and from otherwise interfering with and preventing the exercise by the plaintiffs and the other persons entitled as aforesaid, or any of them, of their rights in and over the waste lands of the forest; and that the plaintiffs and the other persons entitled as aforesaid might be quieted in the possession and enjoyment of their rights.

Demurrers to the bill by five of the defendants were overruled: (L. Rep. 7 Ch. 456; 26 L. T. Rep. N. S. 647.)

The defendants, the lords of the several manors, claimed, by their answers, to be entitled, either with the consent of the homage, or under the provisions of the Statute of Merton, to inclose such parts of the waste land of the forest as were within their several manors, and by virtue of the custom

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of such manors, to dig up and destroy the pasture, turf, and other herbage growing thereon; and they submitted that no such right as the plaintiffs claimed existed under the forest laws, and that such right could not be claimed as appendant or appurtenant to any lands or tenements, and could not be claimed either by prescription or by custom, and was contrary to the common law, and bad. They alleged that the forest laws (assuming such laws to exist, which they did not admit,) did not forbid inclosures of the waste lands within the forest, wherever a custom existed, as in their manors, for the lord to grant the waste lands with the consent of the homage; and that such lord had, under the Statute of Merton, the right of approving any part of the wastes, and that all the inclosures made by them or their predecessors in title of any part of the wastes had been lawfully and properly made, either with the consent of the homage, or under the Statute of Merton, or with license from the Crown during the time such license was required. Further, that the cattle belonging to the owners of lands within the precincts of each particular manor, were marked by the reeve of each manor, so that the cattle of the owners of lands within the precincts of the several manors could be distinguished, and so that there should not be a surcharge of the waste lands of such several manors, and so that the respective owners of such cattle might be enabled to distinguish them on the occasion of the wastes of the several manors within the forest being cleared of cattle in the fence month.

Manisty, Q.C., Joshua Williams, Q.C., Fry, Q.C., and W. L. Fisher, for the plaintiffs.—The right claimed on the part of the plaintiffs is for the owners and occupiers of lands within the ambit of Epping Forest, under certain regulations, to turn their cattle commonable in the forest, on to any part of the great waste of the forest. This right is not the ordinary manorial right of common, as between the lord and the tenant, for we find that in numerous instances, extending over a long period of time, the occupiers of tenements in manor A took their cattle to good feeding in manor B. Some of the parishes within the forest are very large, and include several manors, and many of those manors have no waste at all within them; nevertheless, being within the forest, the inhabitants claimed and exercised the right to turn their cattle on to the waste of the forest. Then there is another notable fact, that if part of the manor, or part of the parish, was outside the forest, that part had no right of common. It will appear from the evidence that it was the duty of the reeve of each parish to mark all the beasts that were brought to him from any part of the parish, entirely disregarding the manor, and that the mark was a passport to any part of the waste of the forest. The sale of the Crown's rights over three of the manors, to which the defendants Glasse and Collyer-Bristowe refer in their answer, could not affect the rights of the commoners. (*Barrington's Case*, 8 Rep. 131, b.) In *Lake v. Plaston* (10 Ex. 196), which is also referred to in their answer, and upon which the defendants may possibly rely in support of their claim to approve under the Statute of Merton, the only point decided was, that where no deer had been turned on the waste for upwards of twenty years, the right of the Crown to turn deer on the waste did not form an element for the consideration of the jury on the

question of sufficiency of common. In *Boulcott v. Winmill* (2 Camp. 261), the only question was as between the tenants and the lord of the manor; no question was raised as to the right over the whole waste of the forest. The evidence clearly shows that from time immemorial cattle marked by a reeve and turned out in a parish, wandered all over the waste; they might be turned on to the waste outside the parish. This is not the ordinary right of common of vicinage, which is the subject of the right of inclosure. In order to have common of vicinage there must be two townships or manors, having separate wastes adjoining each other.

Tyrringham's case, 4 Rep. 386;
Bromfield v. Kirker, 11 Mod. 72;
Vin. Ab. Tit., Common, K.;
Jones v. Robin, 10 Q. B., N. S., 620;
Smith v. Baynard, 3 Keble, 388.

Not only must the wastes be adjoining, but the rights must be reciprocal: (*Clark v. Tinker*, 10 Q. B., N. S., 604.) Again, the extent to which each may common is measured by the extent of their own common: that is to say, if there is a large common adjoining a small common, those who have the right of common on the small common can only put on so many cattle as their common will hold.

Corbet's case, 7 Rep. 5;
Pritchard v. Powell, 10 Q. B., N. S., 589.

In answer to the claim of the lords to approve under the Statute of Merton, we say that it is necessary they should prove that sufficient common is left for the commoners, which they have not done: (*Betts v. Thompson*, 25 L. T. Rep. N. S. 363; L. Rep. 6 Ch. 732.) It is said that in some of the manors there is a custom to inclose by the mere will of the lord, and in others with the consent of the homage; but no grant by copy of court roll can affect an outsider who has a right of common.

1 Walk. Copyholds, p. 45;
Barrington's case (sup.);
2 Scriven on Copyholds, 3rd edit., p. 747;
Budger v. Ford, 3 B. & Ald. 153;
Arlett v. Ellis, 3 B. & C. 346;
Hickman v. Thorny, Freeman, K. B. 209.

The sale of the forestal rights of the Crown cannot affect the rights of the commoners.

Southgate, Q.C., Matthews, Q.C., Nalder and Cowie, for the defendants Glasse, Collyer-Bristowe, Sotheby and Lake.—The right claimed by the plaintiffs cannot be had by mere custom; if they have such right it must have been by an express grant, or by prescription, which implies a grant, and we submit that the ancient documents show that there was no such grant, and no such prescription, in favour of the owners and occupiers of ancient tenements in this forest. This claim in its origin was a right of common over the King's land, and of common by reason of vicinage as between the adjoining manors, and the mere fact that even on numerous occasions cattle strayed from the absence of fences, on to other pastures beyond those districts, will not create a right which will support this suit. A grant cannot be presumed, as the extent of the forest has varied from time to time, and there cannot be a grant over the varying wastes of a varying forest. If the right is established by user, it might be presumed to be not an ordinary common appurtenant, but a common appurtenant so far as regards the parish, with a common of vicinage over the rest of

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the wastes of the forest, and there are several ancient documents to support this theory. They referred to

Livett v. Wilson, 3 Bing. 115;
Attorney-General v. Chambers, 4 De G. & J. 65;
Bromfield v. Kirber, (sup.);
Boulcott v. Winmill (sup.).

Chapman Barber, for the defendant Humphreys, Lord of the Manor of West Ham, disclaimed at the Bar, and was dismissed with costs.

Montague Cookson, for the defendant Pardoe, Lord of the Manor of Leyton Grange.

Kekewich, for the defendant Maynard, Lady of the Manor of Walthamstow Toney; and for the defendant Heathcote, Lord of the Manor of Chingford Earls.

Cecil Russell, for the defendant Warner, Lord of the Manor of Higham Benstead.

Robinson, for the defendant Mills, Lord of the Manor of Chigwell and West Hatch.

Humphrey, for the defendant Maitland, Lord of the Manor of Loughton.

T. C. Wright, for the defendant Hall-Dare, Lord of the Manor of Theydon Bois.

Freeling, for the defendant Wythes, Lord of the Manor of Epping Bury; and for the defendant Colegrave, Lord of the Manor of Cann Hall.

Dickins, for the defendant Sir Hereward Wake, Lord of the Manor of Waltham Holy Cross.

Elgby, for the defendant Hodgson, Lady of the Manor of Chingford St. Paul.

Iangworthy, for the defendant Williams.

Attorney-General and W. W. Karlake, for the Crown, declined to take any part in the argument, and submitted to pay their own costs.

Sir G. JESSEL.—The case has occupied a very long time. I do not say a longer time than it ought to have occupied, having regard to the enormous mass of materials which was put into the hands of the counsel who had to argue the case. But I lament the enormous sum of money which must have been expended in costs, because I cannot help feeling—so far as I am concerned, at all events—that a comparatively small portion of those costs, properly expended, would have been sufficient to have enabled me to decide the issues in the case. To my mind the matter is very plain and very clear. It may appear to other minds quite as plain and quite as clear the other way. But the issues in the case appear to me very simple. The nature of the proof required to establish the claim of the plaintiffs appears to me to be also a kind of proof well known and long used in our courts—both of law and equity. The case of the plaintiffs is one, if I may say so, of extreme simplicity. I shall not say another word upon the pleadings as to whether that case is fairly raised by these pleadings. The plaintiffs allege that in a certain district of country, comprising originally some 60,000 acres, there was a great waste. Whether the whole of the great waste was at any time perfectly continuous is not clear, but I imagine that it was; at all events, I think it is pretty clear that the whole of the great waste in Epping was continuous. Whether the waste in Hainault was, or was not, continuous, is not proved either way to my satisfaction; in fact, the investigation as to Hainault has not been pursued to the same extent, or with the same minuteness, as it has been as regards Epping. I am assuming now that to be known which is familiar to everyone in the cause. By Epping, I

mean the remaining forest of Epping; by Hainault I mean the disafforested forest of Hainault. The two together were formerly sometimes called the Forest of Essex, sometimes the Forest of Waltham, and sometimes Epping Forest. Hainault has been put out of the case, because the wastes of Hainault have been enclosed, and no longer form the subject of litigation. The only subjects of the present litigation are the wastes of the Forest of Epping. These wastes at the present moment consist of a very large tract—nearly 4000 acres, which in the course of the argument has been called the Great Waste, and some detached portions. The larger of the detached portions, I feel no doubt, were formerly connected with, and formed part of, the Great Waste. I think it not improbable that the smaller were also, but really nothing material turns upon it. The plaintiffs say—putting it shortly—that the owners and occupiers of land within this forest are entitled to rights of common appurtenant, for certain commonable beasts, *levant and couchant* upon their lands, over the wastes of the forest, that is, over this tract of country which was 6000 acres or thereabouts before the inclosures, and is now about 4000 acres. They claim in this suit on behalf of themselves and all others the owners of land within the forest to establish this right of common. They say that it is the ordinary common appurtenant to their land. It is limited in various ways: it is limited in the first instance to two kinds of beasts, which were called in the papers neat beasts and horses; it is limited also by the forestal customs, one of which was that during a month of the year called the fence month, no commoning was allowed; it was also limited in another way—that being a royal forest, the king had a right to put his deer in the forest, and of course he would not allow the commoners to prevent the feeding of the deer. But subject to these limitations it was an ordinary right of common appurtenant. That is what they claim. Now how is such a claim to be made out? It may be made out by calling old persons who can prove that for sixty years and upwards this right as alleged has been exercised. The plaintiffs accordingly called a very great number of witnesses, who have proved to my satisfaction, first, that during the whole period there was a division of this forest or tract of country into parishes or villages. When I say “parishes,” that is not quite accurate, because in some cases only a portion of the parish was within the forest. Still I use the term “parishes” to describe the parochial limits. They have proved, secondly, that for each of these parishes there was a forest officer appointed, who was called a “reeve.” He was nominated by the inhabitants of the parish I suppose, although it is not clearly proved in every case, in vestry assembled, and he was sworn in at the Forest Court. This reeve had a duty to perform of marking the beasts which were allowed to go on the common, and as a matter of fact it appears that there was a reeve for every parish, except in one instance, in which the parish, being a very large one, was divided into separate hamlets for the relief of the poor, and in that case there seems to have been a reeve for each hamlet. It is hardly worth mentioning as it is so trivial an exception. In fact there was a reeve for each parochial division, or each division for the relief of the poor. This mark was a letter with a crown,

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and was called the forest mark, and as far as I gather from the evidence, although there is some difficulty about one hamlet or portion of a parish called West Ham, the letters seem to have been in the order of the alphabet—A, B, C, D, E, and so on—a complete series of letters, and each reeve marked the cattle of the inhabitants entitled to common, the measure of the right of common being levancy and couchancy, until an attempt—which I shall advert to presently—was made in the last century to alter it, and the beasts when marked were turned out. One of the great contests in the case has been, where were they turned out? My opinion, upon a careful consideration of the evidence in the case is, that they were turned out wherever the owners pleased. In fact, it is proved that they were turned out anywhere in the parish, or pretty well anywhere in the neighbourhood of the parish. The turning out was not confined to their particular parish. I can find very few instances of turning out beyond the neighbouring parish, but the reason is obvious, and has been stated by more than one witness that, as a rule, the people turned out near their own homes when the cattle were marked at or near their homes, or near the marking place when the cattle were marked at the marking place—the reeve having a custom of attending at a certain marking place for the parish at certain stated times of the year. When I say a “custom,” it seems to have been in pursuance of orders made by the Forest Court to that effect. Upon the result of the whole evidence I am satisfied that the turning out was not restricted to the particular parish, and I am also satisfied that occasionally, although the general rule was what I have stated, persons did drive their cattle to a distance for a particular reason—with the view of obtaining better feed for them—outside the limits of the parish where they were marked. In addition to the evidence of living persons, there is also this to be said—that there are a series of records of ancient claims, dating upwards of two centuries ago, and a series of records claiming the right to turn out on the wastes of the forest,—that is, treating the wastes of the forest as an entire thing, as far as commonable rights were concerned, showing that this notion of being entitled to a right of common over the waste of the forest is not a new notion, it is not a new idea, but it is an old idea which was entertained more than two centuries ago. With this great body of evidence, and under these circumstances, what am I to consider proved? First of all, what is this thing called? Everybody knew it as the Forest right, so the waste was called “Forest Waste,” or “The Forest,” or sometimes “The Forest Wastes” in the plural. That is the name by which this tract of country was known. Is there such a thing as any other name? When I turn to the portions of the wastes in the parishes, I find them described either as “The Forest,” or as “The Forest” with the name of the parish added; for instance, the waste in Walthamstow was sometimes called the Walthamstow Forest. They never called it the Common of the Parish of Walthamstow, or the Parish Common. Sometimes it was called a portion, or part, of the forest waste in the parish. I cannot find a trace anywhere of there being a parish common. Therefore we have that kind of identity of the district in question which shows it for this purpose (that

is, for the purpose of common) to be one waste. In fact the only thing against its being one waste is the fact of the soil being in the different lords of the manors, within the ambit of which, of course, the different portions of the “Great Waste” lie. Now what more do you want to prove a right of common? Nobody in this cause has contended that you want more. I will examine presently the various defences, but supposing I am right in the conclusion I have drawn from the evidence, I do not find that anybody really contests that that will prove a right of common, subject to the arguments I have heard on the law, which I shall call attention to presently. The great point of contest, as I said before, and which was thought by the defendant’s counsel to be the most material point, was that the turning out was not beyond the parish. Upon that I have given my opinion, but I must say that I am by no means satisfied that I should not have arrived at the same conclusion if there had been no evidence upon the subject, because there is a remarkable absence of evidence the other way. If it had been true that the right to turn out was confined to the ambit of the parish we should have found—at least I should have expected to have found—some traces of prohibition of turning out beyond. It appears certainly that until within quite a recent period the Reeves were in the habit of impounding cattle improperly on the waste; and it appears in evidence that they did impound them for two causes—one was for straying in the lanes or on to inclosed lands, and the other was for not being marked. I know that in very modern times the marking has fallen very much into desuetude, and all the forest customs and usages have almost all ceased to be put in force, but that was the practice whilst they were in force. You have not a trace—I do not say that there is not a suggestion, for there is in the evidence—of any beast having been impounded for being turned out outside the parish. Assertions were made by one or two witnesses, but when the matter came to be looked into it is clear that there was no receivable—I will not say reliable, but even decently receivable—testimony to any such effect. It is very remarkable, if there had been such a restriction of the right of turning out, that there is no such evidence, and I am satisfied that there was no such restriction. If this is so, and if they prove that all the people in all the parishes did turn out their beasts in that way under the claims of levancy and couchancy, there must be some quantity of proof sufficient, and when they called eighty odd witnesses I think there was proof sufficient to establish the right of common. There are then various defences which I will take seriatim. I will first of all take the defences in the answers, and the best answer to take is the answer of Glasse and others. I think it gives it in detail, and shows what the defence really is. Now, the answer of Glasse and others says this: “We believe and submit that the forest laws (assuming such laws to exist, which we do not admit) do not forbid inclosures of the waste lands within the forest wherever a custom exists in a manor within the forest, as it does in our said manors, for the lord of such manor to grant the waste lands with the consent of the homage; and, further, that such lord has, under the Statute of Merton, the right of approving any part of the said wastes, and that manors

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which happen to be within the said forest are not exempted from the last mentioned statute." Then they say that the right is established, and "we say that all the inclosures made by us, or by our predecessors in title of any part of the waste of the said several manors of which we are lords, were and have been lawfully and properly made, either with the consent of the homage or under the Statute of Merton, or with licence from the Crown, during the time such license was required and obtainable." I may mention that the bill, in addition to seeking to establish the right of common and to restrain inclosures for the future, also seeks to cause to be thrown down by way of mandatory injunction certain fences which have been put up in times past, and, as limited by the demand of the plaintiffs' counsel, within twenty years before the filing of the bill. Then they deny the title of the plaintiffs, and they say "We believe that the cattle belonging to the owners of lands within the precincts of each particular manor have been and are marked by the reeve of each manor, so that the cattle of the owners of land within the precincts of the several manors can be distinguished, and so that the respective owners of such cattle may be enabled to distinguish them on the occasion of the wastes of the said several manors within the forest being cleared of cattle in the fence month." Then they say that the right they claim to be entitled to, either with the consent of the homage or under the provisions of the Statute of Merton, is "to enclose such part of the waste lands of the said forest as are within the several manors of which we are lords as aforesaid, and by virtue of the custom of the manors of which we are lords to dig up and destroy the pasture, turf, and other herbage growing thereon, and we make out our claim as lords of the said manors, and in the manner in this our answer appearing." Without reading more, the substance of the two defences so set up is this: They say that the common belonging to the plaintiffs is what I may call manorial, that is, that the beasts were marked within the precincts of each manor; that the turning out was always within the manor; and that the rights, therefore, were limited to each particular manor, and, of course, as to other wastes, beyond, could not be substantiated as common appurtenant. The second right claimed, as I understand it, is that in spite of the right of the plaintiffs, even if otherwise established, the defendants, as lords of the manors, would have a right to inclose their lands within their own manors, that is, the land of which they were lords, by virtue of some custom of the manor with the consent of the homage. Now, the singular part of the case is this, that the defendants find a great number of persons, some of them occupying respectable positions in society, to swear affidavits, going the whole length of the defence as to the rights being manorial, stating that the beasts were marked always within the manor, and were turned out within the manor. There was a very ready test of it, because in some of the parishes there was more than one manor. Therefore, the point could be very easily tried as a matter of fact. But the remarkable part of the case is that people should be found to swear to that which is certainly untrue, and which, when the witnesses came to be cross examined, was made manifestly untrue, because many of them departed from what they said, and admitted that the turning out was not

confined to the manor, and that it at least extended to the parish. To use a familiar phrase, the whole of this part of the case broke down, and so utterly and thoroughly did it break down that the counsel for the defendants, whose lot it was to comment upon the evidence, said that he abandoned that contention. So much for that part of the case. The second case made was that they had a right to inclose independently of the plaintiffs' right. They produced manor rolls, which show that for a very long period of time these lords had granted small bits of waste to be held as copyhold; that is, by copy of court roll at the will of the lord, and, as a general rule, that had been done with the licence of the Forest Court. But beyond that, they show nothing, except as regards recent inclosures. When it came to the argument, the leading counsel for the defendants said at once that they did not contend for anything of that sort. They abandoned that also. They could not allege that if the right of the plaintiffs were made out, any such manorial custom (which at the utmost amounts to this, that the grant of waste could be made either under the Statute of Merton or the common law or custom in some shape or another, not interfering with the right of common) would entitle them to inclose the whole of the common, or the greater part of the common, so as to abridge the rights of the commoners, provided the commoners established their general right. Therefore, the two defences taken by the answer were abandoned by the counsel when they came to argue the case. I do not remember at the present moment a case where the defence, in carefully prepared answers, was abandoned, and a new line of argument was taken up, in which that line of argument succeeded, and certainly this case will not be a precedent for any such proceeding. Passing from the defences in the answer, which I might say also traverses the title of the plaintiffs, I will now go to the defences in argument which were put forward by the counsel for the defendants. The first defence was this: It was said, assuming you are satisfied from the parol evidence, strengthened and corroborated to a certain extent by the documentary evidence on which the plaintiffs rely, that this right of common is established, still, being a right claimed by prescription, it can be defeated by showing the origin of the right, and that it is not in accordance with the right claimed. That, no doubt, is perfectly sound law; that, put in other words, if you show user for a certain period of time, sixty years and upwards, which proves immemorial user, the law presumes a grant in accordance with that user, but the person over whose soil the user is proved to have been exercised can say, I can show by documentary evidence what the origin of this user was, and that it is not in accordance with the right claimed. It was said that that could be shown from documents in evidence. The first defence taken in argument by Mr. Southgate was this: he said, when you come to look at the documents you will see that the only right granted was, not a right over this waste of the forest, but a right over that portion of the waste of the forest which belonged to the King; that it was in fact simply a grant by the Crown of a right of common over its own waste. I must say that, having looked at every document to which I was referred, and when I say I have looked at them, I mean having read them three or four times over, I cannot find a single document to

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which that observation can be fairly applied. Every one of the documents either speaks of "the wastes of the forest" or "the wastes and commonable places of the forest," or, in some cases (there is one remarkable case I am thinking of at the present time), "as well in the King's soil as in the soil of other lords;" but those words are not necessary. Other documents speak of "all the wastes of the forest." But it appears to me that I am bound to construe these documents, which consist of ancient claims, beginning at a very early date, the first of them being early in the fifteenth century, and the bulk of them in 1630 and 1670, in their literal sense, and I have not a shadow of a doubt that "all the wastes of the forest," and "the wastes of the forest," and "the wastes and commonable places of the forest" mean exactly what the words import, that is, the entire waste of the forest. I may mention that these documents, to a great extent are claims of the lords of the manors, the former owners of the very manors of which the present defendants are lords, and singularly enough in 1630, with the exception of Loughton, every lord of a manor in Epping claims for himself and his tenants this very right of common for commonable cattle *levant and couchant* upon their lands over the wastes of the forest, so that the lord of the very same manor claims it who now disputes the rights of the plaintiffs. That disposes of the first defence. The second defence which Mr. Southgate brought forward is this. He said: "If you have a grant, that is a presumed grant (for I do not suppose that anybody imagines that the parchment actually existed), it being one of the many fictions of the law to enable courts of justice to give effect to long user, such effect having been given now in many instances by Act of Parliament, it being impossible to give effect to them without the presumption of a grant, because the law said you could not have a custom to take a profit *à prendre*;" the second ground was, that the extent of the forest had varied from time to time; sometimes it has been larger and sometimes it has been smaller, and you cannot have a grant over the varying wastes of a varying forest. Now that is a question of fact. Did it vary? I have come to the conclusion that it did not; that from the time of legal memory to the present time it has not varied at all. In order to prove that it varied, certain ancient records were tendered in evidence. Many of them were very old. The first, I think, is a charter of King John. The charter itself is not in evidence, but an *inspeximus* charter of Queen Elizabeth is in evidence, and it recites that King John had disafforested certain portions of the forest, which are no longer parcel of the forest, and I was told to infer from that, that because King John had disafforested, or said that he had disafforested them, therefore they were once part of the forest. Of course that was not sufficient to prove that they were part of the forest. First of all, they may have been illegally added to the forest; and then the King would not admit that he had illegally added, and then released them from the forest, and the way he would put it would be that he had disafforested them. The next thing was the perambulation of Henry the Third, which certainly, if correct, showed that the forest was a very great deal larger than it is now. It included a vast tract of land in the forest, indeed almost the entirety of the county of

Essex. The next thing which I think was put in evidence was the perambulation of Edward the First, in which it appeared—if that perambulation were correct—that the forest was very much larger, and that it included the large tract of land running down to the Thames—the towns, or townships, of Havering, Barking, Dagenham, and a very large quantity of land in the neighbourhood of the Thames. Then there was a grant by Edward the Second to his Consort of the Forest of Havering, which is recited in the nomination of justices to hold courts for that forest. Then there was, in addition to that, a disafforesting in 1327 of the Hundred of Tendring, which appears from that disafforestation to have been part of the forest. If there were nothing else, all that evidence would certainly go some length to show that the forest, although it never was smaller, was at one time very much larger; but in the reign of King James the First attempts were made to enlarge, not only this forest, but pretty well all the Royal forests, and those attempts were supported by the production of some of the documents which have been brought forward on the present occasion. The result was that in the very first session of the Long Parliament, an Act was passed regarding these very forests, and fixing their boundaries, but doing it in a very peculiar way, because the Act of Parliament did not merely say their boundaries for the future shall be so-and-so, but it said their boundaries from all time shall have been so and so, and it expressly made void all perambulations and documents which either showed, or tended to show, that the boundaries of the forest ever had been different to what they were in the twentieth year of King James I.; so that, even supposing these documents would otherwise have been receivable in evidence, the effect of the Act of Parliament is simply to make them void. The Act of Parliament further provided that a commission should be issued to ascertain what the boundaries were in the twentieth year of King James I., and that those boundaries should be deemed to be and to have been from that time the boundaries of the forest. That commission was issued, and the return made, and it is not disputed that those boundaries are the boundaries at the present day—that is, of course, adding to the present forest of Epping the forest of Hainault, which has recently been disafforested. So that, looking to the terms of the Act of Parliament, I am bound to hold, and I do hold, that the boundaries of the forest have never varied. The section I refer to more particularly is the 4th section of that Act. That disposes of the second argument which was urged upon me. The third defence which was suggested was that the rights of the commoners were limited to the user whilst the forest laws were in force, and ceased when the lands were disafforested. It seems that a portion of the land in the forest of Epping has been disafforested, that is, the Crown has sold its forestal rights under the terms of an Act of Parliament, the result of which appears to me to be that the purchaser of the forestal rights, being the owner of the lands over which such rights extended, did not become the owner of the forest in any sense, but was simply entitled to say that, so far as his land was concerned, the forestal rights of the Crown were extinct. There are no words in the Act of Parliament to affect the rights of the commoners, if such rights existed.

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Therefore, I cannot conceive how the selling of those rights, and the extinguishing of them destroyed their rights, unless indeed it is suggested that inasmuch as it is alleged in the bill, in a quotation from Manwood, that the original reason for granting these extensive rights of common was to commute the burthens of the forest laws, that if the burthens were released the grant was destroyed at the same time. Of course, that is utterly inadmissible. If a man grants an acre of land in consideration of the grantee covenanting to perform certain services, and if some years afterwards the grantor chooses to release the services, that does not enable him to take back the land from the grantee. Nor would it enable him to take back a right of common. I cannot imagine any way in which this right of common once acquired—as the law presumes it to have been—can be affected by the fact of the Crown releasing, not to the commouer, but to somebody else, the forestal rights over a portion of the waste. I think, therefore, that third defence is inadmissible. Now, the next defence was one which took a very long time in discussion, and to which a great deal of the evidence was addressed. It was said that the common right established must be presumed from the user (for, after all, the grant is presumed from the user) to be, not an ordinary common appurtenant, but a common appurtenant so far as regarded the parish (the manorial theory was given up), with a common of vicinage over the rest of the wastes of the forest; and a claim by the lord of the manor of Loughton, and claims by some tenants in the Forest of Epping, and certain claims in the Forest of Hainault in 1630 and 1670 were referred to, to show that the right was claimed in a similar way, which it certainly was in the document so referred to. The difficulties in the way of that defence are manifold, and in my opinion utterly insuperable. In order to have common of vicinage, you must have two vill, or lordships, or manors, with separate commons adjoining. In the present case I cannot find that there was any parish common. The first thing to be established is the separate commons, to start with. There was a part of the wastes in various parishes, but, as I said before, there has been no parish common—there is no common belonging to the parish—you have no two separate commons at all. The very first beginning of common of vicinage fails you. When you have two manors with commons that is intelligible enough. If the manorial theory could have been maintained by the evidence, a great deal, perhaps, might have been made of it. But actually the very foundation does not exist. There are, as I said before, parts of the forest waste in each of the different parishes, but there is no such thing as a parish common from beginning to end. The next thing is this. There are twenty parishes (I have not counted them, but about that number), and it is said that you can have common of vicinage between those twenty parishes and twenty separate commons, if they adjoin each other. I heard a very elaborate argument from Mr. Matthews to show how they could adjoin each other. The answer is, look at the map, and you will see that each parish, as a rule, had its common on one side of it, and does not adjoin more than one, or two at the outside, of the other commons. There is a parish or vill with waste, and then there is a parish on one

side, and another parish on the other. Occasionally there is a parish below, but the end parish, of course, only adjoins one other. It was said that that was possibly a case of common of vicinage. I do not think it is. In the first place, I understand common of vicinage to be confined to two. I read upon that subject a passage from a well-known work, Blackstone's Commentaries, which defines common, and it seems to me, as far as I understand, rightly defines common. He says at page 33, "*Common pur cause de vicinage* is, where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with one another; the beasts of the one stray naturally into the other's fields without any molestation from either." That accords with Coke's statement of the doctrine, and, so far as I know, with every authority on the subject. I was pressed very much with a judgment, which I conceive is not very well reported, of Lord Chief Justice Holt in the case of *Bromfield v. Kirber*, in 11 Modern Reports, which has been so often cited during the argument. As I understand it, the Lord Chief Justice there means to affirm that doctrine. He says you cannot go into a third common. At all events, I hold that to be the law, and it is so stated, as far as I am aware, in every book on the subject, although there is a mistake in Comyn's Digest, who puts in the words "or more," which seem to be copied into some of the text books. It appears to me that that is the true state of the law. There was great inconvenience about this common of vicinage, and I conceive that there is no reason whatever for extending it. Then again, there is another doctrine of common of vicinage. No doubt it sprang from a very old case in Dyer, upon which one judge said one thing and another judge said another; but the dictum of the one judge was adopted, and the dictum of the other judge was repudiated by the great text writers since; that is, that if you have three vill, each of which has a common A., B., and C., and vill B. lies between A. and C., vill B. may intercommon either with A. or C., but that A cannot intercommon with C. If that is the law, as I apprehend it is, it is quite clear that the end parish in this case could by no means intercommon with the parish at the other end. That, again, is a fatal objection to its being a common *pur cause de vicinage*. But that is not all. In common *pur cause de vicinage*, you can only turn out on your own common, and stray on to the adjoining common. That was the reason why there was such a contest about the turning out outside the parish, because, when the defendants failed as regards the manor, they set up, contrary to their answer, that it was an intercommoning by parishes, and when they came to it, of course they were anxious to show that there was no turning out outside the parish. I have already said that I think there was, and that would be a fatal objection also to common of vicinage. There is another. In common of vicinage there is a limitation of the right of this sort; neither party can put on the common—that is, on the two commons—more beasts than his own common will maintain, so that, if there were a vill with a large common, and a vill with a small common, the owner of land in the vill with a small common could not put on the entire common more beasts than the small common could maintain. Now in the present case there is not a trace of any such

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limitation. Some of the parishes had very large commons, other parishes had very small commons, according to the theory of the defendants, but there is not a trace, or a suggestion, or an idea, of any such limitation. On the contrary, in the course of the last century the forest court attempted to regulate the number of beasts to be put on the common, and it appeared at that time that the common was surcharged, that is, that there were people who had the right of common, and who were exercising the right by putting on more beasts than the common could maintain. The forest courts (and I use this only for the purpose of showing that such an idea as regulating the common in the way that common of vicinage required did not enter into anybody's head) first of all gave to poor people their full rights, and said that no one else should put on more than one horse or two cows for every 4l. rental. I am speaking from memory, but I think that is so. The object of it was simply to regulate the right of common, and it was regulated equally all round without the slightest regard to the size of the supposed parish commons. I think when you look into all these circumstances together, notwithstanding that some of those documents say that it was common of vicinage, it is a case in which there can be no common of vicinage. If common there be, it must be the ordinary common appurtenant and nothing else. As I said, before, that is the point upon which the greatest amount of time and argument was expended, but it is a mere attempt to set up an entirely new case contrary to the answers and to the evidence, as far as the defendants are concerned, that it was manorial common, in order to make out a new kind of common of vicinage. Then I come to another point of very great importance. It is said, not only was the turning out limited, but the lords inclosed against the commoners, and although it was not pretended that the right of inclosure was a paramount right, it was said, very fairly, that it afforded evidence of the non-existence of this right. Now there certainly was some evidence that the rights had been forgotten, or not known, for when Hainault was inclosed, although a very singular right of common was claimed, this sort of right was not claimed, that is, a right extending over the whole waste of Hainault. As regards, however, the actual inclosures, they are very carefully summarised in the table, which I have had furnished to me. Now this table is a most singular one. It shows that the number of inclosures before the year 1800 was great, that is, great in the whole, but that the quantity of land inclosed on each inclosure was exceedingly small, so small as to be utterly insignificant. One cannot get a better idea of that than by taking the first in the list. This is the manor of Epping Bury. The rolls begin in 1460. The total number of inclosures before 1600 was seventeen, and the total acreage 6a. 1r.—that is, a third of an acre each; between 1600 and 1700, that is, another hundred years, there were nine inclosures, amounting to 3a. 0r. 4p., again about the third of an acre; between 1700 and 1800 there were twenty-eight inclosures, amounting to 14a. 2r. 33p., being about half an acre each. In fact they are all equally remarkable. I will now take Woodford. In Woodford the rolls began in 1581. There are two inclosures between 1600 and 1700, amounting to

0a. 1r. 20p., and there are two between 1700 and 1800, making together 0a. 11r. 11p. Then between 1800 and 1851 there are a great number of inclosures; they are put down as 156, amounting altogether to 86 acres. Then we have the recent inclosures since the 21st Aug. 1851—being within the period of twenty years—amounting to 195a. 0r. 31p. As to the manor of Loughton, the rolls begin in 1570. There are four inclosures between 1600 and 1700, containing altogether 16 perches. There are twelve inclosures in the next century, containing altogether 1a. 3r. 20p. There are fifty-five inclosures between 1850 and 1851, containing 13 acres, and then we get, since 1851, 130 inclosures, containing 1227 acres. In fact, that is the character throughout. All the ancient inclosures, I think without exception, were of very small extent; the total acreage in each century was very small. They were almost always grants by copy of court roll, and generally although not quite in every instance, with the licence of the Forest Court. They appear to have been small roadside encroachments, or little bits of waste taken by a cottager who built a cottage and then asked for a grant, just the sort of thing which nobody would care to interfere with, and exactly the sort of thing which would probably be authorised by the statute of Merton or the common law. That is an encroachment which would not interfere with the right of common exercised by the remainder of the commoners—in fact, the extent is so small, that one can hardly imagine these things being quarrelled with. They do not appear to me to afford any evidence whatever against the right now claimed, when you consider their nature, their extent, and the circumstances under which they were made. It is not pretended that any such evidence can be obtained from the inclosures within twenty or thirty years. One cannot help seeing that these inclosures began after the decision of the case, which has been so often referred to of *Boulcott v. Wilmill*, under the notion that if you bought up the rights of the Crown in the land so disafforested, there was an end to whatever right of common there had previously existed, and consequently the lord in right of his soil, with the consent of his copyholders, who had other rights of common besides their right of pasturage, might inclose at his will and pleasure, and that I think has been the origin of the inclosures which have given rise to this suit. I believe I have now noticed every material defence. If my opinion is required to be known elsewhere upon any detail of the case it will not be difficult to discover it from what I have said during the argument, and for that reason I do not think it necessary further to prolong my judgment than to consider the very important question of costs. Now the rule which I have always followed, and which I consider the right rule in cases of adverse litigation, is that the cost of the litigation should be borne by the unsuccessful party. I have always been of opinion that that is the rule which sound justice requires, and that in order to exempt any person from the payment of costs, being an unsuccessful party in a litigation, a special case must be made for such exemption. In the present case, so far from finding any such special ground, I must say that I find additional grounds for making the defendant's pay the costs. There are, first of all, those defendants who have actually made large in-

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closures. If I am right in the view I have taken of the law, they have taken other persons' property without their consent, and have appropriated it to their own use. They will retain, under the exceptions proposed in the decree of land covered with buildings, and of land inclosed more than twenty years ago, considerable portions of that property which they have illegally acquired. It does not appear to me that litigants in that position are entitled to any special consideration as to costs. But I go further. As regards the bulk of the defendants, they have been parties to a litigation in which they have endeavoured to support their title by a vast bulk of false evidence. Of course, if they had succeeded, I should not have allowed them the costs of that evidence. But considering that that evidence must, I think, be wholly discredited, and that it was put in after they had seen the plaintiff's evidence, which ought to have made them exercise great care and caution. I cannot make them otherwise than responsible for the acts of their agents who got up that evidence without sufficient care, and who, I think, could have avoided raising the issue on which they fail if they had exercised more diligence and more discrimination. That is an additional reason for making all the parties who used that evidence pay the costs. Then as regards some of the others who really did neither the one nor the other, there are one or two who have not inclosed, and there are one or two who were not parties to this evidence. I am still unable to say that persons who claim adversely rights of this kind in a court of justice, and fail in their contention, should not indemnify their antagonists against the costs of that contention. Though the same circumstances of aggravation may not exist in their case, I cannot find any ground for exempting them from the usual penalty that attends unsuccessful litigants, and although I made a suggestion that, considering the great wealth and position of the actual plaintiffs—that is, the Corporation of London, although they sue as Commissioners of Sewers—they might, if they thought fit, waive those costs, as against these defendants; yet the Corporation of London having considered that suggestion, and not choosing to waive them, I am bound to give them what I consider their strict rights, that is, the costs of the suit against all the defendants, except, of course, the Attorney-General and the defendant Humphreys, whom I have already stated should not pay the costs.

Nov. 24.—The minutes of the decree were finally settled as follows:—

Defendant, Thomas Humphreys, having disclaimed at the bar, dismiss bill against defendant Thomas Humphreys with costs to be paid by plaintiffs.

Declare that the plaintiffs and the other owners and occupiers of lands and tenements lying within that part of the forest of Essex, in the county of Essex, now known by the name of Epping Forest, other than the waste lands of the said Epping Forest, are entitled in right of, and as appurtenant to, their several lands and tenements within the said Epping Forest, to a right of common of pasture upon all the waste lands of the said Epping Forest, for all manner of cattle, that is to say, neat beasts and horses commonable within the forest, levant, and couchant upon their respective lands within the said Epping Forest, according to the assize and customs of the said Epping Forest.

And let the plaintiffs be quieted in the possession and enjoyment of their said rights.

And the plaintiffs (having regard to the provisions of the Epping Forest Act 1871, the Epping Forest Amendment Act 1872, and the Epping Forest Act 1873) by their counsel not asking for any injunction as regards lands which on the 14th Aug. 1871 were actually covered with buildings, or actually inclosed and used as the gardens belonging to, or curtilages of buildings, or as regards lands which were actually inclosed on or before 14th Aug. 1851, declare that the plaintiffs are entitled to an injunction to restrain the defendants respectively, other than the Attorney-General and the defendant, Thomas Humphreys, and their respective servants and agents, from permitting or suffering to be or to remain inclosed or built upon, any of the waste lands of the said Epping Forest other than and except (a) lands which on 14th Aug. 1871 were actually covered with buildings or actually inclosed and used as the gardens belonging to or curtilages of buildings; or (b) lands actually inclosed on or before the 14th Aug. 1851. Enquiry what waste lands of the said Epping Forest in the possession of or belonging to the defendants respectively, other than the Attorney-General and the defendant, Thomas Humphreys, for any and what estate or interest are inclosed or built upon other than and except as aforesaid.

Liberty to apply for an injunction or injunctions in pursuance of the declaration of right hereinbefore mentioned.

Perpetual injunction to restrain the defendants respectively, other than the Attorney-General and the defendant, Thomas Humphreys, and their respective servants, agents, and workmen (1) from building upon any part of the waste lands of the said Epping Forest which have been inclosed since the 14th Aug. 1851, except such parts thereof as were on the 14th Aug. 1871, actually covered with buildings or actually inclosed and used as the gardens belonging to or the curtilages of buildings, and from carrying away or destroying the loam or soil of any part of such waste land except as aforesaid, and from destroying or injuring the pasture, turf, or herbage, being or growing thereon, so as in any manner to prevent, disturb, or interfere with, the exercise by the plaintiffs, or the other persons entitled as aforesaid, or any of them, of their said rights, hereinbefore declared over the said lands when the same shall become uninclosed. (2) From inclosing or building upon any part of the waste lands of the said Epping Forest now uninclosed, or which shall for the time being be uninclosed, and from carrying away or otherwise destroying the loam or soil of the said waste lands now uninclosed, or which shall for the time being be uninclosed, or the pasture, turf, or herbage, being or growing thereon, so as in any manner to prevent, disturb, or interfere with the exercise by the plaintiffs, or the other persons entitled as aforesaid, or any of them, of their said right hereinbefore declared, in and over the waste lands of the said Epping Forest now uninclosed or which shall for the time being be uninclosed. (3) From otherwise preventing, disturbing, or interfering with, the exercise by the plaintiffs or the other persons entitled as aforesaid, or any of them, of their said right in and over the said waste lands of the said Epping Forest now uninclosed or which shall for the time being be uninclosed.

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Adjourn further consideration. Defendants, except the Attorney-General and Thomas Humphreys, to pay costs of suit. General liberty to apply.

Solicitors for plaintiffs: Horne and Hunter, agents to the City Solicitor.

Solicitors for defendants: Collyer - Bristow, Withers and Russell; Cullington and Slaughter; Markby, Wilde and Burra; Beachcroft and Thompson; H. H. Walford; Budd and Sons; Sewell and Edwards; Druce, Sons and Jackson; Tamplin, Taylor and Joseph; Bothamleys and Freeman; Lee, Bolton and Lee; Kingsford and Dorman; Hollingsworth, Tyerman and Son; Solicitor to the Board of Works.

COURT OF COMMON PLEAS.

Reported by ETHELINGTON SMITH and J. M. LELY Esqs.,
Barristers-at-Law.

Nov. 12 and 16, 1874.

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Drury Lane Theatre—Rights of renter to free admission—"Usual audience part" of theatre—Whether stalls are—1 Geo. 4, c. lx. s. 3—Abandonment of statutory right.

The rights of a renter of Drury Lane Theatre to admission thereto are co-extensive with the rights of the public, plus the right to free admission and minus the right to engage places beforehand.

By 1 Geo. 4, c. lx., s. 3, the "new renters" of Drury Lane Theatre, or their assigns, are entitled until the year 1895 "to the free liberty and privileges of admission into the usual audience part of the theatre" between the time of the opening of the doors and the termination of the performance, subject to such regulations as the sub-committee of proprietors shall make for the government and management of the theatre, "provided that such regulations do not affect or abridge the rights of such new renters or their assigns."

Since the passing of 1 Geo. 4, c. lx., a certain part of the then audience part of the theatre was railed off from the rest and converted into "Orchestra Stalls" distinctly numbered, fitted up at extra cost, and having a separate entrance. The right of the new renters to free admission to such stalls had been from time to time disputed, but none of them or of their assigns had ever brought an action to try such right.

The plaintiff, being the assignee of a new renter's share, had entered and occupied a seat in the dress circle, which he afterwards desired to change for a seat in the stalls. He conformed to all the regulations of the theatre respecting such change of seat, except that he refused to pay the fee of 2s. as a consideration for the change, which fee was the customary consideration paid by the public for such change. Persisting in his alleged right to pass free into the stalls, he was ejected from the theatre (without any excess of force) by the servants of the defendant, being the lessee of the theatre, whom he consequently sued in trespass.

Held, upon a special case stated by an arbitrator, that the plaintiff was entitled to judgment, inasmuch as his right to free admission to a seat neither pre-engaged nor occupied in the usual audience part of the theatre had been wrongly disputed.

But held also, that a renter is not entitled to pre-engage any of the seats in the theatre, nor to

occupy a pre-engaged seat, nor a seat in a private box, and that a private box may not be claimed by a combination of renters.

Per Lord Coleridge, C.J., and Brett, J.—It is competent for the lessee for the time being of the theatre at any time to convert the whole theatre into stalls or other seats capable of pre-engagement by the public, without being liable to the renters for thus neutralising their right to free admission.

SPECIAL CASE.

1. This action is brought by the plaintiff to try his right as a new renter of Drury Lane Theatre to admission to the stalls of the theatre as being part of the usual audience part of the theatre within the meaning of 1 Geo. 4, c. lx. s. 3.

2. The plaintiff is a barrister and is one of the new renters of Drury Lane Theatre. The defendant is the lessee and manager of Drury Lane Theatre.

3. [Pleadings made part of case.]

4. The present Drury Lane Theatre was built by subscription under the provisions of three Acts of Parliament, viz.:

50 Geo. 3, c. cxxx., which came into force on the 21st June, 1810.

52 Geo. 3, c. xix., which came into force on the 20th March, 1812.

1 Geo. 4, c. lx., which came into force on the 8th July, 1820.

These Acts form part of this case, and are hereafter for brevity referred to as the first, second, and third Acts respectively.

5. As appears by the preamble of the first Act the Theatre Royal, in Drury Lane, was taken down in the year 1793, and money was raised by subscription for erecting a new theatre which was opened in an unfinished state in the year 1794, and, pending a settlement of the debt and incumbrances attaching to it, was burnt down in 1809.

6. By the first Act certain persons, their successors, and assigns, were united into a company for the purpose of erecting a new theatre, and were incorporated by the name and style of "The Theatre Royal Drury Lane Company of Proprietors."

7. The first Act further authorised the said Company to treat with the persons interested in the theatre for the purchase of their interests, but comprised in sect. 2 a provision that if the Company should not agree with all the persons so interested within the space of two years, the Act should become null and void.

8. By the second Act so much of the first Act as directed that it should become void in case of such non-agreement was repealed, and further provisions were made respecting the proposed new theatre and its management.

9. Sects. 6 to 12 inclusive of the second Act authorised the Company to make terms with the persons called "new renters." Those persons had at some time had claims upon the then Drury Lane Theatre and its site, and it appears by sect. 10 of the second Act that they were entitled under an indenture dated June 14th, 1793, to a rent-charge of 2s. 6d. for every night of a public performance at the theatre. This deed cannot now be found, but from what purports to be a copy of it (without the schedule), produced by the secretary to the company, and also by a recital in what purports to be a copy (but with many blanks) of a deed called the New Renters' deed produced by the solicitor of the company, it appears that in

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addition to the rent-charge of 2s. 6d., the new renters were entitled to free admission on nights of performance. But the first-mentioned copy refers to a schedule as containing the privileges of the renters, and among them the right and privilege of free admission "as there set forth," and there is no copy of the schedule, and there is in neither copy any description of the extent or limits of the privilege of free renters.

[Extract from copy deed of 1819 made part of case (a).]

By sects. 6 and 10 of the second Act, the rights under the said deed of 1793 of such of the new renters as were willing to accept a compensation were commuted for an annuity or rent-charge of 1s. 3d. for each night of performance at the theatre and free admission thereto.

10. By sect. 48 of the second Act the committee of the company were authorised to make bye laws for the management of the theatre not inconsistent with the first and second Acts.

11. By sect. 1 of the third Act the commutation of the rights of the new renters was made compulsory on them.

12. Sect. 3 of the third Act is in the following terms:—

Each of the said several new renters, his executors, administrators, or assigns, or his nominee or person to be annually nominated by each and every of such new renters, or by his executors, &c., shall from time to time, and at all times during the said term of seventy-five years, and one quarter of a year, have and be entitled to the free liberty and privilege of admission into the usual audience part of the said theatre. . . . before the curtain, except in such private boxes as aforesaid [being fourteen in number], on every day and night on which any theatrical or other performance shall be publicly exhibited between the time at which the doors of the said theatre shall be opened for admittance of the public and the termination of such performance, in as full and effectual a manner as the same hath been and is now enjoyed by the said new renters and their assigns: Provided nevertheless, that every person using free admission into the said theatre in pursuance of this Act, or of the said last in part recited act [*the second Act*], or of any agreement or grant heretofore made, given, or granted, shall be subject and liable to such regulations and conditions as the sub-committee of the said company of proprietors shall from time to time deem necessary or make for the government and management of the said theatre, and for the preventing of frauds relative to admission thereto, so that such regulations do not affect or abridge the rights of the said new renters or their assigns as now used and enjoyed, and that all such regulations shall be good and valid, anything to the contrary notwithstanding: Provided always, that no more than one person, in respect of the privileges of free admission so as aforesaid secured or granted by the said last-recited Act [*the second Act*], or this Act, shall in right of any executorship, administration, alienation, or otherwise, be entitled to exercise or enjoy during such acting season the said liberties or privileges of free admission into the said theatre.

Sect. 4 of the third Act is in the following terms:—

From and after the passing of this Act, or so soon as conveniently may be, certificates under the common seal of the said company of proprietors shall be given or issued to each of the said new renters who shall be so entitled to such admission as aforesaid for enabling him to obtain or receive payment of the said nightly rent or sum respectively from the trustees for the time being when the same shall become payable as aforesaid, and to use and exercise such privileges as aforesaid.

(a) By this deed the Drury Lane Theatre Company granted to certain parties or their assigns "full and free license, liberty, and privilege of admission or entrance into the audience part of the theatre."

13. No evidence has been obtained as to the manner in which the privilege of admission had been or was at the time of the passing of the third Act enjoyed by the new renters or their assigns.

14. Drury Lane Theatre as finished and opened under the provisions of the said three Acts contained private boxes, pit, two tiers of boxes, and two galleries. The lower tier of boxes is now ordinarily called the dress circle, and the upper tier of boxes is now ordinarily called the first circle.

15. In September 1843, many years after the opening of the present theatre, Mr. Alfred Bunn, who was then the lessee of the theatre, separated the two rows of seats in the pit nearest to the orchestra from the remaining portion of the pit and converted them into two rows of stalls. The said stalls are approached by a different access from the pit, they were fitted with more expensive and commodious seats than the pit, and each stall had a number, whereas the seats in the pit were not numbered. These distinctions between stalls and pit have been observed ever since.

16. For the first two years after their creation the stalls were let to persons who took them for the season. A few of them which were not taken for the season were let by the night at the rate of half-a-guinea a night to the holders of other stalls for their friends, but they were not let by the night to the general public. The stall-holders at this time were allowed to have keys which admitted them behind the scenes. Ladies never sat in stalls at this time. Evening dress was worn both in the dress circle and in the stalls.

16A. Up to October 1843, the instructions of the lessees to their box-keepers had been to place renters who desired to sit in the dress circle in one of the three back rows of that circle, and not in either of the two front rows, and these instructions were carried out. In that month the lessee found that the renters were becoming discontented. Some of them asked to be allowed to sit in the stalls on payment of the difference in price, but this was refused. The lessee, therefore, to pacify the renters, gave instructions that they should be allowed to sit in any row of the dress circle, and from that time they did so.

16B. Mr. Oliphant, who was associated in the management of the theatre from 1843 to 1846, states that Burgess, who had charge of the registration book in which renters and their nominees signed their names in the manner mentioned hereinafter in the 24th paragraph, and who was not a servant of the lessee, used to tell the renters and nominees on taking their signature, that they were not entitled to sit in either of the first two rows in the dress circle, and after the creation of the stalls, he used to tell them they were not entitled to sit in the stalls. He did this at the request of Mr. Bunn, the lessee, and of Mr. Parsons who used to let the seats to prevent disputes.

17. After two years the stalls which were not taken for the season were let to the general public by the night, and some few years later the number of stalls was increased by a portion of the then existing pit next behind the then existing two rows of stalls being added to the stalls. There now are, and have been for upwards of twenty years, five rows of stalls containing 120 stalls. Besides these about thirty occasional

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stalls can be found by placing chairs at the ends of the rows. All of the stalls are situated on the site of what was previously to the year 1843 a portion of the pit.

18. The defendant on his own benefit night, which is the last night of the season, has been in the habit of adding an additional row to the stalls (taken from the pit) for this night only.

19. A distinction has prevailed between the mode of letting seats in the dress circle and stalls. The seats in the dress circle with the exception of those in the back row are numbered, and up to the closing of the box office in the afternoon of the day of performance, any person can book a place in the dress circle, in which case he receives a voucher containing the number of the seat which he has taken, and that seat is retained for him up to the end of the first act of the first piece. After the theatre is opened for the performance in the evening, a person paying at the doors who wishes for a seat in the dress circle, does not receive a voucher entitling him to any particular seat, but he receives a pass for the dress circle which entitles him to sit in any seat in that circle which may happen to be unlet, or after the first act unoccupied. If he dislikes it, he may change to any other seat which may be unlet or after the first act unoccupied. With respect to the stalls a person who takes a stall, whether before or after the opening of the theatre for the performance, always receives a voucher for a numbered seat. That seat is retained for him the whole evening, whether he comes to occupy it or not, and he is not entitled to sit in any other seat even though it is unlet or unoccupied. Renters have never been allowed to book places before the opening of the theatre for the performance in any part of the theatre without payment.

20. In the first circle the seats have been let in the same manner as in the dress circle. In the pit and galleries none of the seats are numbered, nor can specific seats be taken. The private boxes are let separately and specifically for the night, and are retained all night for the persons who have taken them. Seats cannot be taken in a private box, but the whole box must be taken.

21. The prices of seats in the theatre have for many years been as follows: stalls, 7s.; dress circle, 5s.; first circle, 4s.; balcony, 3s.; pit, 2s.; gallery, 1s.

22. The right of the new "renters" to sit in the stalls without payment has been a matter of contention. It has always been disputed by the lessees or managers, and they have occasionally ejected new "renters" from stalls which they had taken possession of. From time to time, but not often, some new "renter" has claimed the right to sit in the stalls, and threatened legal proceedings to enforce his alleged right. On one occasion, proceedings were actually commenced by a new "renter," but they were abandoned. No legal decision has ever been obtained upon the claim. The lessee and managers have frequently given stalls to new "renters" when asked for them as a favour, though they have refused them as a right.

23. As a general rule, the new "renters" have frequented the dress circle, though sometimes going to the pit and first circle and galleries.

24. According to the practice which has prevailed as long as can be remembered, a person who is a new "renter," or a purchaser of a new

"renter's" nomination for the year, writes his name once for all in a signature book called the "Registration Book," when he wishes to obtain admission to the theatre he writes his name in what is called "the Renters' Book," which is kept during the performance at the free list box in the vestibule of the theatre by a person who is appointed by the committee of "renters," and who is called the free list clerk, because he has charge of the free list book as well as of the "renters'" book; he has also the registration book, for the purpose of comparing the signatures. The new "renter," or nominee, on signing his name on the "renters'" book, receives a card marked "renter," which is a voucher to the servants of the lessee or manager that the bearer is a new "renter." No regulations in writing are proved ever to have been made by the committee or sub-committee of proprietors respecting the admission of new "renters," that the practice stated in this paragraph has prevailed with their sanction. The Registration Book and the "renters'" book are, and have always been returned to the secretary of the sub-committee of proprietors at the termination of the performance, and are retained by him until he hands them to the free list clerk on the next night of performance. Save as mentioned in this paragraph, there is no evidence of any regulation respecting the admission of new "renters" ever having existed.

25. In each of the years 1868, 1871, 1872, and 1873 the defendant sublet Drury Lane Theatre for a few months to Mr. Mapleson, who produced Italian Operas there. Mr. Mapleson on each occasion made important alterations in the audience part of the theatre. He turned the whole of the pit into stalls, and the whole of the dress circle into private boxes, and increased very considerably the prices of admission, the price of a stall being one guinea for a night. The number of stalls under this arrangement is, exclusive of chairs, two hundred and seventy-seven. On each occasion before opening the theatre, Mr. Mapleson called a meeting of the new "renters," and told those who attended that he would reserve for them during that particular operatic season the first row of the stalls and thirty-six seats in the first circle, or as it is called during this operatic season the "dress circle." This proposition was on each occasion accepted as satisfactory by the majority of the "renters" present at the meeting, but it does not appear that they had much choice in the matter, or that Mr. Mapleson would have modified his proposition if they had been dissatisfied. The alterations made by Mr. Mapleson were only temporary, and did not continue after the end of his operatic season, it being part of his contract with the defendant that he should leave the house as he found it. The defendant was no party to the alterations made by Mr. Mapleson. The defendant had nothing to do with Mr. Mapleson's arrangements or management.

26. The plaintiff on the 27th March 1863, purchased a new "renter's" share, numbered 209, and formerly held by one George Hartwell. The transfer to him was registered at the office of the theatre on the 2nd April 1873. A copy of the "renter's" certificate under the seal of the company of proprietors, formerly granted to George Hartwell, and assigned to the plaintiff is annexed to and forms part of this case.

27. The night of 27th March 1873, was a night

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on which theatrical performances were publicly exhibited at the theatre. The plaintiff went to the theatre, signed his name in the "renter's" book at the free list box in the usual manner, and received from the free list clerk a card bearing the word "renter." He proceeded up the staircase leading from the rotunda or hall to the dress circle. Half way up the staircase was the box of the check-taker for the dress circle. The plaintiff gave the card marked "renter" to this dress circle check-taker, and was passed to the dress circle. The dress circle check-taker dropped the card marked "renter" through an opening into a locked box. The plaintiff proceeded into the dress circle, and the box-keeper showed him a vacant seat. This seat was not in a good position, and the plaintiff could not see the whole of the stage from it, but the box-keeper could not give him a better seat in the dress circle. The plaintiff thereupon said, "I will go to the stalls." The box-keeper went back with the plaintiff to the dress circle check-taker on the stairs, and said, "Pass over to the stalls." The check-taker gave the plaintiff a ticket marked "dress circle cross" and said, "take that to the desk in the hall." The plaintiff descended to the hall, and went to the desk in the hall which was occupied by the stall registrar, and gave him the ticket marked "dress circle cross," said to him "I want a stall." The stall registrar said, "where would you like it?" The plaintiff replied that he did not care. The stall registrar then made out a ticket for stall No. 90, and asked the plaintiff for 2s. The plaintiff replied, "I am a renter, and entitled to free admission." The stall registrar said, "I cannot give you admission without payment." The plaintiff said, "I am a renter entitled by Act of Parliament to free admission." The stall registrar replied, "I know nothing about that, I must obey orders." The plaintiff then said, "I must endeavour to get in without a ticket," and went to the entrance of the passage leading from the hall to the stalls. The stall check-taker who was on duty there asked him for his ticket. The plaintiff told him he was a renter. The check-taker said "I cannot help it, I cannot admit anyone without a ticket." The plaintiff said, "Where am I to get a ticket?" The stall check-taker pointed to the desk in the hall. The plaintiff said, "I have just been refused one there." The check-taker said, "I cannot help it." The plaintiff thereupon went back to the stall registrar's desk and said, "Will you give me my ticket?" The stall registrar pushed towards him the ticket marked "dress circle cross," which the plaintiff had previously brought to him. The plaintiff attempted with this ticket to gain admission to the stalls, but was refused admission, and on persisting in endeavouring to proceed along the passage leading from the hall or rotunda to the stalls, he was forcibly expelled by the defendant's servants from this passage, and removed into the hall or rotunda, no unnecessary violence being used. He was not removed from, but left the theatre.

28. The persons mentioned in the previous paragraph, with the exception of the free list clerk, were all servants of the defendant. The stall check-taker refused the plaintiff admission to the stalls because he had not a ticket for a numbered stall. The stall registrar refused to give the plaintiff a ticket because he would not pay 2s. In acting as they did they were obeying the general orders of the defendant.

29. The plaintiff never assented to any arrangement that a renter should pay 2s. in crossing from the dress circle to the stalls.

30. The ticket marked "dress circle cross," which was given by the dress circle check-taker to the plaintiff, and was presented by the plaintiff to the stall registrar, was a similar ticket to that which would have been given by the dress circle check-taker to any person not being a renter who had bought a ticket for the dress circle, and wished after entering the dress circle to change from the dress circle to the stalls. It is contended on behalf of the defendant that the plaintiff, after handing his ticket marked "renter" to the dress circle check-taker and receiving from him a pass to the dress circle, and subsequently a ticket marked "dress circle cross" had lost his identity as a renter, and could only be treated by the stall registrar and the stall check-taker as an ordinary paying member of the public who had paid for a place in the dress circle and wished after entering the dress circle to change to the stalls, and that the plaintiff ought to have gone back to the free list clerk, given up to him the ticket marked "dress circle cross," signed his name a second time in the "renter's" book, procured a fresh ticket marked "renter," and taken that ticket to the stall registrar. But no proof has been given that either by regulation or practice any system of signing the "renter's" book twice in the same evening had ever been recognised or existed; also although the servants of the defendant who ejected the plaintiff did not know the plaintiff personally, they did not eject him because they had any doubt of his being a "renter"; also, the plaintiff was willing to comply with all the regulations of the theatre respecting the admission of "renters," and believed that he had done so, and so far as any satisfactory evidence respecting such regulations has been given, had in fact done so. Mr. Guiver, a witness produced on behalf of the defendant, who was treasurer to Drury Lane Theatre from 1862 to 1873, including the night on which the circumstances which gave rise to the present action took place, and who represented the management in front of the curtain during that time, states that according to the practice, as he understood it, if a "renter," on entering the theatre declared his desire to sit in the stalls, the proper course for him to pursue would be to take his ticket marked "renter" to the stall registrar in the hall or rotunda, who would detain him at his desk while he sent the ticket marked "renter" up to the dress circle check-taker on the stairs, to be changed for a ticket marked "dress circle cross," on receiving which, and also 2s., the stall registrar would give the "renter" a ticket for the stalls. The same witness stated that the renter's ticket was considered to represent 5s. Also the defendant himself states that the orders given to his servants were, that if a "renter" wished to occupy a stall, he must get a ticket marked "dress circle cross," and exchange that, on payment of 2s., for a ticket for a stall. Except as a matter of favour, the defendant has always refused to allow "renters" to occupy seats in the stalls without payment. When "renters" have claimed it as a right he has refused to concede it. When asked as a favour, and when it has been consistent with the business of the house he has frequently conceded it. The only servant of the defendant who had authority from the defendant

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to make such a concession without specially consulting the defendant was the Mr. Guiver mentioned above in this paragraph of the case.

31. The defendant took a lease of the theatre from the company of the proprietors for a term extending from 1866 to a date in 1873, subsequent to the night when the plaintiff was ejected. He took the lease under the belief that the new renters were not entitled for free admission to the stalls, but with the knowledge that the right was sometimes claimed by the new "renter," and that the question had not been settled by any decision of a court of law. Since the night when the plaintiff was ejected from the stalls, the plaintiff's lease has expired and he has taken a fresh lease. Both leases contain clauses saving the "renter's" right in general terms.

32. The number of renters is 300. The average number who have attended per night during the dramatic season is about twenty. On benefit nights or nights of a new performance as many as seventy or eighty frequently attended. If admitted to the stalls without payment they would in all probability attend in greater numbers, especially during the operatic season. The number of seats in the theatre which are not allowed to be booked before the opening of the theatre for performance are as follows:

Galleries	...	...	...	...	...	900
Balcony	...	...	...	...	...	400
Pit...	...	...	...	...	...	700
First circle, back row,	...	...	...	...	...	58
Dress circle, front row,	...	...	...	...	...	132

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The number of seats in the dress circle which are capable of being booked is 243. The number in the first circle capable of being booked is 133. Renters have access to those seats when not booked or occupied.

33. The value of a renter's share has much increased during the last few years. The market price in 1858 was about 38*l*. It is now about 160*l*. The price of a nomination for a year has increased during the same period from 1*l*. 10*s*. to 6*l*. 6*s*. The prices have increased during the last four years nearly 60 per cent. The amount received by the new renters by way of a dividend or rental from time to time is shown by the indorsement on the back of the plaintiff's certificate. [Copy made part of case.]

34. The plaintiff only attended one of the meetings of renters called by Mr. Mapleson as described in paragraph 25. On that occasion he did not accede to Mr. Mapleson's proposition, and left the meeting without voting.

35. [Court to have power to draw inferences of fact.]

36. The question for the opinion of the court is whether, under the circumstances stated in the above case and upon the proper construction of the Act of Parliament, the defendants' servants were justified in preventing the plaintiff from entering the stalls of Drury-lane Theatre, and in ejecting him from the entrance of such stalls on the evening of the 27th March 1873. If the court are of opinion in the negative, the verdict entered for the plaintiff is to stand. If the court are of opinion in the affirmative, the verdict is to be entered for the defendant. In either case, if the court are of opinion that some of the issues raised by the pleadings ought to be found for one party and some for the

other, the verdict is to be entered upon such issues in accordance with the directions of the court.

The court are to have power to give judgment for the plaintiff or defendant, irrespective of the pleadings or demurrers.

Day, Q. C. (Sydney Hastings with him) for the plaintiff.—The questions in this case are, first, have the renters a right to be admitted to the stalls, and second, did the defendant, being a renter, properly assert that right? The renters claim a free admission to the stalls under sect. 3 of the Act of 1820. [Lord COLERIDGE.—Perhaps there may be an objection to an ambulatory right, as inconsistent with the proper government of the theatre. It may be that the plaintiff should have gone to the stalls first.] The stalls are the "usual audience part of the theatre," and "usual" means not usual from time to time, but, usual at the passing of the Act. [DENMAN, J. referred to *Jones v. Hustable*, L. Rep. 2 Q. B., 460. KEATING, J.—Is it contended that the pre-engagement of a stall is invalid against a renter? It is so contended, inasmuch as in 1820 there was no such thing as the pre-engagement of a stall. [Lord COLERIDGE, C. J.—You put it then that for seventy-five years after 1820, any alteration of the theatre is void as against the renters. BRETT, J.—Your argument goes to this, that the renters are entitled to the whole theatre except fourteen boxes. KEATING, J.—However, you support that argument by pointing out that if it had not been for the renters, there would have been no theatre at all. DENMAN, J.—From section 3 it would seem whatever is used as the audience part of the theatre for the time being, the renters have a right to occupy.] If the audience part were curtailed, so as to change the house into a circus, the renters would have no right to go into the ring; the manner of enjoyment is uncertain, but the right subsists. [DENMAN, J.—Is there not some evidence that the renter may go to any part of the theatre, subject to a regulation that he should pay the 2*s*. extra as a consideration for being allowed to change from one part of the house to another? On the contrary the evidence is quite inconsistent with this. There is no such thing as waiver of a statutory right, and where private rights are distinctly assured, they may be asserted at whatever public inconvenience.

Taylor v. Waters, 7 Taunt. 374;

Stratton v. Great Western Railway Company, L. Rep. 5 Ch. App. 761.

M'Intyre, Q.C. (Poulter with him) for the defendant.—The plaintiff had no right to go to the stalls without payment, but assuming that he had such right, he had lost the power of exercising it, by having once exercised his option to occupy the dress circle instead. His privilege of free admission, however, did not extend to the stalls, such stalls not being the "usual audience part of the theatre." The stalls, in fact, are a peculiar and distinct part of the theatre, being let under exceptional regulations as to booking, &c., and having a separate entrance. [Lord COLERIDGE, C. J.—If the public are usually admitted to the stalls for the purpose of seeing the performance, I do not see how the stalls are not the "usual audience part of the theatre."] There has been an appropriation of the stalls by successive lessees as against the renters, who have shown their acquiescence in such appropriation by not bringing

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an action to support their right to free admission if they have any. Such an appropriation might be acquiesced in in the same manner as an obstruction to a right of way or flow of water is acquiesced in; and the plaintiff was bound by the acquiescence of his predecessors. [Lord COLERIDGE C.J.—It appears from paragraph twenty-two that the rights of the renters have always been a subject of contention.]

Day waived his right to reply.

Lord COLERIDGE, C.J.—This is a special case, stated upon an action brought to recover damages for an interference with a certain alleged right of the plaintiff, and the right alleged to have been interfered with is the right of the new renters of Drury Lane Theatre to free admission under the Act 1 Geo. 4, c. lx., the Act of 1820. The plaintiff bought his share of one of the new renters under that Act, and is the assignee of one of such new renters, so ascertained. Now it is not clearly, or rather it is not in any way made out, who these "new renters" were, and what consideration was given by them for the rights vested in them by the Act of 1820. However, under the three successive statutes referred to in the case, and particularly in the first, they are denominated "new renters," and it appears that after certain negotiations their rights were defined by sect. 3 of the Act of 1820, a section which has been much insisted on by both sides in the course of the argument, and has been very properly and carefully examined. There is no evidence of any particular mode of enjoyment prior to 1820, and it is said in the case that nothing is known as to any particular mode of enjoyment prior to 1820. But I think that the Act is to be construed as giving the right in the fullest manner, and that the words used in the first part of sect. 3 are not words of limitation, but mean that the renters have had these rights fully and freely; and shall continue to have them fully and freely. Reading the section further, we find the words "that every person using such free admission shall be subject and liable to such regulations and conditions as the sub-committee shall from time to time deem necessary" for the management of the theatre. The new renter having the right of full and free entry, is to have it still, subject to regulations and conditions, so that his rights as renter be not infringed. Now then, what are those rights? It may be convenient to consider what rights were asserted in this particular case, and in what manner the plaintiff asserted them. It appears that certain regulations were in force at the theatre: e.g. that renters seeking admission should enter their names in a book. [The learned judge further referred to the regulations detailed in paragraph 27, and proceeded.] That such regulations were in every respect reasonable and proper is not disputed, and to every one of these regulations the plaintiff conformed. But when he had occupied a place in the dress circle he found that he did not like it, and being aware that a stall was vacant, asked to change. Now if this had happened to one of the public, and not a renter, the individual to whom it happened would have had to go back to the box office, pay two shillings extra, get his ticket marked, and then furnished with a ticket, or some other credential, he would be entitled to take his place in the wished-for stall. Here again, the plaintiff was willing to comply, and did in fact comply, with all the regulations of the theatre, except as to the

payment of the two shillings. The box keeper declined to furnish him with the requisite voucher, and the plaintiff insisted on his alleged right to pass into the stalls without payment. Thereupon, both parties still insisting, force (no more than necessary) was used, and the plaintiff ejected from the theatre. Now, had the defendant's servants a right so to eject the plaintiff? If they had such a right, the plaintiff fails; if they had not such a right, the plaintiff succeeds. The question has been argued before us upon the construction of the third section of the Act of 1820 (already read), and it has been said that a renter has an absolute right to go anywhere in the theatre except to fourteen boxes, and, as I understand Mr. Day, to take a seat anywhere. Mr. Day, therefore, contended that the plaintiff was entitled to disregard all the ordinary regulations for the benefit of the public, such as the regulation conferring the right to take places beforehand; that in this respect the renter was entitled to disregard all the claims of the public, short of an actual physical occupation of a seat by a member of the public at the time when the renter also might wish to take that seat. If it were necessary to carry Mr. Day's argument so far as this, I for one would give judgment for the defendant. I think it would be wholly unreasonable so to construe the words of the third section of the Act of 1820. But it is not necessary to carry the argument so far; there is a ground perfectly good which entitles Mr. Day to succeed, although the chief part of his argument fails. I am of opinion that the reasonable construction is that the renter shall be "between the time at which the doors of the theatre open for the admission of the public and the termination of the performance" in the same position as any member of the public who should go at the same time, excepting as to payment. But, as the public, so the renter is subject to rules, and as no member of the public could dispossess of his seat another member of the public who had pre-engaged it, so neither could the renter. Indeed, the renter labours under a certain disadvantage, inasmuch as, *quâ* renter, he cannot take his place beforehand. The sub-committee have made certain rules and regulations, and to these the renter must conform. He cannot claim to go to a pre-engaged stall, although vacant, nor to a private box, because it is not unreasonable that there should be private boxes to be filled by four persons, the right of the public to such boxes being not to a place in a box, but to the whole box. This is a fair and reasonable construction of the statute, at once ascertaining the right of the renter, conferring on him a right by no means unimportant, and limiting the irrational contention that he may go where he pleases irrespective of the pre-engagement of places by the public. Such being the true mode of construction, I would just say a word as to a question raised by Mr. McIntyre for the defendant. Mr. McIntyre says that the rights of the renter are limited still further than I have indicated; he contends that the renter is excluded from the stalls as not being the usual audience part of the theatre. And for what reason? Simply because there were no stalls in the year 1820 at all, stalls being first called into existence in 1843. From that year there have been stalls physically separated from the other seats in the theatre, having a separate entrance, and allowed to be pre-engaged. All that shows

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that this particular part of the *auditorium*, if I may use the Latin word in the absence of an English one, had certain privileges annexed to it; but none the less is it the "usual audience part of the theatre." The audience are as much usually in the stalls, as in the pit, boxes, dress circle, or any other part of the theatre. Our judgment, therefore, must be for the plaintiff, because the defendant has tried to enforce a regulation abridging the rights of the renter, seeking to make him pay money, whereas the statute says that his admission is to be free. In all other respects the defendant is right. I have entered thus fully into the matter, because I understand that both parties wished that an intelligible rule should be laid down for their future guidance. I may add that I do not consider the right of the plaintiff to be an easement; but even if it were, and if we acceded, which we do not, to Mr. McIntyre's analogies, there has been no abandonment of the easement. This we infer as a fact from the finding in paragraph 22 of the case.

BRETT, J.—In this case we have power to answer the questions put to us irrespectively of the pleadings, or demurrers, and I proceed to answer those questions accordingly. [After stating the questions for the court, and recapitulating the material facts, the learned judge proceeded.] The whole question depends upon the construction of sect. 3 of the Act of 1820. It appears that by that Act the old rights of renter were put an end to, and with respect to the rights created in lieu of them, Mr. Day argues that these are of the most extensive character. They include, he contends, a right to go into any private box already occupied if not fully occupied, and a right to go into a box taken beforehand, if it be not physically filled. Mr. McIntyre contends that the right is confined to the dress circle, pit, and gallery. I think that Mr. Day puts the right too high, and that Mr. McIntyre puts it too low. By the terms of the Act of 1820 the renters are entitled for 75 years from that date to free admission into the "usual audience part of the theatre." This description comprises stalls, pit, dress circle, gallery, and boxes, and gives the renter free admission to the whole of the theatre. But there are limitations to this extensive right. It is only exerciseable "between the time at which the doors of the theatre are opened for the admittance of the public and the termination of such performance." It is also subject to the regulations made by the sub-committee for the management of the theatre. It is in fact the same right as that of any member of the public, plus free admission. It is impossible to suppose that it was ever an absolute right, entitling the renter, for instance, to go into the dress-circle in his shirt sleeves. Now what is the position of any member of the public? Any member of the public may take a seat in any part of the theatre not pre-engaged or occupied. He cannot take a single place only in a private box, but must take the whole of it. Neither could a renter take such a place; and I think also that four individual renters could not combine for the purpose of taking a box, it being a reasonable condition that a box must be taken wholly or not at all. The renter therefore may go to any part of the theatre not pre-engaged or occupied, except that he may not go into a private box whether engaged or not. In conclusion I may say that in my opinion the theatre

may be altered without any consideration of the renters. If for the purposes of the opera for instance, the lessee choose to make a different distribution of seats, if he add to the number of boxes, even if he turn the whole dress circle into boxes, so long as such an alteration be made *bona fide* with the view of serving the whole public, the renter cannot complain.

DENMAN, J.—I concur with the judgments of my Lord and my brother Brett, so far as those judgments apply to the questions before the court. As to the last point raised by my brother Brett, I would remark that I give no opinion either one way or the other.

LORD COLERIDGE, C. J.—I wish to say that I concur with my brother Brett in his opinion as to the last point, that opinion being grounded on the principle which we have laid down as our guiding one in this case, that, excepting the gratuitous admission, the rights of the renters are co-extensive with the rights of the public.

Judgment for plaintiff.

Attorneys for plaintiff, J. C. Stogdon.

Attorney for defendant, Chatterton.

BAIL COURT.

Reported by E. A. KINGLAKE, Esq., Barrister-at-Law.

Monday, Nov. 23, 1874.

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Highways—Dedication to public—Utility—Acceptance by inhabitants—5 & 6 Will. 4, c. 50, s. 23.

By the Highways Act 1835 (5 & 6 Will. 4, c. 50, s. 23) it is provided that no road to be hereafter set out shall be deemed to be a highway, which the inhabitants of a parish shall be compellable to repair, unless the person proposing to dedicate such highway shall give three months' previous notice in writing of his intention to dedicate, and shall have made the same to the satisfaction of the surveyor, and of any two justices of the peace who are required to view the same, and to certify, &c. . . . Provided, nevertheless, that on receipt of such notice as aforesaid, the surveyor of the parish shall call a vestry meeting of the inhabitants; and if such vestry shall deem such highway not to be of sufficient utility to justify its being kept in repair, any one justice of the peace, on the application of the surveyor, shall summon the party proposing to make the new highway to appear at the next special sessions for the highways, and the question as to the utility shall be determined at the discretion of such justices.

A landowner, having given three months' notice to the surveyor of a parish of his intention to dedicate a highway, the surveyor called a meeting of the inhabitants, who decided that the highway was not of sufficient public utility for the parish to accept it. It was afterwards discovered that, through the mistake of the overseer, the meeting was illegally convened.

Held, that the neglect of the surveyor to call a meeting did not enable the landowner to dedicate the highway to the parish, and that the acceptance by the vestry of the highway was a condition precedent to the dedication.

Semble, per Archibald, J., that the proviso in the section should be an enactment.

THIS was a rule for a mandamus calling on certain justices of the county of Norfolk to view a certain

highway which the Norfolk Estuary Company propose to dedicate to the public, and to determine whether the highway is of sufficient utility to justify its being kept in repair at the expense of the parish of North Wootton.

The facts of the case were as follows :

The Proprietors of the Norfolk Estuary Company were incorporated by the Norfolk Estuary Act 1857, for the purpose of reclaiming from the sea, and inclosing and embanking certain tracts of land, being part of the great estuary of the Wash, situate between the counties of Norfolk and Lincoln, with power to purchase, take, hold, and dispose of lands. The Lands Clauses Consolidation Act 1845 is incorporated with the said Act. The Norfolk Estuary Company, who are the owners in fee of a considerable acreage of land in Norfolk, laid out a road in the parish of North Wootton, and on the 15th May, 1871, their secretary served on the surveyor of highways the following notice :

I, the undersigned James Botterell, the secretary of the Norfolk Estuary Company, hereby give you notice that the said Norfolk Estuary Company have made, and after the expiration of three months from the date hereof do intend to dedicate to the use of the public, a certain highway in the parish of North Wootton in the county of Norfolk, extending in length sixty-one chains and thirty links, or thereabouts, from the Lynn and Hunstanton Railway, to the boundary fence of inclosure No. 4, the property of the said Norfolk Estuary Company.

On the same day the secretary of the company also served on the justices for the Petty Sessional Division of Freebridge, Lynn, notice that the company had made in a substantial manner, and of the width required by the Act of Parliament (5 & 6 Will. 4, c. 50), the road, and that they intended to dedicate it to the use of the public, and that they also required the justices to view the same, and certify that it had been made in a substantial manner. In consequence of the notice the surveyor convened a vestry meeting, which was accordingly held on the 12th June 1871, when a large majority of the inhabitants then present decided that the road was not of sufficient utility to justify its being kept in repair at their expense; the surveyor having been advised that the meeting which he had convened was informal owing to some irregularity in the notices, convened a second meeting to be held on 14th Dec. 1871, when the vestry came to the same conclusion as before. The surveyor did not summon the company pursuant to the 23rd section of 5 & 6 Will. 4, c. 50, or sect. 46 of the Highway Act 1864 (27 & 28 Vict. c. 101), to appear before the justices until the 14th Feb. 1872, when it was contended on behalf of the company that the justices had no jurisdiction to determine the matter, as the application by the surveyor was too late, it not having been made in accordance with the 23rd section of the Highway Act 1835, to the special or petty session next after the service of the notice on the surveyor. It was also objected that the surveyor could not take advantage of his own wrong in that the vestry meeting of the 12th June 1871 was informal and void through his own default; and also it was contended that the justices sitting in petty sessions had no jurisdiction to hear the matter. The justices having decided against the company, they applied for a writ of *mandamus* to compel them to inspect the road.

Cave showed cause.—The case turns on the con-

struction of the General Highways Act 1835 (5 & 6 Will. 4, c. 50, s. 23)(a). There is nothing in the Act which requires the justices to summon the parties to the next sessions after the vestry meeting has been held. What would be the use of the surveyor having to call the justices together unless the parish had decided not to accept the road? The surveyor is only the agent for the parish, and they are not bound to accept a highway owing to his omitting to convene a meeting.

Field, Q.C. (*Arbuthnot* with him).—The question here is the construction of the statute. If we look back at the state of the law before the passing of the Highway Act, we shall find that without this section a landowner might have dedicated any highway to the public and thrown on the parish the repair, without their being able to offer any resistance. The statute, however, points out a continued course of procedure, and unless it is useful and substantially made the parish need not accept the burden of repair. The landowner is to give three months' notice to the surveyor of his intention to dedicate the road, and it is the duty of the surveyor promptly to view the road and call a vestry meeting. [BLACKBURN, J.—I don't doubt the surveyor ought to call a vestry meeting.] The statute puts the duty on the surveyor, and not on the inhabitants, and he is an officer of the parish at large, and his mistake must fall on the persons he represents. [ARCHIBALD, J.—Before this Act the parish would become liable to keep the road in repair, and if they do not do what is necessary they do not come within the exemption of this statute; that is the strongest way of look-

(a) The 23rd section enacts that no road or occupation way made, or hereafter to be made, by and at the expense of any individual or private person, body politic, or corporate, or any roads already set out, or to be hereafter set out as a private driftway or horse path in any award of commissioners under an inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair; unless the person, body politic or corporate, proposing to dedicate such highways to the use of public, shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made, or shall make, the same in a substantial manner, and of the width required by this Act, and to the satisfaction of the said surveyor, and of any two justices of the peace of the division in which such highway is situate, in sessions assembled, who are hereby required, on receiving notice from such persons, or body politic or corporate, to view the same, and to certify that such highways have been made in a substantial manner, and of the width required by this Act, at the expense of the party requiring such view, which certificate shall be enrolled at the quarter sessions holden next after the granting thereof; then, and in such case, after the said highway shall have been used by the public, and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highways shall for ever thereafter be kept in repair by the parish in which it is situate; provided, nevertheless, that on receipt of such notice as aforesaid, the surveyor of the said parish shall call a vestry meeting of the inhabitants of such parish, and if such vestry shall deem such highway not to be of sufficient utility to the inhabitants of the said parish to justify its being kept in repair at the expense of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party proposing to make the new highway to appear before the justices at the next special sessions for the highways, to be held in and for the division in which the said intended highway shall be situated; and the question as to the utility as aforesaid of such highways shall be determined at the discretion of such justices.

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ing at the case.] The surveyor ought to have followed the order; the words "provided always" in the section must mean "Be it enacted." There is a continued course of procedure, and there ought to be a limit of time. Why is the landowner to give the surveyor three months' notice if time is no object. [BLACKBURN, J.—It is obviously for the purpose of the surveyor consulting with the parishioners.] If the Act said the vestry were to determine if the road was of sufficient utility for them to accept it, that would be a condition precedent to the dedication by the landowner, but that is not so. They referred to

Reg. v. Dukinfield, 4 B. & S. 167; 32 L. J. 320, M. C.

BLACKBURN, J.—In this case we have to determine a point turning on the construction of the statute, and I have come to the conclusion the rule should be discharged. Before the passing of the 5 & 6 Will 4, c. 50, any road could be dedicated to the public, and might be made a highway, and the Act was passed to govern and regulate the management of highways. The Act is general, and it enacts that no road or occupation way made, or hereafter to be made, by and at the expense of any individual or private person, body politic or corporate, nor any road already set out, or hereafter to be set out, as a private driftway or horse-path, in any award of commissioners under an Inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public, shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent. He is to give three months' notice to the surveyor, but there is no provision that the surveyor is to make the notice public; a simple notice is to be given to the surveyor, and no ratepayer would be aware of it. The section then goes on, "and shall make the same in a substantial manner, and of the width required by this Act, and to the satisfaction of the surveyor, and of any two justices of the peace of the division in which such highway is situate, in petty sessions assembled, who are hereby required, on receiving notice from such person, to view the same, and to certify that such highway has been made in a substantial manner." Then arises the question which in *Reg. v. Dukinfield* (4 B. & S. 158; 32 L. J. 230, M. C.) I said was in no wise clear, but that the Act was so curiously and awkwardly worded that I had considerable difficulty in saying what the right construction was. Unless the surveyor calls a meeting the ratepayers have no opportunity of opposing the dedication of the road, and I quite agree with Mr. Field's construction that the surveyor ought to convene a meeting in reasonable time. In point of fact he did convene a meeting; but through some mistake it was invalid, and treated as a nullity. It was argued that the surveyor was bound to call a meeting, and if he does not, it must be taken the ratepayers do not object, and the landowner may expect the parish to take the road. That construction would be very hard on the ratepayers, and why the neglect of the surveyor to give notice to the parishioners should be an acceptance by the parish is not clear, and I am not inclined to say the failure of the surveyor to give the parish

notice is equivalent to a consent. At the first meeting it was decided that the road should not be accepted, and it is said the second meeting was held too late. I think the justices were quite right, and the rule must be discharged.

ARCHIBALD, J.—I have had considerable doubt in this matter. The most plausible view on behalf of the applicants for a *mandamus* is that this is a provision of the old general law, and if the enactment had commenced: "Whereas parishes are liable to repair all highways," then I should understand the provision to be that they could in future relieve themselves. The earlier part of the section provides that the person proposing to dedicate the road to the public shall give three calendar months' notice of his intention. Then reading the statute in that way, this is an intention of a notice to dedicate. But then there must be a meeting of the vestry, and in the event of their thinking the road of not sufficient public utility the matter is to be decided by the justices. I really think instead of this being a proviso it is an enactment, else it would fix the parish with liability.

Rule discharged.

Attorney for applicant, H. L. Pemberton,

Attorney for respondent, G. E. Eyre.

Tuesday, Nov. 24, 1874.

THE GUARDIANS OF LUDLOW UNION v. GUARDIANS OF THE BIRMINGHAM UNION.

Mandamus—Costs—No cause shown.

Where a writ of *mandamus* is opposed, the court will in all cases grant costs against the party so opposing it, even where the opposition be withdrawn before the time for the argument of the rule arrives.

Semble, per Blackburn, J.—Where no cause is shown a different rule may be adopted.

Dugdale showed cause against a rule calling on the guardians of the Birmingham Union to pay the costs of a writ of *mandamus* and the costs consequent thereon. This was a *mandamus* directed to the justices of Warwickshire to enter continuances and hear the appeal. Notice was served on the guardians by the parties interested, who gave notice on the 19th May last, that they would appear and oppose the motion. On the 9th June, after the applicants had been put to considerable expense, the guardians gave notice they would not oppose the application, and the rule was made absolute on that day. In *B. v. Justices of Lancashire* (5 D. & L. 436), Wightman, J., in discussing an application for the costs of a writ of *mandamus* to court of quarter sessions, a case on all fours with the present, says, "In support of the application for the costs, the general rule that the costs of writs of *mandamus*, the issuing of which is opposed, are given to the successful party, was relied upon, while on the other side it was contended that as a general rule costs were not given where the proceedings were rendered necessary by some mistake of the court itself, and that though there were cases in which the costs of writs of *mandamus* to correct erroneous decisions of inferior courts, had been given to the parties applying for them, those were cases in which the objections unsuccessfully taken in the courts below, were so obviously untenable and frivolous that they ought not to have been

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taken, and the parties might be considered as wilfully misleading the court. Such a general rule would not be applicable to the case of a party who having succeeded in the court below upon an erroneous judgment, offers no resistance to the correction of the error, and is no party to the proceedings in this court by showing cause against the issuing of the *mandamus*." The guardians of the Birmingham Union withdrew their opposition, and as the costs are within the discretion of the court, in such a case the court will not grant them: (*R. v. St. Saviour's Southwark*, 7 Ad. & E. 950.) [BLACKBURN, J.—Can you show me a single instance in which the costs have not been granted.] If the judgment of Wightman, J., had been dissented from there would be some reported case, but I can find none.

Russell Griffiths.—The rule to show cause was served on the 19th May, and it was not until the 19th June that they retracted the notice. The rule acted upon by the court under 1 Will. 4, c. 21, s. 6, is that when an application for a *mandamus* is made and opposed the unsuccessful party pays costs, except under very peculiar circumstances. *R. v. Justices of Surrey* (14 Q.B. 684). I can't find any case in the books where the application is not opposed either for or against.

BLACKBURN, J.—I think, as the guardians opposed and disputed the writ, there should be a rule absolute, but at the same time I am desirous to make it understood, where no cause is shown we might decide differently, and then we shall probably let the argument be heard before the full court.

ARCHIBALD, J.—I am of the same opinion.

Rule absolute.

Attorneys for applicant, *Hayes and Co.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 14, 1874.

(Before KELLY, C.B., LUSH, BRETT, and QUAIN, JJ., and POLLOCK, B.)

REG. v. JOSEPH RUDGE.

Indictment—Larceny and embezzlement by Partners' Act (30 & 31 Vict. c. 116)—24 & 25 Vict. c. 96, s. 22.

Upon an indictment under 30 & 31 Vict. c. 116, against a partner or a joint beneficial owner for stealing, charging the prisoner with being a partner in one set of counts, and in another with being a beneficial owner of the property stolen:

Held, that if upon the evidence it turned out that he was guilty of embezzlement and not of larceny, he might, upon a proper direction to the jury, be found guilty of embezzlement upon the indictment, by virtue of sect. 72 of 24 & 25 Vict. c. 96. So also, if the charge in the indictment had been one of embezzlement and not larceny, he could have been found guilty of larceny if the evidence warranted it.

CASE reserved for the opinion of this court by the Recorder of Manchester.

At a quarter sessions held for the city of Manchester, on the 28th Aug. 1874, Joseph Rudge was tried before me upon the following indictment:

City of Manchester in the county of Lancaster, to wit.—The jurors for our lady the Queen, upon their oath present, that Joseph Rudge, on the 24th

Oct. 1871, being then a member of a certain copartnership, to wit, a copartnership between one Richard Leicester and others and him the said Joseph Rudge, did then and whilst he was such member of such copartnership, and within the space of six months from the first to the last of the acts of stealing charged in this indictment, 1l. 10s. of the property of the said copartnership, to wit, of the said Richard Leicester and others, and him the said Joseph Rudge, then and there being found, feloniously did steal, take, and carry away, against the form, &c.

Second count.—That the said Joseph Rudge afterwards, to wit, on the 26th Jan. 1872, being then a member of the said copartnership, and within the space of six months from the first to the last of the acts of stealing charged in this indictment, 1l. 15s. of and belonging to the said copartnership, then and there being found, feloniously did steal, take, and carry away, against the form, &c.

Third count.—That the said Joseph Rudge afterwards, to wit, on the 11th April, in the year last aforesaid, being then a member of the said copartnership, to wit, on the day and year last aforesaid, and within the said space of six months from the first to the last of the acts of stealing charged in this indictment, 1l. 15s. of and belonging to the said copartnership then and there being found, feloniously did steal, take, and carry away, against the form, &c.

Fourth count.—That the said Joseph Rudge, on the day and year first aforesaid, then being, together with the said Richard Leicester and others, a beneficial owner of certain moneys of and belonging to them the said Richard Leicester and others, and the said Joseph Rudge, did then, and within the space of six months from the first to the last acts of stealing charged in this indictment, and whilst he was one of such beneficial owners, certain other money, to wit, 1l. 10s., the property of them the said beneficial owners, then and there feloniously did steal, take, and carry away, against the form, &c.

Fifth count.—That the said Joseph Rudge afterwards, to wit, on the 26th Jan. 1872, being a beneficial owner, afterwards and whilst he was such beneficial owner as last aforesaid, on the 26th Jan. in the year last aforesaid, and within the said space of six months from the first to the last of the acts of stealing charged in this indictment, 1l. 15s. of and belonging to the said beneficial owners then and there being found, feloniously did steal, take, and carry away, against the form, &c.

Sixth count.—That the said Joseph Rudge afterwards, to wit, on the 11th April in the year last aforesaid, being a beneficial owner as aforesaid, and whilst he was such beneficial owner as aforesaid, to wit, on the day and year last aforesaid, and within the said space of six months from the first to the last of the acts of stealing charged in this indictment, 1l. 15s. of and belonging to the said beneficial owners then and there being found, feloniously did steal, take, and carry away, against the form, &c.

It was proved at the trial that the prisoner was the Central Secretary to the Flint Glass Makers' Society of Great Britain and Ireland, in which Richard Leicester and others were partners with him. The society was instituted for the purpose of assisting its members in sickness, &c.

The prisoner was paid an annual salary of 30l.

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as central secretary, and certain sums of money were transmitted to him on account of the society by each of the district secretaries. It was his duty to act in accordance with the rules of the society, of which the following refer to its duties.

Election and Duties of Officers.

That there shall be a central secretary elected annually by a majority of the votes of the trade, who shall be eligible for re-election, and who shall have the power to nominate a central committee (open to the objection of the trade), in whose hands the executive power of the society shall be vested from year to year, subject to such regulations as shall be hereafter mentioned.

That the voting for the office of central secretary, trustees, and the district where our funds are to be invested, shall be decided by individual voting.

The central secretary shall supply district secretaries with printed forms for returns of all members who were in arrears on last quarter night; also, a summary account of income and expenditure.

The central secretary shall publish a report of the income and expenditure of the society every quarter, with a list of the members in arrears, also, the names of all expelled.

He shall also keep a list of the unemployed with references to the situations they are capable of filling, and when applied to for a man, he shall send the man who has been longest on the list, if he is capable of filling the situation he is required for.

The central secretary, neglecting to publish the quarterly report within one month after receiving the last of the district schedules, shall be fined 2s. 6d. for each week it is delayed.

The central secretary's salary shall be 30l. per annum.

Banking of surplus Funds.

That the surplus money of each district be deposited in the bank in the name of three trustees, chosen at the first quarterly meeting of the district; the bank book to be produced at each meeting of the district, and at the general conference of the society.

The prisoner made out his accounts and circulated them as usual in the month of February last. There appeared in that account items entered as paid by him to printers for work done on account of the society, exceeding the sums actually paid for such work by the several sums which the prisoner was charged with stealing in the indictment.

In May last a committee of the society was summoned by the prisoner, and subsequently so that scrutineers were appointed to examine the prisoner's accounts. They met in July. At their meeting the prisoner produced three printers' bills for printing, purporting to be receipts, in order to discharge himself from the amount falsely alleged in his accounts to have been paid by him to the printers. These bills and the signatures to the receipts were fictitious, not having been made out or signed by the printers, or any one on their behalf. The prisoner took credit for, and was allowed in account by the scrutineers, the sums for which he produced the fictitious receipts.

At a subsequent investigation of the prisoner's accounts these facts were discovered, and the prisoner appeared to be a defaulter to the society to the extent of several hundred pounds.

The jury found the prisoner guilty, but having some doubt whether he could be found guilty on the evidence produced, I reserved this case for the consideration of the Court for the Consideration of Crown Cases Reserved. Judgment was respited, and the prisoner bailed.

If there was evidence upon which the jury could find the prisoner guilty, the conviction is to stand, if not, it is to be quashed.

(Signed) HENRY W. WEST,

Recorder of the said City of Manchester:

Woodard, for the prisoner.—The conviction

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cannot be sustained. The first three counts are framed on the 30 & 31 Vict. c. 116, s. 1, which enacts that, "If any person, being a member of any copartnership, or being one of two or more beneficial owners of any money, goods or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods or effects, bills, notes, securities, or other property of or belonging to any such copartnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such copartnership, or one of such beneficial owners." There was no offence of larceny in this case. The prisoner was a member, and also the central secretary of the society. In his capacity of central secretary it was his duty to receive moneys from district secretaries, to use them for the purposes of the society, and deposit the surplus money in the bank in the name of the trustees. He received the moneys as the servant of the society, and not in his capacity of a member; and being a defaulter, his offence is not that of larceny. If any offence was committed, it was that of embezzlement, and he could not have been found guilty of embezzlement upon this indictment for larceny, for he is charged in the one set of counts as a member of a copartnership, and in the other as a beneficial owner with Leicester and others. [BRETT, J.—If this was a stealing, your point is gone, for the statute says, "He shall be liable to be dealt with, tried, convicted, and punished, as if he had not been or was not a member of such copartnership or one of such beneficial owners." Was not the money sent to him by the district secretaries money belonging to the society?] The case does not say that any of the sums charged in the indictment were transmitted by anyone belonging to the society. And the 24 & 25 Vict. c. 96, s. 72, which provides in the latter part of it, that if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, &c., he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny but is guilty of embezzlement. Here the jury have not found the prisoner guilty of embezzlement; if they had, it would have been a different question. Further, the property should have been laid as the property of the trustees, if it was a stealing from the society:

Reg. v. Marks, 10 Cox Crim. Cas. 367.

Ambrose, Q.C. (*Smyley* with him), for the prosecution, were not called upon to argue.

KELLY, C.B.—This case is not altogether free from difficulty, as the case is somewhat loosely stated. But looking at the terms in which the question is submitted to us, viz.: "If there was evidence on which the jury could find the prisoner guilty, the conviction is to stand; if not, it is to be quashed," I think we may read it, "Guilty either of embezzlement or larceny." Now the facts that raise the question are, that certain moneys belonging to this copartnership or society were transmitted by the district secretaries to the prisoner on account of the society. It follows, therefore, that the money which so came into the prisoner's possession was money belonging to the society. Then the prisoner made out his accounts and entered therein sums as paid to printers, ex-

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ceeding the sums actually paid by the several sums charged in the indictment; and when called upon to verify his accounts, the prisoner produced fabricated receipts for the sums so alleged to have been paid by him. If the case had stopped there, it might have been said that the time had not arrived for accounting for the whole of the money in his hands and paying over the same to the society, and that the difference had been applied by the prisoner to the use of the society. But the concluding paragraph of the case states that at a subsequent investigation of the prisoner's accounts, these facts were discovered, and the prisoner appeared to be a defaulter to the society to the extent of several hundred pounds. This can only mean that the time had arrived when the moneys received by the prisoner should have been accounted for, and that the prisoner had failed to account for them. The result is, that the prisoner had received moneys belonging to the society which he did not account for, and had given false receipts in respect of them, and it is equivalent to an allegation that he had embezzled or stolen those moneys. I think, therefore, that the learned judge was right in directing the jury that if they were satisfied that the prisoner was guilty of one or the other of those offences, to convict, as we must take it that what is reserved for our opinion is, whether the prisoner was guilty upon the evidence of any offence on which the conviction upon this indictment could be sustained.

LUSH, J.—I am of the same opinion. The indictment charges that the prisoner, being a member of a copartnership, feloniously stole moneys belonging to the copartnership. The question reserved is, whether there was any evidence to justify a conviction upon that charge. Now the evidence showed that the prisoner had fraudulently appropriated to his own purposes money belonging to the society. If we are to take it that the money so appropriated came to him from district secretaries, he would be guilty either of larceny or embezzlement. The statute says, that if a member of any copartnership, or one of two or more beneficial owners, shall steal or embezzle any property belonging to such copartnership or to such joint beneficial owners, he shall be liable to be tried and dealt with as if he had not been such copartner or beneficial owner. Putting, therefore, the membership aside, it is clear that the prisoner was guilty either of larceny or embezzlement, it is immaterial which, upon sect. 72 of 24 & 25 Vict. c. 76. We must assume that the learned recorder gave a proper direction to the jury upon this, and that they found the prisoner guilty of the offence of which there was evidence.

BRETT, J.—I am of the same opinion. The question reserved for the court, as we must take it, is, was there evidence upon which the prisoner could be found guilty upon this indictment on a proper direction to the jury? The only point is, whether he was guilty of stealing or embezzlement, and if, upon the evidence, of embezzlement only, could he be found guilty upon this indictment? The indictment is framed upon the 30 & 31 Vict. c. 116; but if it had been an ordinary indictment for larceny, there is no doubt that the prisoner could have been found guilty of embezzlement upon it: (24 & 25 Vict. c. 96, s. 72.) This indictment charges the prisoner with larceny; and, if so, the 24 & 25 Vict. c. 96, s. 22, in terms applies to it, and there is no reason why we should not so apply it.

There was ample evidence that the prisoner was guilty of embezzlement.

QUAIN, J.—I am of the same opinion. By the 30 & 31 Vict. c. 116, we may look at the case as if the prisoner had never been a member of the copartnership; and then, if so, by 24 & 25 Vict. c. 96, s. 72, a conviction on the indictment upon a proper direction to the jury may be sustained, if the prisoner was guilty either of larceny or embezzlement. There was ample evidence that he was guilty of embezzlement.

POLLOCK, B.—I am of the same opinion.

Conviction affirmed.

Attorneys for the prosecution, *Wheeler and Cobbett.*

Attorneys for the defence, *Hampson and Walmsley.*

EXCHEQUER CHAMBER.

Reported by M. W. M'KELLAR, Esq., Barrister-at-Law.

May 9 and Nov. 30.

ERROR FROM THE QUEEN'S BENCH.

REG. v. GREEN.

Churchwardens—Election by parishioners—Separate townships—Division of parish—10 Vict. c. iii. By a private Act of Parliament, obtained in 1847 at the instance of the patrons of the rectory, a parish, consisting of four townships, one of which was called by the name of the whole parish, was divided into three separate and distinct parishes and rectories; and it was provided that "two fit and proper persons shall be chosen churchwardens for each such parish, when such division shall have taken place, at the same time and in the same manner as churchwardens are now chosen and appointed for the said" name of the original parish, "the rector of each of the said new rectories exercising the same rights and powers in the appointment of such churchwardens, or one of them, as the rector of the said rectory of" the original parish "now exercises." It was also provided that "the present churchwardens of" the name of the original parish "shall continue in office, and perform all the necessary acts and duties, as churchwardens, relating to the three separate and distinct parishes and churches as aforesaid, after such division shall have taken effect, until the next usual period of appointing churchwardens."

Before this Act, one of the townships of the parish, of a different name from that of the original parish, which was by this Act formed into a separate parish, had its separate chapel and graveyard, in which the usual services were performed by a curate appointed by the rector, and its own vestry and two separate churchwardens, who by custom were both chosen by the inhabitants without interference by the rector. The churchwardens of the rest of the parish were chosen and appointed as at common law.

Held, by the majority of the Exchequer Chamber, (reversing the decision of the majority of the Queen's Bench), that the Act of Parliament did not deprive the inhabitants of this township of the privilege in their possession to choose both churchwardens for the parish into which the township was formed.

THIS was an appeal from a judgment of the

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majority of the Queen's Bench in favour of the defendant, upon return to a *mandamus* stated in a special case. The writ commanded the defendant, the rector of the parish of March, in the county of Cambridge, to convene a meeting in vestry of the inhabitants, ratepayers, of the said rectory and parish, for the purpose of electing two fit and proper persons to be churchwardens for the said rectory and parish.

The case was argued in the court below on the 12th Nov. 1873, and judgment was given on the 16th Feb. 1874; the majority of the court in favour of the defendant consisted of Blackburn and Archibald, JJ., from whose opinion Quain, J. dissented.

The special case and the judgments of the Court of Queen's Bench are fully reported 30 L. T. Rep. N S. 255; *ante*, vol. viii., p. 473.

Bulwer, Q.C. (with him *F. M. White*) now argued for the appellant, the prosecutor.

Prideaux, Q.C. (with him *F. Turner*) for the respondent, the rector.

Cur. adv. vult.

Nov. 30.—CLEASBY, B., delivered the judgment of himself, Pollock and Amphlett, BB.—The parish of Doddington consisted of four townships. The three townships or hamlets of Doddington, Wimblington, and Benwick, and the township of March. The township of March was larger in area and population than the three other townships taken together, and had a chapel and graveyard, with a spire and peal of bells, in which all the offices of the church were performed. It had its own overseers, made its own poor and highway rates, and had separate churchwardens, and a church rate confined to March; and the inhabitants held their own vestries in which the inhabitants of the other townships did not interfere. It appears by paragraph 18 of the case that March, which, in the Act of Parliament which will be presently referred to, is called the township chapelry or hamlet of March, was sometimes called the parish of March in the vestry books and other similar documents; and that the inhabitants are called parishioners of March, and the chapel called the church of March. The parish church was in the township of Doddington, and there the inhabitants of the townships of Doddington, Wimblington, and Benwick held their vestries and made their several rates, and churchwardens were appointed by the name of churchwardens of the parish of Doddington, but they exercised no functions within the township or chapelry of March. In the chapelry of March the custom prevailed that the inhabitants should elect both churchwardens, the vicar having no right of appointment. This custom was questioned in 1782, and proved the subject of a trial at the assizes for Cambridge in 1782, and the custom was established (see paragraph 26). It is worthy of notice (though it was hardly adverted to in the argument or in the judgment in the court below) that the churchwardens so elected acted *ex officio* as overseers of the poor for March. The mode of electing the churchwardens to act for the rest of the parish, called, as has been already mentioned, churchwardens for the parish of Doddington, was the usual one in the absence of any custom, viz., a joint appointment if there was no difference, and if there was a difference then the rector appointed one, and the inhabitants elected the other. Matters being in this condition, a private Act was

obtained in 1847, at the instance of the then patron of the rectory of Doddington, for dividing the parish or rectory into three separate and distinct parishes and rectories; and by this Act, sect. 1, it was enacted that the township, chapelry, or hamlet of March should be and form a separate and distinct parish and rectory called by the name of the parish and rectory of March. The question in the present case is whether this Act of Parliament does away with the customary mode of election of churchwardens in March, and substitutes the mode of election which prevails in the absence of custom. It appears to me that it does not. In the first place, the common mode of election is not an incident to a parish or rectory so as to make the formation of a parish or rectory necessarily to carry with it the common mode of election. The customary mode of election is as much an incident to a parish as a common one, and it is a question of fact whether the custom exists so as to be incident or not. The learned counsel contended, though without placing much reliance upon it, that the formation into a separate parish or rectory *ipso facto*, carried with it the common mode of election; but that seems to be incorrect: it would do so if there was no customary mode of election applicable to it, but that is the question we have to consider, and the answer depends upon the proper construction of the Act, how by the first section the old limits are preserved, and the township, chapelry, or hamlet of March is made into a parish and rectory. It appears to me that if there were nothing else, the township, chapelry, or hamlet must include local customs which belong to them. Those customs were annexed to the land, and were not for the interest of particular persons, but for the persons as inhabitants. It would therefore not be correct to hold that that which may be properly included in the change is taken away by the change from a chapelry into a separate parish. Before examining the particular words of the Act of Parliament, I will only observe that it ought to require very strong and clear words in a private Act of Parliament, obtained at the instance of the patron of the living, to take away the right of the inhabitants of the district, established adversely to the rector by the judgment of a court of law. But I apprehend that when the words are examined it will appear that they were used, though perhaps with some looseness of language, to retain the old mode of election both of the churchwardens for Doddington and of the churchwardens of March; and that the argument opposed to this view has for its only foundation the looseness of language by which the churchwardens for the parish of Doddington (exclusive of March) had been called churchwardens of Doddington without any qualification. In fact they were the only churchwardens appointed in the parish church of Doddington, and unless they are to have a long and explanatory name would naturally have the name of churchwardens of Doddington. The section to be considered is the 5th, and the question is what do the words "in the same manner as the churchwardens for the parish of Doddington" import. It appears to me that the words "in the same manner" maintain the existing mode of choice, and they can't do so unless the words "parish of Doddington" signify the whole parish of Doddington. The legislation has reference to the whole parish, and the words which properly signify the whole parish ought to be so read.

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There is no reason *à priori* why the mode of choice prevailing formerly in one part of the parish should be preferred to that prevailing in another. But this reading of the words has the great merit of not indirectly and by construction taking away any existing right, and so violating a rule of construction found in the common law as early as Coke upon Littleton, 115a, referred to by my brother Quain in his judgment. Indeed, if the words were clear, enacting in general terms the common mode of election as applicable to a number of subjects collectively, as to a parish consisting of several townships, the authorities are very strong that these general terms are not to be held as taking away a particular custom existing in one of them. The distinction is between one enactment, introducing an entirely new mode of election which would abrogate all the old ones, and an enactment introducing in affirmative words the common law, in which case particular customs would remain (see Hargreave's note, 153 to Co. Litt. 115a): the authorities are numerous and are there referred to. But it is unnecessary to pursue this view in the present case, because it appears to me that the proper meaning of the words is that the old mode of choosing is to continue in the whole parish. The words are "for the parish of Doddington." This, taken by itself, means the whole parish of Doddington, and not one part which has been sometimes called the parish of Doddington, though there may be circumstances to make it signify the part which has been so called. And the reasons which make me conclude that in this Act of Parliament it ought to mean the whole parish of Doddington, are, first, that the words in the fifth section being "the said parish of Doddington," we find the following recital with which the Act begins: "Whereas the rectory and parish of Doddington, otherwise Dornington, in the diocese of Ely, in the county of Cambridge, comprises the whole of the township of Doddington, otherwise Dornington, the hamlet of Benwick, the hamlet of Wimblington, and the township, chapelry, or hamlet of March." This properly, if not conclusively, interprets the same words used in the fifth section. Secondly, the language of the sixth section appears to me conclusive as to this. The second portion of that section continues in office for the current year all the old churchwardens, and it describes them all as "churchwardens for the parish of Doddington." Now there is no sounder course of construction than that words in general should be read in the same sense in several parts of an Act of Parliament, or other document, unless there is something in the context to show that a different meaning should be given. In the sixth section the words must be used as signifying the whole parish, and its several parts, unless we are to hold that the effect of that section was *ipso facto* to do away with the churchwardens of March for the current year—a proposition which the learned counsel for the defendant in answer to one of my learned brothers hardly ventured to contend for. We have, therefore, in the present case, in favour of the construction which it appears to me should be adopted, the language of the recital of the Act of Parliament, which may be properly used as an interpretation clause, and the language of the sixth section, which in relation to the same matter, viz., the churchwardens of March, gives a particular meaning to the words. It appears to

me superfluous to strengthen this conclusion by reference to sect. 22, or other section of the Act, as I should wish to be regarded as adopting the reasons given by my brother Quain in his judgment in the court below. I will only add that this conclusion is strengthened by the custom in the chapelry of March that the churchwardens chosen according to the custom are *ex officio* the overseers for the township. The above reasons appear to me to outweigh the grounds upon which the opposite conclusion is founded. It is true that the words "churchwardens for the parish of Doddington" had been used in the sense of churchwardens of the parish, exclusive of March. And this no doubt lays a foundation for an argument that in the present Act it should be so read, and would be sufficient in the absence of reasons to the contrary. But it depends upon a coincidence of language in the Act of Parliament with language properly applicable to one thing, and which has in a manner, which can be accounted for, been applied to another. This is not in my opinion sufficient to meet the weighty reasons against holding such language to deprive the inhabitants of March of a right which they possessed. Something was said in the course of the argument of the words in the 5th section "choice and appointment," indicating that there was afterwards to be a choice and appointment, and that when the inhabitants chose or elected there would be no appointment in the proper sense of the word, that is, no appointment of one churchwarden by the rector. But this language, if any reliance could be placed upon the particular words, would be satisfied by a choice and appointment in some of the parishes where the rector had the right of appointing one, and a choice or election where there was a choice and election before. Besides the words "choice and appointment," indicating in a general sense the act by which the office of churchwardens is conferred, it would be most unreasonable, it appears to me, to make them governing words in the construction of the clause, I will only add that if the intention was as contended for by the rector, it would have been clearly and naturally expressed by enacting that in all the three new parishes the same mode of appointing churchwardens should prevail, viz., appointment of one by the vicar and election of the other by the inhabitants, unless they concurred in a joint appointment. But such an enactment, affecting, as it might, the existing rights, would hardly have been allowed in a private Act of Parliament, and therefore the present form should be a proper one, importing no change. If it could be supposed the language of the section had been used to give or to take away the rights of the parishioners of March, an unfavourable impression would have arisen in relation to the person responsible. But I do not make any insinuation of that sort. I think that the language was used in order to preserve the rights of the inhabitants of the whole parish, and that it has done so sufficiently.

BRAMWELL, B.—I am of opinion that the judgment should be reversed. The question turns on sect. 5. In construing it, it must be borne in mind that the churchwardens of Doddington, Benwick, and Wimblington, were called "the churchwardens for Doddington" (I should think more properly of Doddington), and I have no doubt that by that name they could sue or take a

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gift. But "churchwardens for or of Doddington" is not the expression in the statute. The statute says that in future churchwardens shall be chosen for each such parish as they now are chosen and appointed for the said parish of Doddington, the rector of each of the new rectories exercising the same rights and powers in the appointment of such churchwardens as the rector of the said rectory of Doddington now exercises. They are then to be chosen for each such parish as they now are for the said parish of Doddington. Now what is the said parish of Doddington? If the previous sections are examined it will be found that the said parish of Doddington is the whole parish consisting of Doddington, March, Benwick, and Wimblington. The said parish then means the whole of the parish; the non-insertion of "whole" makes no difference, and the whole means all the parts. The churchwardens then of the new parishes are to be elected "as the churchwardens for the whole of Doddington, including therein Doddington, March, Benwick, and Wimblington, are now elected." No difficulty arises in *reddendo singula singulis*. The churchwardens for the part of Doddington are "now elected," one by the rector, one by the parishioners. So they are to be in future. So the churchwardens for Benwick and Wimblington, who are the same as for Doddington, are now elected in that way. So in future. The churchwardens for March are now elected by the parishioners. So in future. This construction is confirmed by the conclusion of the clause which supposes that there are different ways of electing churchwardens in the said parish, and the rector of each new parish will exercise the same rights and powers in the appointment of churchwardens as the rector of the said parish of Doddington exercised in it before. So that if he exercised none before in March, neither will the new rector now. Had that been meant which the defendant contends, the words should have been "as at Common Law," or "one by the parishioners, one by the rector if they differ;" or "as the churchwardens of Doddington, Benwick, and Wimblington are now elected." Sect. 6 confirms this view. The said parish there has the same meaning as in sect. 5, and there is no need to suppose a *casus omissus*, or that any part will be left without churchwardens. Sect. 22 confirms it: that supposes that there will be different modes of electing in the new parishes. Lastly the right and justice are that way. We ought not to suppose that the privilege in the possession of the inhabitants of March has been taken from them. There is no reason why it should have been. If done, the words should be plain.

Lord COLERIDGE, C.J., delivered the judgment of himself, Brett, and Denman, JJ.—This was an appeal from a judgment of the Court of Queen's Bench on a special case stated in a proceeding by way of *mandamus* for the purpose of obtaining the opinion of the court on the question whether the inhabitants of the parish of March, in the county of Cambridge, have the right to elect both the churchwardens of that parish. The rectory and parish of March was created in 1847 by the Act 10 & 11 Vict. c. iii., which was passed for the purpose of dividing the parish of Doddington into three new parishes. Before the passing of the Act the parish of Doddington consisted of four townships, viz., Doddington, March, Wimblington, and Benwick. The parish church was in the town-

ship of Doddington; and in the township of March there was a consecrated chapel with a graveyard, which was served by a curate nominated by the rector of the parish of Doddington. The inhabitants of March were generally married and buried in the chapel and graveyard of March, but it appears from the Act, sects. 15 and 28, that they had equally with the rest of the inhabitants of the above parish of Doddington the right to be married and buried at the parish church. The inhabitants of March seem to have enjoyed all the rights and privileges of a separate parish. They appointed their own sexton (paragraph 20 of case) without any interference on the part of the rector of Doddington, although the rector appointed the parish clerk (so called) of March. Nevertheless in the Act of Parliament March is spoken of throughout as the township, chapelry, or hamlet of March, and is treated throughout as a parochial chapelry within the parish of Doddington. With regard to the appointment of churchwardens it appears from the case that before the passing of the Act the inhabitants of March used to hold vestries at March and elect two officers for the township who are called in the case churchwardens, although it is not stated by what name they were elected. None of the inhabitants of the rest of the parish used to take part in the March vestries. The persons so elected in March officiated within the township of March only. The inhabitants of the other three townships used to hold vestries at Doddington, and at such vestries two churchwardens were appointed by the name of "churchwardens for the parish of Doddington." The churchwardens so appointed exercised no functions within the township of March, nor did any of the inhabitants of March take any part in their election. At the vestries held at March the inhabitants by custom elected both persons, but at the vestries held at Doddington the common law method of appointment prevailed, that is, a joint appointment of both churchwardens by the rector and the parishioners where there was no difference; and in case of difference the appointment of one by the rector and the election of the other by the parishioners. Such was the state of things before the passing of the Act 10 & 11 Vict. c. iii. By that Act the parish of Doddington was for the future to be divided into three separate parishes. The township of Doddington and hamlet of Wimblington were to be the new parish of Doddington, the township, chapelry, or hamlet of March was to be the new parish of March, and the hamlet of Benwick was to be the new parish of Benwick. The provision with regard to the appointment and election of churchwardens in the new parishes is contained in the 5th section of the Act, upon the construction of which the entire question in the present case depends. The material words of the 5th section are as follows: "Two fit and proper persons shall be chosen churchwardens for each such parish, when such division shall have taken effect, at the same time and in the same manner as churchwardens are now chosen and appointed for the said parish of Doddington, the rector of each of the said new rectories exercising the same rights and powers on the appointment of churchwardens or one of them, as the rector of the said rectory of Doddington now exercises." The contention of the prosecutors is that the effect of this section is to pre-

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serve to the inhabitants their right to elect both churchwardens in the said parish of March. The rector of March contends that the effect is to give him the right to appoint one of the churchwardens in case of difference. Such is the question at issue, and in consequence of the difference of opinion, both in the court below and in this court, it is necessary to examine with care the statements of the case, and the language of several sections of the Act of Parliament. Now the 24th paragraph of the case (the substance of which I have already set forth) states that at the vestries held at Doddington, churchwardens were appointed by the name of "churchwardens for the parish of Doddington," and in the appointment of these churchwardens for the parish of Doddington, the rector (paragraph 25) had the common law right of appointing one in case of difference. By the Act there are to be three new parishes, Doddington proper, March, and Benwick, and (here I use the very words of the 5th section) "two fit and proper persons shall be chosen churchwardens for each such parish" (i.e. Doddington, March, and Benwick) "when such division shall have taken effect, at the same time and in the same manner as churchwardens are now chosen and appointed for the said parish of Doddington." I pause here to ask how were the churchwardens for the parish of Doddington chosen and appointed? The case (paragraphs 24 and 25) answers the question, in the common law manner. It should seem necessarily to follow, if the section stopped here, that the churchwardens of March could not legally be chosen in any other manner. It has been said, however, that the words from which this inference is drawn do not justify it, because they include also the churchwardens (so to call them) of March, and that these persons (as is the fact) were not chosen and appointed in the common law manner. But in order to sustain this objection it must be assumed or found that the officers who acted as churchwardens for March were in law or in fact two of the churchwardens for the parish of Doddington, in other words that there were four churchwardens for the parish of Doddington, two of whom acted for March only. In the very able judgment of my brother Bramwell, which I have had the advantage of reading, this is assumed. With genuine deference for him, however, I can find no ground in principle, or in authority apart from his own, for any such assumption. Many large parishes, especially in the North of England, are divided into townships, and in each township churchwardens or chapelwardens are elected; but each of these, though chosen by and acting specifically for the respective township, is churchwarden for, and represents the whole parish. Churchwardens and parishes of this kind will be found described in the cases of *Rex v. Marsh* (5 A. & E. 468), and *Bremner v. Hull* (L. Rep. 1 C. P. 748). But the churchwardens (so called) of March and the parish of Doddington were neither officers nor a parish of this sort. There is, however, a case of *Wise v. Creeke* (2 Lev. 186), in which something very like the relation of March to Doddington is to be found described, so like that it is worth while to refer to it. That was a suit by the churchwardens of Addenbury to compel the inhabitants of Bodecut, a village in the parish of Addenbury, to contribute to the repairs of the parish church. The plaintiff declared in prohibition, and stated as fol-

lows: Time out of mind they have had in Bodecut a chapel parochial or a church of Bodecut *infra parochium de Addenbury*, in which, time out of mind, there has been a body of a church, a chancel, *campana et omnia alia parochialia trophea*, and Divine service and Sacraments, and a distinct perambulation for Bodecut, separate from that of Addenbury, and that the inhabitants of Bodecut never go to the church of Addenbury nor have seats there, and that the inhabitants of Bodecut have distinct churchwardens, and make no other use of the church or churchyard of Addenbury *nisi tantum pro sepultura*. In this case it was held that the custom to repair the parochial chapel was good to exempt the inhabitants of Bodecut from liability to repair the mother church. But it was not contended, nor could it have been, that the churchwardens of Bodecut were churchwardens of Addenbury. The two churchwardens of Addenbury brought the suit, and they would have been improper parties if the churchwardens of Bodecut had been churchwardens of Addenbury also, and in like manner I do not think that the churchwardens of March were or could have been churchwardens for the parish of Doddington. They are nowhere called so, and I see no ground for saying that they could have so acted. It seems to me, therefore, that if the 5th section had stopped with the words which I have been examining, the inference which I have drawn from these words would be inevitable. But the 5th section does not stop with these words, and it is to be considered whether the rest of the section strengthens or weakens the inference which I draw from the words which hitherto I have been considering. The section proceeds thus, "The rector of each of the said new rectories exercising the same rights and powers in the appointment of such churchwardens or one of them as the rector of the said rectory of Doddington now exercises." On this I observe first that (I think without exception) throughout the Act of Parliament and the case, whenever the common law mode of choosing churchwardens is alluded to, the word made use of is "appoint." There was at Doddington a joint appointment by the rector and the parishioners, and in case of difference, an appointment by one churchwarden by the rector and an election of another by the parishioners. It may be important to observe that it is not strictly accurate to say, as has been said, that the churchwardens of Doddington were elected one by the parishioners and one by the rector. The rector did not elect but appoint: the parishioners, if there was a difference, did not appoint but elect; if there was no difference then there was a joint appointment. Before the Act passed, however, the churchwardens, so called, for March, were not appointed at all, they were both elected. The only churchwardens who were or could be appointed, were those of Doddington. Now bearing this in mind, and reading the section as it is suggested it should be read, treating the word Doddington as including March, and *reddendo singula singulis*, this follows as the reading of it. "Two fit and proper persons shall be chosen churchwardens of March at the same time, and in the same manner as churchwardens are chosen and appointed for March." But no churchwardens were ever appointed for March at all, and the word appointed must on this view be rejected as far as March is concerned.

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The section will then proceed, "the rector of March, exercising the same rights and powers in the appointment of such churchwardens, or one of them, as the rector of the said rectory of Doddington now exercises [in the part of Doddington called March]." The last seven words must be inserted in order to sustain the interpretation of the section contended for by the prosecutor. But there being no appointment of churchwardens in March, and the rector of Doddington exercising no right of appointment of churchwardens in March, this latter part of the section has, according to this interpretation, no meaning whatever. If the interpretation contended for by the defendant be correct, both parts of the section make good sense, a strong reason surely for thinking that the latter interpretation is the sound and reasonable one. Is then the argument in favour of this interpretation weakened in any way by any other sections of the Act? The 6th and the 22nd sections have been referred to both in the court below and in this court, as making in favour of the prosecutor. As to the 6th, it was pointed out by my brother Quain, that, according to the view of the majority of the court below, the churchwardens (so called) of March would be for a short time superseded. The answer of my brother Blackburn is probably sufficient, that the former part of the 6th section will meet the suggested difficulty. But even if it is not, the difficulty does not seem to me to be substantial. There are to be three new parishes created, and that one of them (Benwick) should have no churchwardens except those of Doddington, and that the other (March) should have substituted churchwardens for the necessarily short period between the division and the time for the next election of churchwardens in each of the three parishes, does not appear to me, I confess, a very formidable matter. The 22nd section does not, I think, as has been suggested, contemplate different forms of choosing churchwardens as intended to prevail in the different parishes. The words on which reliance is placed are copied from the words of the 4th and 5th sections, and if in the earlier sections they are to be interpreted as the prosecutor contends for, they must in the latter section receive the same interpretation. There is a consideration much counted on both in argument and by my learned brothers who are of opinion in favour of the prosecutor, which requires to be noticed. It is that the election by the inhabitants of March of both officers who served as churchwardens was a customary privilege in the inhabitants not commonly existing, and which, if taken away, it is to be expected would be taken away by clear and express words. No doubt a consideration entitled to weight, but in construing this Act of Parliament to less, I think, than usual. For it appears elsewhere in the Act that its intention was to make all three parishes exactly alike, and to make the parish of March therefore exactly like the other two, whether the privileges of the inhabitants were thereby taken away or not. It seems that the inhabitants of the two parishes of Benwick and March lost at once the right of marriage, and after twenty years, that of sepulture, in the church and churchyard of Doddington. The parish clerk of Doddington had half the fees of marriages which took place in March and Benwick, after the division, secured to him (sect. 28), although he had no right (paragraph 20 of case)

to any fees for marriages celebrated in the chapel of March before the division. "The sexton of March was appointed" (I quote the 20th paragraph of the case) "separately at a vestry of the parishioners of March, without any interference on the part of the rector in the choice or appointment of such sexton." Yet by the 4th section of the Act, the sexton of the new parish of March is to be appointed by the rector only, the privilege of the inhabitants in respect to this appointment being by necessary implication indeed, but not by direct words, taken away. Moreover, the concluding words of the fourth section do not appear to me, either in argument or in the court below, to have had sufficient attention paid to them. The fourth section enacts that the three new rectors shall have exclusive charge of souls, and so forth, in each rectory; and concludes as follows: "and shall also appoint parish clerks, sextons, and other officers, and shall have all such other powers in each such parish and rectory as the rector of Doddington is now entitled to exercise in the rectory or parish of Doddington aforesaid." Churchwardens are "officers." One of "such other powers" was the power of appointing one of the churchwardens in case of difference. Yet, according to the view of the prosecutor, this power is taken away from the rector of March by sect. 5, and sects. 4 and 5 are rendered inconsistent. It may be said that the last words of the fourth section "in the rectory or parish of Doddington, aforesaid," carry the matter no further than the same words in the fifth, and are to receive the interpretation in the fourth section, which my brother Bramwell has given them in the 5th. I am unable to agree to this. Three new parishes and three new rectors of three new parishes are spoken of in the 4th section. Their powers are defined by reference to a common standard, i.e., the powers of the rector in the parish of Doddington. Does this mean to include or exclude March from the standard? If it includes March it leaves the powers of the rector of Benwick absolutely undefined, because the powers exercised by the rector in March and in Doddington were different. If it excludes March, and means Doddington proper, then the section is sensible and intelligible; the powers of the three rectors in the three parishes are made exactly the same, and amongst these powers is the common law power of appointment of one churchwarden in case of difference in all three parishes alike. It is true that the 5th section follows the 4th, and it may be said is to be read as qualifying it. If it were expressed as a proviso, which it is not, this would be so. But the reasonable interpretation seems to me to be that the 4th section deals with the rights of the rectors, the 5th with the rights of the parishioners in the choice of churchwardens. The last portion of the fifth section it is true omits the words "in the rectory or parish of Doddington aforesaid," which are to be found in the fourth section. But if the "Rectory of Doddington" does not include March in the fourth section (and I think I have shown that it cannot), there can be no sound reason for construing it differently in the 5th section, and introducing a subtlety or difficulty of construction, which is avoided by construing it as the defendant contends for. I admit certainly that this Act of Parliament is a striking example of the good sense of the precept I have always heard attributed to Baron Wood,

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that when men, especially lawyers, mean the same thing, they should say the same thing, and use the same words. If the words of the Act of Parliament could not by fair means be made clear, it might be necessary to enter on the difficult and doubtful questions of probability arising on very imperfectly known facts, as to the passing of the Act, who promoted it, what notices were given, who appeared before the Parliamentary Committee, and what were the decisions arrived at by these Committees, if any, which are embodied in the words of the Act itself. But no conclusion derived from premises so uncertain could be anything but uncertain too, and I decline for my own part to enter upon the inquiry. For it appears to me after much consideration that the words of the Act are clear, that the judgment of the majority of the court below was right, and that it ought to be affirmed.

Judgment for prosecutor, the appellant.

COURT OF APPEAL IN CHANCERY

Reported by E. STEWART ROCHE and H. PRAT, Esqrs.,
Barristers-at-Law.

Wednesday, Nov. 18, 1874.

(Before the LORD CHANCELLOR and the LORDS JUSTICES.)

SAULL v. BROWNE.

Criminal proceedings—Injunction—Jurisdiction.

A bill was filed in 1872 by one partner, against two other partners, alleging that they had formed a scheme to transfer the business; and praying for a realisation of the partnership property, and that the defendants might pay her for the losses occasioned by the transfer of the business. In 1874 the plaintiff obtained from a police court, a summons against the two other partners for a conspiracy to defraud her out of her share of the business.

On a motion to have the proceedings on the summons restrained until the hearing of the suit.

Held, that as the suit was to recover and realize property, and the summons was to obtain personal punishment for a criminal offence, the Court of Chancery could not interfere.

THIS was a motion by two of the defendants, Browne and Godfrey, to restrain the plaintiff, until the hearing of the suit from proceeding on a summons which she had obtained in one of the Metropolitan Police Courts, against the applicants on a charge of conspiracy to defraud her of her just share in a partnership business which had been carried on by her and the defendants. The suit was instituted against W. Saull, Godfrey, Browne, Findlay and the *cestui que trusts* under the will of Thomas Saull, wine and spirit merchant, who died in 1855 having bequeathed his business to the plaintiff, his widow, and the defendant, W. Saull his son, in trust to carry it on as directed by the will. It appeared that in 1858 the plaintiff and the defendant W. Saull took into partnership with them, the defendants Godfrey and Browne, and thenceforth traded under the style of "Saull and Co." This partnership was dissolved in 1871, and in May 1872 the defendant Browne established a wine merchant's business in Worship-street, under the style of "W. J. Browne and Co.," and subsequently took the defendants Godfrey and Findlay into partnership and the three had since continued to trade under the same style. The bill charged

that at the dissolution of the partnership the defendants Godfrey and Browne, acting in collusion together, arranged a scheme for transferring the Aldersgate-street business to No. 8 Worship-street, and that the latter business had been commenced and carried on by means of money improperly, and without the knowledge of the plaintiff drawn out of the Aldersgate-street business, and by means of the appropriation of the goodwill of the Aldersgate-street business, and that the defendants Godfrey, Browne, and Findlay had traded with these assets, and had thereby realised large profits. The bill prayed for a declaration that the goodwill of the Aldersgate-street business, and so much of the assets of that business as represented assets appropriated by Godfrey and Browne, and transferred to the Worship-street business, and all profits arising therefrom, constituted part of the estate of the testator, and for the necessary accounts and inquiries. On the 12th Nov. 1874, issue was joined in the suit, and on the 13th Nov. the plaintiff obtained a summons from the magistrate of the Worship-street Police Court against the defendants Godfrey and Browne, alleging that the said defendants did unlawfully conspire to defraud the plaintiff of her just share of and in the partnership business of "Saull and Co." carried on at 15, Aldersgate-street, and to utterly destroy the said business, and to transfer the goodwill and the stock and assets thereof to No. 8 Worship-street for their own benefit. The summons was to be heard on the 19th Nov., and on the 16th the defendants Godfrey and Browne applied to the Master of the Rolls for leave to serve the plaintiff with notice of motion to restrain her from proceeding on the summons until the hearing of the cause. The Master of the Rolls refused the application, intimating that he did so in order to enable the parties to carry the matter to a higher court, as if the motion came before him, he should refuse to interfere with the criminal proceeding, for want of jurisdiction. The two defendants thereupon applied to the full court, which granted leave to serve notice of motion. The motion to have the proceedings on the summons restrained, now came on for hearing.

Fry, Q.C. and Ince, in support of the application, contended that the matters in respect of which criminal proceedings were instituted, were the same as those which formed the subject of the Chancery suit, and that this was merely an attempt under colour of a criminal charge to try an issue in the suit. They referred to;

Attorney-General v. Cleaver, 18 Ves. 210;

Lord Montagu v. Dudman, 2 Ves. sen. 396;

The Mayor and Corporation of York v. Pilkington, 2 Atk. 302.

Fischer, Q.C. and Locock Webb for the plaintiff were not called upon.

The LORD CHANCELLOR (Cairns) said he had no doubt but there had been cases in which the object of criminal proceedings taken by a party to a suit in this court had been so identical with the civil remedy that this court had thought it right to order that the party should not pursue his remedy in both courts. He desired to express his opinion that there might be such cases. He thought the authorities referred to came within this observation. But as regarded the present case, it appeared that the bill alleged that the defendants acting in collusion together, arranged a scheme for appropriating the plaintiff's share in the partnership

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business, and prayed for the usual realization of the partnership assets. He made no observation as to the plausibility of the case set up by the bill, but he found that the same plaintiff took out a summons in the Police Court against the defendants, or some of them, alleging that they had unlawfully conspired to defraud the plaintiff of her share in the partnership business. The summons was based on the criminal jurisdiction of the Police Court, and the plaintiff sought thereby to put in force the law against the two defendants, and to obtain the punishment of the two defendants for a criminal conspiracy. That was a result different from anything which could be obtained in this court. It was true that the judge in the criminal court might have to consider the same question that would ultimately have to be determined by this court, but the object of the police court proceedings was not to obtain relief in respect of partnership property, but punishment for a criminal offence. It had been asked during the argument, whether a summons of this kind could not be taken out, and after the hearing in the police-court a bill have been filed in the matter. There could be no doubt that it could be done. Neither could there be a doubt that, after relief had been obtained in this court for loss occasioned by a conspiracy, a summons could afterwards be taken out in a criminal court for the punishment of that conspiracy. And if this could be done afterwards, there could be no reason why it should not be done at the same time, especially as the conviction would not be received as evidence in the suit. Of course it was for the discretion of the magistrate to consider whether he would entertain this summons, but with that their Lordships had nothing to do. He was of opinion that the motion must be dismissed with costs.

Lord Justice JAMES was of the same opinion. He was quite aware that in former times the Court of Chancery had been asked to interfere, and had interfered when officers of the court were harassed and disturbed by criminal proceedings, and when they had no other protection. Some of the cases of interference by the court which were contained in Mr. Swanston's Reports were of this description. He observed, however, that during all the centuries during which the Court of Chancery had been in existence, only one precedent for making such an order as the court was asked to make in the present case, was to be found, for the authorities cited were merely comments on Lord Hardwick's decision in the *Mayor and Corporation of York v. Pilkington*.

Lord Justice MELLISH concurred.

Solicitors, Howard and Co.; Müller and Müller.

Wednesday, Aug. 5, 1874.

(Before the LORDS JUSTICES.)

WILLIAMS v. THE AYLESBURY AND BUCKINGHAM RAILWAY COMPANY.

Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 69—Compulsory purchase of glebe land—Application of purchase money—Permanent improvements—Rebuilding rectory.

A railway company under the powers of their Act, took part of the glebe lands belonging to a rec-

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tory. It was agreed between the bishop, the patron and the rector, that the purchase money should be applied towards rebuilding the rectory, which was in a dilapidated condition. The company did not pay the purchase money for some time, and the rector advanced the amount thereof, and the rectory was rebuilt. On the money being paid into court by the company, the rector, the bishop, and the patron presented a petition that the purchase money might be paid to the rector :

Held, that the court had no power to order the money to be paid to the rector.

Quere, whether the 69th section of the Lands Clauses Consolidation Act empowers the court to authorise the application of the proceeds of sale of glebe land, taken by a company, towards the rebuilding of a rectory house.

This was a petition for the payment of a fund out of court, which was presented under the following circumstances.

In 1867 the Aylesbury and Buckingham Railway Company, under the powers of their Act, took a portion of the glebe lands belonging to the Rectory of Waddesden, and the price to be paid by the company was assessed at 700l.

The rectory house was old and dilapidated, and it was determined to rebuild it. An arrangement was accordingly made between the bishop, the patron, and the rector, that the purchase money of the land taken by the railway company should be applied towards the rebuilding of the house, and that the rest of the money requisite for that purpose should be borrowed from the Commissioners of Queen Anne's Bounty.

In accordance with this arrangement the rectory house was pulled down and rebuilt. The railway company, however, fell into difficulties, and neglected to pay the purchase money of the land.

The rector himself advanced the amount of the purchase for the purposes of rebuilding, and in Nov. 1871 he filed a bill against the railway company for specific performance of their contract. The bill also prayed for an injunction to restrain the company from continuing in possession of the land until the money was paid, and for a declaration that the plaintiff was entitled to a lien on the land for the purchase money and interest, and for a sale (if necessary) to enforce the lien.

Ultimately the railway company paid the purchase money into court, and the present petition was presented to the Master of the Rolls by the rector, the bishop, and the patron, praying that the fund in court might be paid to the rector in repayment of the money advanced by him for rebuilding the rectory house.

The Master of the Rolls, though desirous of making the order prayed for, doubted whether he had power under the 69th section of the Lands Clauses Consolidation Act to sanction such an application of the purchase money, and he therefore desired the petition to be mentioned to the Court of Appeal.

Townsend, for the petitioners.—In *Re Incumbent of Whitfield* (1 J. & H. 610), money paid into court by a railway company in respect of glebe land taken by them was ordered to be applied towards the costs of building a vicarage house, part of which was defrayed by the Governors of Queen Anne's Bounty. That case is precisely the same as the present case, except that there the

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petition was presented before the house was built, while here the building is completed. [Lord Justice MELLISH.—Even assuming that the 69th section of the Lands Clauses Consolidation Act empowers us to apply such a fund to buildings, what power have we to order the rector to be recouped money which he has laid out on the building?] Here all parties interested assent to such an application of the funds. In *Re Leigh's Estate* (25 L. T. Rep. N. S. 644; L. Rep. 6 Ch. 887), where the court refused to allow such a fund to be applied in recouping a tenant for life what he had already expended on new buildings on the estate, the remaindermen objected to such an application of the funds. The delay in presenting this petition is the fault of the company, who neglected to pay the purchase money into court till they were forced to do so by a bill for specific performance. In *Ex parte Rector of Claypole* (29 L. T. Rep. N. S. 51; L. Rep. 16 Eq. 574), Bacon, V.C. held that the purchase money for glebe lands taken by a railway company might, with the consent of the bishop and patron, be applied towards the expenses of improvements of and additions to the rectory house.

Without calling upon

B. B. Swan, for the railway company,

Lord Justice JAMES said: In my opinion it is utterly impossible to grant this application. We have no more power to order this fund to be paid to the rector than to order any other money in court to be paid to him. The 69th section of the Lands Clauses Consolidation Act says that the money shall be applied "in the purchase of other lands to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner as the lands in respect of which such money shall have been paid stood settled." These words have been construed as authorising the court to sanction the laying out of such money in new buildings upon the settled estate, such buildings being regarded as permanent improvements. The present application shows the danger of so stretching the words of an Act of Parliament. Each decision which stretches the words is used as a precedent for stretching them still further. The cases which have been cited do not, however, authorise us to do what we are now asked to do. I am sorry for this gentleman, for he appears to have been misled in the matter. But we have no more power to do what he asks than we should have had to order the land which the company have taken to be sold in order to raise funds for rebuilding the rectory house. The Act does not authorise us to grant this application.

Lord Justice MELLISH.—I am of the same opinion. I, also, am very sorry for the position in which the rector is placed. But it is utterly impossible to say that the proposed application of the money would be a purchase of other lands to be settled upon the like uses as the lands in respect of which the money was paid, within the meaning of the 69th section of the Act. The fact that all parties interested consent, does not enable us to make an order which the Act does not authorise.

Lord Justice JAMES.—The petition must be refused with costs. The fund in court must be invested, and the income thereof paid to the rector.

Solicitors for the petitioners, *Evans, Foster, and Rutter*, agents for J. Newton, Leighton Buzzard.

Solicitors for the railway company, *White and Buckston*.

V.C. HALL'S COURT.

Reported by RICHARD MARRACK, S. H. S. LOFTHOUSE, and HENRY C. DRANE, Esqrs., Barristers-at-Law.

Dec. 9 and 10, 1874.

LAWRENCE v. CLEMENTS.

Mortgage to a building society—Subsequent mortgage—Payment off of building society, and further advance—Statutory receipt—Priorities.

A. being possessed of houses held by two under leases borrowed money from a building society, and in order to secure repayment demised the houses to the society by two leases, each ten days short of the term out of which it was derived. A. afterwards obtained an assignment of the lease which had been granted to his own lessor, and then, concealing the mortgage of the under leases, mortgaged the houses to B. for a term one day short of the original lease. Subsequently, C. paid off the building society, and made a further advance to A. C. at the same time took from the building society a receipt in conformity with the 6 & 7 Will. 4, c. 32, and from A. two leases similar to those which had been granted to the building society. B. on discovering C.'s mortgage, commenced an action of ejectment against A. and C. for breaches of covenants contained in the leases to C.

Held, that the action must be restrained, C. being entitled to priority over B. in respect of the sum paid to the building society, though not in respect of the further advance.

THIS was a suit to determine which of two mortgagees of the same property was entitled to priority. The facts of the case were as follows:—

By an underlease dated the 19th Feb. 1861, F. H. Robinson demised to F. Clements for a term of ninety-eight years and a half wanting ten days from the 25th March 1861, a piece of ground on which were subsequently erected four houses known as Nos. 16, 17, 18, and 19, Windmill-grove, Croydon.

By another underlease dated the 23rd March 1861, Robinson demised to Clements for a term of ninety-eight years and a half wanting ten days from the 25th March 1861, another piece of ground on which were subsequently erected four houses known as Nos. 20, 21, 22, and 23, Windmill-grove, Croydon.

On the 13th April 1861, Clements demised the premises comprised in the underlease of the 19th Feb. 1861, to the Amicable Mutual Benefit Building Society for the residue of his term, except the last three days thereof, by way of mortgage to secure repayment of 120*l.* lent to him by the society, and any further advances not exceeding 200*l.* in the whole. And on the 21st May 1861, he further charged the premises with repayment of another sum of 100*l.* lent to him by the society, and any further advances not exceeding 200*l.* in the whole.

On the 13th Aug. 1861, Clements demised the premises comprised in the underlease of the 23rd March 1861, to the same society for the residue of his term except the last three days thereof, by way of mortgage to secure repayment of 100*l.* lent to him by the society. And in the month of Nov. 1861, he further charged the premises with the repayment of another sum of 250*l.* lent to him by the society, and all fines and other payments in respect thereof as therein mentioned.

On the 16th Aug. 1867, Clements borrowed

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500*l.* from R. P. Lawrence. Of this sum 300*l.* was paid by Lawrence to the building society in discharge of the mortgage debt due to the society from Clements, and the remaining 200*l.* was paid by Lawrence to Clements. The building society thereupon indorsed on each of the deeds of mortgage and further charge a receipt, in pursuance of the 6 & 7 Will. 4, c. 32, for all sums due to the society from Clements. The society also handed over the mortgage deeds to Lawrence, together with the other title deeds relating to the mortgaged premises. And by an indenture dated the 15th Aug. 1867, Clements demised to Lawrence all the premises comprised in the two under leases for the residue of Clements' respective terms therein excepting the last day of each, by way of mortgage to secure repayment of the 500*l.* lent to him by Lawrence, and interest thereon at the rate of 5*l.* 10*s.* per cent. per annum.

Lawrence died on the 14th Dec. 1870, having by his last will, dated the 21st Sept. 1864, appointed the plaintiffs his executors, and they duly proved his will.

In July 1873, the plaintiffs, finding that the 500*l.* which had been lent by Lawrence to Clements, together with a considerable arrear of interest, remained unpaid, advertised the premises comprised in their mortgage security for sale by auction, but on the morning of the day appointed for the sale they received a letter from an agent of one William Arnum, informing them that Arnum was a mortgagee in possession of the houses comprised in the under lease of the 19th Feb. 1861, and also claimed the ground rents payable on account of the property comprised in the under lease of the 23rd March 1861. The plaintiffs thereupon postponed the sale, in order that they might make inquiry as to the validity of Arnum's claim. They then discovered that Clements had, shortly after the execution of the last mortgage to the building society, obtained from Robinson an assignment of the original lease under which the latter held the premises comprised in the two under leases granted by him to Clements, and that Clements had on the 23rd July 1864, mortgaged this lease to Arnum by demise, wanting one day, to secure repayment of 450*l.* lent by Arnum to Clements, and interest thereon at the rate of 6*l.* per cent. per annum. This mortgage deed stated the property to be subject to four underleases, and contained also covenants by Clements to pay the ground rents of the premises, insure them, and keep in repair.

In Jan. 1874, Arnum commenced an action of ejectment in the Court of Exchequer against Clements and all persons claiming under him, in order to recover possession of the property comprised in the two under leases which had been granted to Lawrence. He founded this action on non-payment of the ground rent, and breaches of covenant in not repairing and insuring the property.

The plaintiffs accordingly filed their bill against Clements and Arnum, and thereby prayed for an injunction to restrain Arnum from proceeding with his action at law, for an account of what was due to them in respect of the sums paid by Lawrence to the building society and to Clements respectively, and for a foreclosure decree against Arnum and Clements in case these sums were not paid.

The injunction was moved for on the 19th March 1874, when it was ordered that the plaintiffs should give judgment in the action, such judgment and the costs of the action to be afterwards dealt with as this court should direct. The plaintiffs now moved for a decree in the terms of the prayer.

Dickinson, Q.C. and *Strickland* for the plaintiffs read evidence to prove that neither the building society nor Lawrence had had any notice of the mortgage to Arnum. They submitted that the effect of the receipts given by the building society was to vest the legal estate in the mortgaged premises in Lawrence (*Pease v. Jackson*, L. Rep. 3 Ch. 576) who was also entitled to tack his additional payment to Clements, inasmuch as Arnum's mortgage deed gave the latter notice of the under leases, and bound him, therefore, to make inquiry, in which case he would have discovered the fact of the mortgage to the building society.

Green, Q.C. (*G. Hastings* with him) for the defendant Arnum.—This case is altogether different from that of *Pease v. Jackson* (L. Rep. 3 Ch. 576). There, the mortgagee whose claim was postponed was an equitable incumbrancer only, but here Arnum has a legal title with which this court will not interfere. The Act 6 & 7 Will. 4, c. 32, says that the statutory receipt of the building society shall vest the estate comprised in their security "in the person or persons for the time being entitled to the equity of redemption." And that person, here, is the defendant Arnum, who has a legal title in the property of which Lawrence and his representatives are merely equitable incumbrancers. He cited also

Prosser v. Rice, 28 Beav. 68.

A reply was not called for.

The VICE-CHANCELLOR said that he could not distinguish this case from *Pease v. Jackson* (L. Rep. 3 Ch. 576). Lawrence had furnished the money for paying off the building society, and was, therefore, according to that decision, the person entitled to the equity of redemption, it having been expressly agreed that Lawrence should stand in the shoes of the building society. It was true that the mortgage to Arnum was a legal one, but he must be held to have taken it subject to a prior equitable claim. The Act, however, did not appear to give the person paying off the building society such an estate as would entitle him to tack further sums beyond those paid to the society, and it had not been shown that Arnum had constructive notice of the mortgage to Lawrence at the time when he took his own security. The decree would contain a declaration that the plaintiffs were entitled to priority over Arnum in respect of the money paid by Lawrence to the building society. This would be followed by the common foreclosure decree in respect of that sum, and of any amount properly applied by the plaintiffs for repairs, with interest and costs of the suit. Then there would be a declaration that Clements was a trustee for the plaintiffs for the purposes of such legal estate, if any, as became vested in him on the payment off of the mortgage to the building society. Then, a decree for successive redemptions by Arnum, afterwards by the plaintiffs, and ultimately by Clements. The judgment in the action at law must be vacated, and the plaintiffs' costs in the action of ejectment and of the motion for injunction must be included in their costs of this suit.

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Solicitors for the plaintiffs, *William Day*.
Solicitors for the defendant *Clements, E. Jones*
and *Co.*

Solicitors for the defendant *Arnum, Deane,*
Chubb, and Co.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Wednesday, Nov. 11, 1874.

HAIGH (app.) v. THE TOWN COUNCIL OF SHEFFIELD
(resps.)

*Betting—Place kept or used for the purpose of
betting—Foot races—Betting Houses Act (16 & 17
Vict. c. 119), s. 3.*

*Appellant was the occupier of an enclosed ground
used for cricket, foot racing, and other sports. On
the occasion on which the ground was visited by
a policeman, foot races were going on, and 6d.
was paid by each person for admission. Within
the grounds, but outside the space reserved for the
runners, certain professional bettors stood on
chairs and stools, with books in their hands,
shouting out the odds on the various runners, and
betting with different persons, who each paid 1s.
and received in return a ticket. Behind each pro-
fessional bettor was a man who recorded the bets
made in a book. The appellant knew of what
was going on and took no steps to prevent it,
though he might have prevented it if he had been
so minded.*

*Held (following and approving Eastwood v. Millar,
30 L. T. Rep. N. S. 716), that this ground was
a "place" within the meaning of sect. 3 of the
Betting Houses Act (16 & 17 Vict. c. 119), and
that on the evidence the appellant was rightly
convicted of permitting the place to be "kept or
used" for the purpose of betting.*

CASE stated by the Police Magistrate for the
Borough of Sheffield for the opinion of the Court
of Queen's Bench.

1. The following summons was heard by me on
the 5th Dec. 1873:

Borough of Sheffield, to wit.—To Joseph Haigh, of the
Park, in the township of Sheffield, in the said borough of
Sheffield, licensed victualler.

Whereas information hath this day been laid before the
undersigned, one of her Majesty's justices of the peace in
and for the said borough, for that you within the space of
six calendar months last past, to wit, on the 21st July
1873, at the township of Sheffield, in the said borough,
being then the occupier of a certain place, to wit, Hyde
Park Cricket Ground, situate at the park in the said
township and borough, unlawfully, knowingly, and wil-
fully did permit the said place to be used by George
Trickett, — Enfield, T. Parker, Turner Wilson, Charles
Johnson, and P. Yardley, for the purpose of betting with
persons resorting thereto, contrary to the form of the
statute in such case made and provided.

These are, therefore, to command you in her Majesty's
name to be and appear on Friday, the 5th Dec. 1873, at
eleven o'clock in the forenoon, at the Town Hall in Shef-
field, in the said borough, before such justices of the
peace in and for the said borough as may then be there,
to answer to the said information, and be further dealt
with according to law.

Given under my hand and seal, this 4th Dec. 1873, at
Sheffield aforesaid.

(Signed)

FREDK. T. MAPPIN, J.P.

2. I convicted the defendant in the nominal
penalty of 1s. and costs, it being the object of the
town council, at whose instance this and other
summonses were taken out, as well as of the de-

fendant, to have the questions raised in this case
determined by a Superior Court.

3. The defendant, being dissatisfied with my
determination, and having duly applied to me in
writing, I state this case, setting forth the facts
and grounds of such determination for the opinion
of the Court of Queen's Bench.

4. This charge was framed under the Act 16 & 17
Vict. c. 119, which enacts that "no house, office,
room, or other place shall be opened, kept, or
used for the purpose (among others) of the occupier,
owner, or keeper thereof, or any person using the
same, or any person procured or employed by or
acting for or on behalf of such owner, occupier, or
keeper, or person using the same, or of any per-
son having the care or management, or in any way
conducting the business thereof, betting with
persons resorting thereto." Sect. 3, under which
the information was laid, imposes a penalty on
any person who, being the owner or occupier of
any house office, room, or other place, or a person
using the same, shall open, keep, or use the same
for the purposes hereinbefore mentioned, or either
of them, and also on any person who, being the
owner or occupier of any house, room, office, or
other place shall knowingly and wilfully permit
the same to be opened, kept, or used by any other
person for the purposes aforesaid, or either of
them.

5. The material facts of this case are that the de-
fendant occupies, as tenant, a house, together with
a piece of inclosed ground adjoining, called Hyde
Park Cricket Ground, used for cricket, foot racing,
and other games and sports. On the day named
in the summons foot racing took place in the
grounds, to which persons were admitted on pay-
ment of 6d. Within the grounds, but outside the
space reserved for the runners, and amongst the
spectators, some fifteen or twenty persons, being
clearly professional bettors (George Trickett being
one of them) stood on chairs and stools in different
spots, with books in their hands, calling out the
odds on the various runners, and betting with
different persons, a man behind each of the pro-
fessional bettors recording the bets in a book, the
persons betting paying money (1s. each) and
receiving a ticket. (A large number of persons
assembled in the grounds, to the number of up-
wards of 10,000.) Although there was nothing to
show the terms on which Trickett and the other
professional bettors were admitted to the grounds,
the evidence satisfied me that the defendant knew
of what was going on and took no steps to prevent
it, and that he might have prevented it if he had
been so minded. No attempt was indeed, as I un-
derstand, made on the part of his counsel to con-
trovert that part of the case. Further, although
his counsel did attempt to contend that the space
of ground was not a "place" within the statute, I
was of opinion that it was. I observed that Mr.
Justice Blackburn, in giving his judgment in
Doggett v. Catterns (34 L. J. 159, C. P.), in the
Exchequer Chamber, while holding with the rest
of the court that a spot under a tree in Hyde Park,
resorted to for the purpose of betting, was not a
place within the Act (reversing the decision of
the Court of Common Pleas), is reported to have
observed, "I do not say that an open field is not
a place which may come within the description
of the term place in the statute" On the other
hand the counsel in support of the complainants,
in answer to my inquiry, declined to contend that

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the use of a chair or stool constituted each particular spot where Trickett and the betting men stood a place as distinguished from the Hyde Park Cricket Ground generally. There is an obvious distinction between a chair and the wooden structures on the Doncaster racecourse, which in *Shaw v. Morley* (L. Rep. 3 Ex. 137, also reported 37 L. J. 105, M. C.) was held to be an office and place within the Act.

6. The real question on the case, as seemed to me, was one quite distinct from the reported cases, and was this, was there a user by Trickett of the Hyde Park Cricket Ground for the purpose of betting with persons resorting thereto within the meaning of the Act? But more closely the question is, does the statute include an incidental and partial use of a place for betting purposes; or is it confined to what may be termed either a "paramount," or "dominant," or "governing" use? The grounds are really used for the purpose of foot racing and other games and sports, and they are occupied by the defendant as tenant for those purposes, and if from being declared unlawful or from any other cause the practice of betting as above described were to cease, the grounds would, in every other respect be occupied by the defendant, and used for the purposes and with all the other incidents heretofore existing. In matter of fact as well as law there was no occupation or user by the defendant himself of this place for any prohibited purpose, but on the other hand I found as a matter of fact (as a legitimate deduction from the evidence) that Trickett resorted to the grounds for the sole or principal object of betting with other persons present.

7. I entertained doubts as to whether the defendant had committed the particular offence charged, still the ultimate inclination of my opinion was that the defendant had brought himself within the four corners of the Act, and I was the more inclined to take this view, because I cannot doubt that the system permitted by him is within the mischief sought to be suppressed, that is, that it tends, in the language of the Act, "to the injury and demoralisation of improvident persons." I therefore convicted the defendant of the offence charged.

8. The question of law for the opinion of the court is, whether the evidence and facts, as above found by me, warranted the conviction; if not, the decision is to be reversed, otherwise it is to be affirmed.

J. E. DAVIS, Police Magistrate, Sheffield.

Philbrick, Q.C. (with him *O. Crompton*), for the appellant, contended, First, that this was not a "place" within the meaning of the Act, as that word must be taken *ejusdem generis* with the words, "house, office, room," which precede it; and, secondly, that it was not "kept" for the purposes prohibited by the Act. [*BLACKBURN, J.*—The conviction is under sect. 3, which makes it an offence for the owner or occupier to permit the place to be "used" for the purpose of betting.] The word "used" means habitually used. [*BLACKBURN, J.*—Even if that were so, it seems to have been pretty clearly proved that the user here was habitual.] The betting was not the primary object for which the place was kept or used, but only an incidental thing, the racing being the chief and the superior object. Further, it must be shown that the owner or occupier "knowingly and

wilfully" permitted the user, and "wilfully" means that he "intended" it to be used for the purpose. [*MELLOR, J.*—If a man, with power to prevent its being used for the purpose of betting, takes no step to prevent it being used for that purpose, surely he "wilfully" permits the user. We must not be hypercritical, but put the ordinary meaning on the words of the Act. *LUSH, J.*—"Wilfully" means of his will. If he can prevent it and does not, then he permits it wilfully.] *Eastwood v. Millar* (30 L. T. Rep. N. S. 716); and *Doggett v. Catterns* (12 L. T. Rep. N. S. 355; 34 L. J. 159, C. P.) were referred to.

Barker, for the respondents.—*Doggett v. Catterns* (*ubi sup.*) is clearly distinguishable from the present case. In the recent case of *Bous v. Fenwick* (30 L. T. Rep. N. S. 524; L. Rep. 9 C. P. 339), the appellant stood on a stool on a race course, making bets and receiving deposits of money. A large umbrella, capable of covering several persons, being fixed over his head by means of a long pointed stick with a spike at the end, which was inserted into the ground; and on the outside was a placard bearing the owner's name and address, and an announcement, "We pay all bets past the post;" and the Court of Common Pleas held that he was using a fixed and ascertained "place," within the meaning of the Act, for the purpose of betting, and that he was rightly convicted. That is a stronger case than the present. The case of *Eastwood v. Millar* (30 L. T. Rep. N. S. 716), is undistinguishable from the present case. There the appellant was owner of certain inclosed grounds, to which persons were admitted through a gate by ticket, for which they paid. Whilst a pigeon shooting match was going on there between two persons for a wager, bets were made by several persons, two bookmakers shouting out and offering odds; after the shooting match there was a foot race, at which bets were similarly made; and appellant was standing by, taking no part in the betting, but he could hear what the bookmakers and others were saying. This court held that the grounds were a "place" within the 3rd section of the Act, and that the evidence justified a conviction for permitting the place to be "kept or used" for the purpose of betting. *Lush, J.*, said: "It has not been denied that an open ground, or not covered over, could be a place within the meaning of the Act. I can see no reason why an inclosed area, though uncovered, should not be a place within the meaning of the Act as well as a building. It is an inclosed space occupied exclusively by the appellant; it is, therefore, quite within the words of the Act, and quite within the intention of it, too. That it is a large inclosure—between three or four acres in extent—does not at all affect the question whether it is or is not a 'place,' within the meaning of the Act, the inclosure being a place to which persons are admitted only by leave of the occupier, the appellant," all which is equally true in the present case. "The next question," said his Lordship, "is, whether the evidence was sufficient to show that the place was kept or used for the purpose of betting. It has been said that the evidence is only of what took place on one occasion; and, further, that the primary object for which the place was kept or used was not betting but pigeon shooting, and that we should look to the primary object and not to the incidental user on one occasion. I cannot take that view of the matter. I think the evidence was sufficient to justify the justices in coming to

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the conclusion that the place was kept or used for the purpose of betting as well as for the purpose of pigeon shooting; and I think there was good reason for coming to the conclusion that it was kept for the one purpose as well as the other."

BLACKBURN, J.—I think that the conviction in this case must be affirmed. The Legislature, in passing the Act of 16 & 17 Vict. c. 119, begin by reciting in the preamble that "a kind of gaming has of late sprung up, tending to the injury and demoralisation of improvident persons, by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promise to pay money on events of horse races and the like contingencies; for the suppression thereof be it enacted," &c. The 1st section of the Act then provides that "no house, office, room, or other place, shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper or person, as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing, on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid." On this, my brother Brett remarks in the case of *Bows v. Fenwick* (*ubi sup.*): "When the Act of Parliament in question passed, the Legislature had not made up its mind to prohibit gaming altogether. But what it did mean to prohibit was, that which is described in the preamble, viz., a kind of gaming which had of late sprung up, tending to the injury and demoralisation of improvident persons, 'by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse racing and the like contingencies.' That discloses the kind of gaming which was sought to be suppressed. The enacting part of sect. 1 then provides that 'no house, office, room, or other place, shall be opened, kept, or used' for the purposes mentioned in the preamble. And then sect. 3 enacts that 'any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, &c., and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place, opened, kept, or used for the purposes aforesaid, or any of them,' shall on summary conviction be liable to a penalty. It would seem, therefore, that the kind of gaming prohibited is the opening and keeping a place for the purpose of gaming or betting with persons resorting thereto—a fixed place to which all persons may resort." I refer to

these observations, not for the purpose of dissenting from them, but for the purpose of saying, that while the latter part of the section refers only to that kind of betting mentioned in the preamble, I think it is not clear that the first part of the section does not go further. It is sufficient to say, that in the present case the betting was a gambling for something deposited, and, therefore, within the section. The money was deposited also in the case of *Bows v. Fenwick* (*ubi sup.*), and the same was the case in *Eastwood v. Millar* (*ubi sup.*); and it is perfectly intelligible that the Legislature may have intended to confine itself in this enactment to betting done only in that manner. But it is not necessary to decide that point here, for the gaming in this case, as in the two cases just mentioned, was by depositing money with the professional bettors, who do not trust others, though trusted by them. The first question to be determined here is, whether this was a "place" within the meaning of the Act? It was completely under the control of the owner, just as much as a skittle alley is, and it is immaterial that it was not covered in. In the Hyde Park case (*Doggett v. Catterns* (*ubi sup.*)), where the betting took place, was clearly not a "place" within the meaning of the Act, because the person who had the control over Hyde Park was the ranger, and he had nothing to do with the betting. Here, on the contrary, it is proved by the magistrate, that the appellant received money for admitting persons to the ground, and that, "within the grounds, but outside the space reserved for the runners, and amongst the spectators, some fifteen or sixteen persons, being clearly professional bettors, (George Trickett being one of them), stood on chairs and stools in different spots, with books in their hands, calling out the odds on the various runners, and betting with different persons, a man behind each of the professional bettors recording the bets in a book, the persons betting paying money (1s. each) and receiving a ticket, although there was nothing to show the terms on which Trickett and the other professional bettors were admitted to the grounds, the evidence satisfied me that the defendant knew of what was going on and took no steps to prevent it, and that he might have prevented it if he had been so minded. No attempt was, indeed, as I understand, made on the part of his counsel to controvert that part of the case." Though it is not expressly stated that the 1s. was received by the professional bettors under the obligation to pay the odds in shillings, in case the persons depositing it won, that is clearly the meaning. And on the rest of the finding, I can come to no other conclusion than this, that the magistrate was of opinion that the appellant knew that people would come into his grounds for the purpose of betting, and knowing that he permitted it; knowing that was their intention, he permitted them to enter, and must therefore be taken to have intended the natural consequences of his act. There is an old case reported, 3 B. & Ad. 184 (*Rea v. Moore*), where a person converted his premises, which adjoined a public highway, into a shooting ground, where persons came to shoot at a target and also at pigeons, and other persons collected outside and in the neighbouring fields to shoot at the pigeons which escaped from the ground, a great noise and disturbance being caused, and it was held that he was indictable for causing this nuisance, inasmuch as it was a pro-

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bable and natural consequence of his keeping ground for shooting pigeons in such a place. It being proved here, on ample evidence, that the appellant, who had the grounds solely under his control, permitted them to be used for the purpose of betting, by Trickett and others, is it any defence to say that the grounds were used primarily for another purpose? The appellant keeps them for both purposes. I cannot understand any argument adduced to show the intrinsic superiority of the racing over the betting. As to the further argument that it must be shown that the place is "habitually" used for the purpose of betting, it may be replied, in the first place, that there is nothing in the statute about the necessity of the place being habitually used for the purpose of betting. In the next place, if betting had taken place there only once, the magistrate would not probably find that it was "used" for the purpose; but if the occupier, knowing that betting was going on, though once only, permitted the place to be used for that purpose, the case would be within the statute. I do not express any opinion on the question whether the Act is restricted to cases where money is actually deposited, or whether it extends to other cases also. That may be a question of some nicety, and it is not necessary to decide it now, as money was deposited in the present case. For the reasons I have given, I think the conviction was right, and ought to be affirmed.

MELLOR, J.—I am of the same opinion. Authority is not wanted for affirming this conviction; but if authority were wanted we have it in the case of *Eastwood v. Millar* (*ubi sup.*) I entirely agree with what was said by my brothers Lush and Archibald in that case. In that case only one instance of betting had been proved, but I entirely agree with the view taken there by my learned brethren, which disposed of the arguments based on that fact; and I concur in what my brother Blackburn has now said with reference to the word habitual. Whether the user was habitual or not was a question of fact for the magistrates to determine. Except so far as the frequency of the thing shows that it must have been "knowingly" permitted, I do not see the importance of showing that the user was habitual. Here professional bettors stood on chairs and stools, with other persons behind them to record the bets when made, so that nothing can be clearer than the fact of the betting. As to whether an actual deposit of the money was necessary, I say nothing. As to the contention based on the word "place," I think the matter is quite unarguable. The observations made upon that word in the Exchequer Chamber, in the case of *Doggett v. Catterns* (*ubi sup.*), do not touch the present case. I cannot imagine anything being clearer than this, that the place where the betting was allowed to take place here was a "place" within the meaning of the Act. In applying the *ejusdem generis* rule of construction in a case like the present we must look at the object of the Act, and bear in mind that every succeeding word is larger in its meaning than those that precede it; so that, assuming the applicability of this rule of construction, we are not bound by it here to give any narrow interpretation to the word "place." For the reasons mentioned, I think the magistrate was right in the view he took of this case, and that the conviction must be affirmed.

LUSH, J.—I am of the same opinion. I have given a great deal of consideration to this statute since the decision pronounced by myself and my brother Archibald in the case of *Eastwood v. Millar* (*ubi sup.*), and the result is that I am convinced we were entirely right in the view we took of the statute in that case. The preamble of the Act is in these words, "Whereas a kind of gaming has of late sprung up, tending to the injury and demoralisation of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promise to pay money on events of horse races and the like contingencies." Now it appears to me clear from this that there was no intention on the part of the Legislature to interfere with betting or wagering as it had ordinarily been practised before; a previous Act (8 & 9 Vict. c. 109) dealt with cases of ordinary betting, treating them as a matter of neutral character, neither on the one hand to be encouraged, nor, on the other hand, to be prevented. It left bets of the ordinary kind as a mere matter of honour between the parties. Neither did the Legislature, by the Act of 16 & 17 Vict. c. 119, intend to interfere with betting as ordinarily practised. What was intended to be dealt with by this statute was a new form of betting, taking the form of common gambling, a very different thing from the former kind, and much more demoralising. And the words of the enacting part of the statute go beyond the words of the preamble for the purpose of better carrying out the object intended, and making the Act more effectual. The words in the preamble are "houses or offices;" and if these were the only words in the enacting part of the statute it would be easy to evade it by carrying on the prohibited gambling elsewhere. To prevent this the enacting part of the Act says (sect. 3) "or other place," including inclosures or anything else. It is the kind of betting carried on, not the nature of the place where it is carried on, which the statute regards and aims at. Again, the preamble speaks of "the owners or occupiers of such houses or offices, or other persons acting on their behalf." It would be easy to evade this, also, if these were the only words; therefore, the enacting part of the statute (sect. 3) goes on to speak also of "a person using the same," and prohibits the owner or occupier from knowingly and wilfully permitting the same to be opened, kept, or used "by any other person for the purposes aforesaid, or either of them;" the purposes aforesaid being the carrying on of the business of gambling. I think it is quite evident that the Legislature intended to suppress this particular kind of gambling altogether, and we must construe the Act so as to suppress the mischief and to advance the remedy, whilst not straining its language so as to embrace cases which are not within it. The present case seems to me to come within the very words of the Act, as well as within its spirit. I need not again recite the facts which show it to be so, as they have already been sufficiently stated by my learned brothers. I am of opinion that the conviction should be affirmed.

Conviction affirmed.

Attorneys for appellant, *Doyle and Edwards*, for *Binney and Sons*, Sheffield.

Attorney for respondents, *R. and W. B. Smith*, for *Yeomans*, Sheffield.

[BAIL.]

REG. v. HANNAY.

[BAIL.]

BAIL COURT.

Reported by R. A. KINGLAKE, Esq., Barrister-at-Law.

Tuesday, Nov. 24, 1874.

REG. v. HANNAY.

Land not injuriously affected—Notice to treat—Time within which complaint may be made—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 10) —11 & 12 Vict. c. 43 ss. 1 and 11.

Where a person is required to give up any lands under the 121st section of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) and have the amount of compensation settled by two justices; if the lands have not been injuriously affected, it is not necessary that the complaint shall be made to the justice within six months from the time of the notice under the 11 & 12 Vict. c. 43 sect. 1 & 11.

Re Edmundson (17 Q. B. 67) distinguished.

RULE calling upon James Lenox Hannay, a Metropolitan police magistrate, and James Mair, to show cause why a writ of *mandamus* should not issue commanding the said magistrate to hear and determine a summons by the Metropolitan Board of Works against the said James Mair, touching the compensation to be paid to him by the Board in respect of his interest in certain premises.

It appeared from the affidavits upon which the rule was obtained that James Mair was occupier of some premises in Shoreditch within the compulsory limits of the Metropolitan Street Improvement Act of 1872, with which Act the Lands Clauses Consolidation Act of 1845 (8 & 9 Vict. cap. 18) is incorporated.

The Metropolitan Board of Works required the premises for the purpose of a new street, and on the 4th March 1874 they served Mr. Mair with a notice to treat under sect. 18 of the last mentioned Act.

On the 21st March Mr. Mair sent in his claim, in which he stated that he was a yearly tenant at a certain rent.

The Board requiring possession on the 25th Dec. 1874, they on the 30th Oct. procured a summons to be issued from the Worship-street Police Court requiring Mr. Mair to attend and have his compensation assessed by the magistrate under sect. 121 of the Lands Clauses Act 1845. Upon the 7th Nov. the parties attended when it was objected on behalf of Mr. Mair that the application was too late, inasmuch as more than nine months having elapsed since the notice to treat was served the matter came within sect. 11 of 11 & 12 Vict. c. 43, and the magistrate being of opinion that the objection was well founded, declined to hear the case, or to determine the amount of the compensation.

Woolf showed cause.—The summons in this case was a complaint made before a justice, upon which he had authority to make an order for the payment of money, under the 11 & 12 Vict. c. 43, s. 1. By the 11th section it is enacted that in all cases where no time is already, or shall hereafter be specially limited, for making any such complaint, or laying any such information in the act or acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose. Here more than six months had elapsed between the service of the

notice to treat and the issuing of the summons, and, therefore, the magistrate had not jurisdiction to entertain the question. In the case of *Re Edmundson* (17 Q. B. 67), it was held that an adjudication by two justices under the Lands Clauses Consolidation Act 1845, and Railway Clauses Consolidation Acts 1845, of the sum to be paid by a railway company as compensation to a party whose lands had been injuriously affected by the exercise of their statutory powers, is an order within the 11 & 12 Vict. c. 43, s. 1, and is bad under sect. 11 if the complaint on which the order is founded be made more than six calendar months after the cause of complaint arose. The award by the magistrate is in effect an order for the payment of money, and, although under sect. 12 of the Lands Clauses Consolidation Act, the respondent would be entitled to compensation for the value of his unexpired term or interest, and for any loss or injury he might sustain, which compensation would be settled by two justices if he had gone before them within six months after notice, yet I submit now the jurisdiction of the justices is ousted, and he is entitled to go before a jury to settle his claim under the 68th section of the Act. [BLACKBURN, J.—A notice to treat remains binding for six years, and yet you say that in a case of compensation before justices it has only an effect for six months.] I do not say the notice expires, but that they must seek a fresh tribunal, and go before an arbitrator or a jury.

BLACKBURN, J.—In the case cited by Mr. Woolf, the lands had been "injuriously affected," and compensation was due, so that it might be said there was something in the nature of a complaint. The judgment of Patteson and Wightman, JJ., for whose opinions I have the profoundest respect, show that those learned judges had in their minds the distinction which would arise if there had been no injurious affecting. Here there is no compensation due till the board takes possession. What the magistrate does is a mere completion of the contract between the parties of which the notice to treat is the first step. I do not entertain the least doubt that the magistrate had jurisdiction to hear this summons, and I think we should distort the language of the statute if we were to interpret it as has been suggested. I confess that I should have paused before I came to the same conclusion as the learned judges in *Re Edmundson* (17 Q. B. 67). In the cases to which sect. 68 of the Lands Clauses Act applies, no limitation in point of time is imposed on the right of the party whose lands have been injuriously affected to have compensation assessed by arbitration or by a jury, and that would have led me to hesitate before I decided that there was any such limitation in cases which come under sect. 121.

QUAIN, J.—I am of the same opinion. I think that the magistrate acting under the Land Clauses Consolidation Act is in the same position as an arbitrator would be if he were appointed for the purpose of assessing compensation. *Prima facie*, I should, but for the case which has been cited, have said that there was no complaint before him at all; but it is enough to say that the present case is not a similar one to that. There the party might in some sense be said to be a complainant, though I should have hesitated before coming to such a conclusion. The present application was merely to get compensation assessed for premises which had not been injuriously affected, and that

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prevents the two cases from being at all similar one to another.

ARCHBISHOP, J.—If this had been a case of injurious affecting we should have been bound by *Re Edmundson* (17 Q. B. 67). Had the matter been *res integra*, I certainly should have felt much difficulty in coming to the conclusion arrived at there. But there is a great distinction between that case and the present, for there and here had been something done in the nature of a trespass, the only remedy for which was by a summons before the justices whose adjudication might be said to be an order to pay damages, enforceable by distress. But I am not at all disposed to extend that case beyond the limits to which it applies, and I agree, therefore, that this rule for a *mandamus* to hear and determine the summons must be made absolute.

Rule absolute.

Attorney for applicants, *The Solicitor to the Board of Works.*

Attorney for respondent, *W. Overton.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Tuesday, Nov. 24, 1874.

(Present: The Right HON. The ARCHBISHOP OF CANTERBURY (Dr. Tait), The LORD CHANCELLOR (Cairns), The BISHOP OF LONDON (Dr. Jackson), Lord PENZANCE, Lord SELBORNE, Sir JAMES W. COLVILLE, The DEAN OF ARCHES (Sir R. Phillimore), and Sir BARNES PEACOCK.)

PARNELL v. ROUGHTON.

ON APPEAL FROM THE CHANCERY COURT OF YORK.

Ecclesiastical law—Church Discipline Act—Pleading.

In a suit against a beneficed clergyman for offending against the ecclesiastical law in the manner in which he conducted divine services, the articles alleged that he himself did certain acts complained of "in a ceremonial manner;" and also that he "sanctioned, permitted, and suffered" the doing of such acts by others without alleging that he "authorised" them;

Held (affirming the judgment of the court below), that such averments in the articles were properly pleaded.

An averment in an article which follows the exact words of a rubric in the Prayer Book is sufficient, and it lies upon the minister complained of to show that he has any answer to it.

This was an appeal from an interlocutory decree or order of the Worshipful Granville Harcourt Vernon, Judge of the Chancery Court of York, in a cause of office promoted by the respondent against the appellant.

The suit was brought under the provisions of the Act 3 & 4 Vict. c. 86, against the appellant, a beneficed clergyman in the diocese of Chester, for certain alleged offences against the laws ecclesiastical relating to the mode of conducting Divine Service.

The case came before the Chancery Court of York in the first instance by virtue of letters of request from the Lord Bishop of Chester.

An appearance was entered for the appellant, and articles were then exhibited on behalf of the respondent.

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The appellant opposed the admission of the articles, objecting to one article altogether and to portions of several others. He filed a detailed statement of his objections and of the grounds thereof.

The passages objected to were of three kinds.

One kind charged the appellant with doing certain specified acts "in a ceremonial manner," or, "as a matter of ceremony," or, "being performed as and constituting a ceremony."

The second kind charged the appellant, not for his own acts, but with permitting and suffering other clergymen to do certain acts in the church of his benefice.

The third kind was the entire Article 12, and an abstract of it in the summary contained in Article 13.

Article 12 is as follows:

Also we article and object to you, that you the said Reverend Charles Parnell, in the said church or chapel of Saint Margaret, on divers occasions within two years next before the commencement of this suit (to wit), on Sunday morning the 3rd Nov. 1872, and on Sunday morning the 18th June 1873, celebrated the Lord's Supper in the course of Public Worship and Divine Service, and yourself then consecrated and received the elements when no person communicated with you.

The article then went on to charge the permission of somewhat similar acts by other clergymen on two other occasions, the further difference being that it was charged that on these occasions respectively one or two persons only communicated.

The admission of the articles was argued before the learned Judge of the Chancery Court of York on the 17th April 1874. The learned judge made a slight alteration in the passage in Article 13, which had been objected to; but in all other respects overruled the objections of the appellant, and he ordered the articles, with this one exception, to be admitted as exhibited.

The learned judge, in pursuance of the provisions of the Act referred to, gave leave to appeal from this decree or order, and from it the present appeal was accordingly brought.

A. J. Stephens, Q.C., Jeune, and W. G. Phillimore, for the appellant, argued that the words "in a ceremonial manner," were embarrassing, prejudicial, and improperly pleaded, because they were deductions of law, and imputations of motive: (*Martin v. Mackonochie*, 36 L. J., N. S., 22, Eccl. per Dr. Lushington.) [The LORD CHANCELLOR.—That case merely shows that such words are unnecessary; not that they vitiate the proceedings. Lord SELBORNE.—Are they to be struck out as surplusage?] Yes, in that case; but if they are a conclusion of law, it is bad pleading. They beg the question, it is the matter in dispute. The acts mentioned are necessarily ceremonial; it is the excess that makes them illegal, and that is a conclusion for the judge: (see the judgment of Sir R. Phillimore in *Martin v. Mackonochie*, 18 L. T. Rep. N. S. 257; L. Rep. 2 Adm. & Eccl. 136.) The words, "sanctioned, permitted, and suffered," are too vague; they do not allege how, or whether the appellant was present or absent: (see the judgment of Lord Chancellor Cairns, in *Martin v. Mackonochie*, 19 L. T. Rep. N. S. 804; L. Rep. 2 P. C. 380.) As to the allegations in Articles 12 and 13, as to no person communicating with the appellant, there are no means by which a clergyman can find out whether any persons intend to communicate until

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after he has received the communion himself, now that the first rubric in the Communion Service has fallen into disuse. On this point of the case he referred to a case before one of the Consistory Courts in 1852, which is privately printed, but not reported.

Dr. Deane, Q.C. and B. Shaw, for the respondent, were not called upon.

Their Lordships' judgment was delivered by

The LORD CHANCELLOR (Cairns).—Their Lordships do not desire to call upon the respondent. The questions which are raised in this case are questions merely of pleading, and are, moreover, questions of mere technicality in pleading; and their Lordships desire it to be understood that, in the advice which they will feel it their duty to tender to Her Majesty, no decision will be given nor any opinion expressed on any proposition of law. Their Lordships cannot but regret that, upon what is merely a question of technicality in pleading, the great and, as they think, the unnecessary expense has been incurred of bringing the case at this stage before this tribunal. The objections which are made to the articles are threefold. The first is an objection to those parts of several of the articles in which certain acts are alleged to have been done in a ceremonial manner, or as connected with and being part of the ceremonies of public worship. With regard to the introduction of those words, their Lordships are not prepared to say that the words may not be surplusage, and that the conclusion to be drawn from the other averments would not, of itself, supply the absence of these words, if they had been absent. But their Lordships cannot regard these words, at the highest, as more than a statement by the pleader that the acts alleged were not done in an accidental or casual manner, but were done deliberately and intentionally, and as forming part of the worship which was then proceeding. Their Lordships, in this sense, conceive that the words amount to allegations of fact capable of proof, and do not, as was said, amount to conclusions of law to be drawn from facts. The second objection deals with those parts of the articles in which it is said that the appellant, being responsible as incumbent for the due performance of Divine service in his church, sanctioned or permitted, and, in another article, sanctioned or permitted and suffered, these acts, which are alleged to have been a departure from the course of public worship as authorised by law. It is said that the averment should have been that the acts in question were authorised by the incumbent; but their Lordships are of opinion that the incumbent being responsible for the due performance of Divine service, it is, in the first instance, at all events, sufficient to charge that departures from that order of service were sanctioned or permitted, or were sanctioned or permitted and suffered, by him, leaving it to him to allege and prove, if he is able, any circumstances which will show that these acts, although actually done, had not his authority, or had not, in reality, his sanction or permission. Their Lordships, not finding any precise statutory enactment requiring the use of particular words, are not prepared to say that the words used in the present case are inappropriate.

The third charge remains, which is that contained in the 12th and in the 13th articles that the appellant "sanctioned or permitted, and suf-

ferred the Lord's Supper to be celebrated by another clergyman, in the church or chapel, in the course of public worship and Divine service, so that he himself then consecrated and received the elements, when only one person communicated with him;" and, also, that the appellant himself, on another day, "sanctioned or permitted and suffered, the Lord's Supper to be celebrated by his curate in the said church or chapel, in the course of public worship and Divine service, so that he himself then consecrated and received the elements, when only two persons communicated with him;" and also that on a third occasion, on a Sunday morning, November the 3rd, and on Sunday morning, 15th June, 1872 and 1873, the appellant himself "celebrated the Lord's Supper in the course of public worship and Divine service, and himself then consecrated and received the elements, when no person communicated with him."

Now the two rubrics which have been referred to upon the subject of this charge, are the second and third at the end of the Communion Service: "There shall be no celebration of the Lord's Supper, except there be a convenient number to communicate with the priest, according to his discretion;" "and if there be not above twenty persons," the next rubric says, "in the parish of discretion to receive the communion, yet there shall be no communion except four or three, at the least, communicate with the priest." Now, what their Lordships find has been done in the case of these two articles is, that, as they stand, there is an averment, following the exact words of the second of these rubrics, that there has been communion, and that the elements were consecrated and received by the minister, either where no person communicated with him, or where only one person communicated with him, or where only two persons communicated with him. Their Lordships are of opinion that, at this stage of the case, and without offering any expression of what they may think, when the facts of the case come to be more closely examined, it is sufficient for the complainant to follow the words of the rubric as he has done; and to say that there were either no persons, or not more than one, or not more than two, communicating with the priest upon the occasion in question, leaving it for the minister complained of to allege, by way of answer to this charge, anything he has to allege, either as to his having seen that there were other persons in church, as he thought, ready to communicate, and as to whom he expected that they would communicate, or any other defence that he is able to allege.

Their Lordships are of opinion, therefore, that there is no substance in any of the three objections made against these articles: that the judgment of the learned Judge below is correct: and that this appeal ought to be dismissed, with costs, and they will humbly advise her Majesty accordingly.

Proctor for the appellant, *G. H. Brooks*.

Proctors for the respondent, *Moore and Currey*.

[C. P.]

STRATTON AND OTHERS v. THE METROPOLITAN BOARD OF WORKS.

[C. P.]

COURT OF COMMON PLEAS.

Reported by EYREBRINGTON SMITH and J. M. LELY, Esqrs.
Barristers-at-Law.

Nov. 13, 20, and 25, 1874.

STRATTON AND OTHERS v. THE METROPOLITAN
BOARD OF WORKS.

Lands Clauses Act 1845, s. 133—Thames Embankment Act 1863, ss. 1-3, 18-15, 21, 29—Deficiency in rates—Action to recover—Land taken "for the purposes of works"—Whether liability in respect of public highways, &c.—When demand may be made by parish.

Where land assessed to the poor rate is taken for public purposes, promoters under the Lands Clauses Act are liable, until completion of the works, to make good all deficiencies in the poor rate, even in respect of works such as public highways, which can never become assessable.

By sect. 133 of the Lands Clauses Consolidation Act 1845, if the promoters of an undertaking for public purposes "become possessed of any lands liable to be assessed to the poor's rate, they shall from time to time, until the works shall be completed and assessed to such poor's rate, be liable to make good the deficiency in the several assessments for poor's rate by reason of the lands having been taken or used for the purposes of the works . . . and on demand of such deficiency the promoters of the undertaking shall pay all such deficiencies to the collector of the said assessments."

By the Thames Embankment Act 1863 (26 & 27 Vict. c. 75), which incorporated the above enactment, the defendants were authorised to take certain lands for the purpose of constructing (inter alia) an embankment on the bank of the river Thames, and two new streets within the parish of St. Mary, Lambeth.

By the 14th section, it was provided that when the works thus authorised should be completed, of which completion the certificate of the chairman of the defendants' board should be conclusive evidence, the new roadway and streets with the sole power of paving, &c., the same, and of rating hereditaments within the same, should be under the control of the same vestries, &c., as the other streets in which the same should be situate.

The construction of the works was commenced in 1865, and completed upon the 11th May 1870, upon which day the certificate mentioned in sect. 14 was duly given. At that time part of the lands taken by the defendants consisted of public highways, part formed the site of St. Thomas's Hospital, having been sold by the defendants to the governors thereof (who disputed the rateability of the hospital), part was planted as an ornamental garden, part was building land, part had been sold by the defendants to private owners, and part was wholly waste. All such lands, except a small portion as and being Crown property, had been assessed to the poor's rates previously to their being taken by the defendants, and no part of such lands, except that conveyed to private owners, had become so assessed afterwards.

In April 1872, the plaintiffs then being churchwardens and overseers of the parish of St. Mary, Lambeth, demanded from the defendants all the deficiencies in the poor rate in respect of all the lands in the parish taken by the defendants for the purposes of their works. The plaintiffs had been elected to serve from Easter 1871 to Easter 1872.

The accounts of the parish from 1865 to Easter 1871, had been audited by the poor law auditor, and were in fact closed:

Held, by Keating, Lush, and Denman, JJ., upon a special case stated without pleadings: First, that by virtue of the 133rd section of the Lands Clauses Act, the plaintiffs might legally demand from the defendants, in a lump sum, the arrears of all deficiencies of rates down to the date of the certificate of the completion of the works, in respect of all classes of property taken except the Crown property, although a portion of the property taken, being converted into public highways, could never become assessable; secondly, that the amount payable by the defendants being what the parish had lost upon each assessment, the fact of the accounts being closed did not disentitle the plaintiffs to demand such amount; and, thirdly, that it was not a condition precedent to the recovery of such amount that it should have been demanded from time to time as the rates were made and collected.

SPECIAL case without pleadings.

1. The plaintiffs are the churchwardens and overseers of the poor of the parish of St. Mary, Lambeth, for the year from Easter 1871 to Easter 1872, and the defendants are the Metropolitan Board of Works. The churchwardens from Easter 1872 to Easter 1873 were the same as for the preceding year, and four of the overseers were the same up to Michaelmas 1872. After that date the eight overseers were different persons, but the said churchwardens and overseers are not the same as for the previous years. This action is brought to recover 6319l. 17s. 9d., the alleged deficiency in the poor rate of the said parish, as hereinafter mentioned.

2. By the Thames Embankment Act 1863 (26 & 27 Vict. c. 75), the defendants were authorised to construct an embankment of part of the river Thames on the south side thereof, in the parish of St. Mary, Lambeth, and certain other works.

3. Among the provisions of the said Act are the following:

WORKS.

Sect. 1. The board may in the situations and lines, and according to the levels and within the limits of deviation, and on the lands defined in the deposited plans, sections, and book of reference, make and create the embankment and works hereinafter described, namely,

(1) An enlargement of the bed of the Thames, by an excavation of the land and a removal of the wharf walls and premises from or near Gunhouse-alley, near to the London Gasworks, to or near Broad-street, all in the parish of St. Mary, Lambeth:

(2) An embankment on the right bank of the Thames, in the parish of St. Mary, Lambeth, commencing at or near Gunhouse-alley and ending at Westminster Bridge:

(3) A new street, to be wholly situate in the parish of St. Mary, Lambeth, from Palace New Road to Bishop's Walk:

(4) The widening of Palace New Road within the limits of deviation, in continuation of such last-mentioned street:

(5) A new street, to be wholly situate in the parish of St. Mary, Lambeth, commencing in and out of the roadway on the before-mentioned intended embankment, and terminating at or near Vauxhall-row:

(6) The reclaiming or inclosing of a portion of the bed or foreshore of the Thames.

Sect. 2. The board shall lay out and maintain a public footway of not less than twenty feet in width on and along the said embankment from Westminster Bridge to the point where the intended street to Vauxhall-row diverges from the embankment roadway.

Sect. 3. [Authorization of works auxiliary to the above.]

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Sect. 13. The board may cause such part of the roadway, inclosed ground, and streets aforesaid respectively, to be laid out for carriageways, and such part thereof for footways, as they think proper.

Sect. 14. When the roadway, new streets, and approaches aforesaid respectively are completed, of which completion a certificate signed by the chairman of the board, and delivered to the clerk of the peace for the county of Surrey, shall be for all purposes conclusive evidence, all the ground laid open into the same respectively shall be deemed to form part thereof respectively, and be used by the public accordingly; and thenceforth the same roadway, new streets, and approaches, with the sole power, authority, and duty of paving, repairing, cleansing, lighting, and watching the same, and of rating hereditaments within the same respectively, shall be under the care, management, control, and jurisdiction of the same vestry boards, district boards, commissioners, or persons as the other streets in the parishes, districts, or place in which the same respectively are situate.

LANDS.

Sect. 15. The board may enter upon, take, and use, for the purposes of this Act, any of the lands defined in the deposited plans and books of reference; and the Lands Clauses Consolidation Act 1845 (with the exception of ss. 34 and 92), and the Lands Clauses Consolidation Amendment Act 1860, shall be incorporated with this Act.

Sect. 21. [Incorporation of ss. 27, 32, 33, 34, and 37 of the Embankment Act of 1863.]

Sect. 29. Subject to the provisions of the Embankment Act of 1862, and of the Metropolis Improvement Act 1863 and of this Act, and to the provision hereinafter contained for payment of the costs, charges, and expenses of and incidental and preliminary to the obtaining of this Act, or incurred by the board in relation thereto, all money becoming part of the Thames Embankment and Metropolis Improvement Fund after the passing of this Act, shall be paid by the Treasury to the board, as the board may by writing, under their seal, require, and shall, after paying off the charges on such fund, created or to be created under the authority of the Embankment Act of 1862 and the Metropolis Improvement Act 1863, be applied by the board as follows:

First, in satisfying all charges on the said Improvement Fund created under this Act;

Secondly, in paying the expenses from time to time incurred in respect of the undertaking authorised by this Act;

Lastly, in the improvement of the Metropolis in such manner as may hereinafter be determined by Parliament.

4. By the Thames Embankment Amendment Act 1864 (27 & 28 Vict. c. cxxxv), the defendants were empowered to purchase additional lands and to make further improvements in the parish of St. Mary, Lambeth, for the purposes of the Thames Embankment Act 1863.

5. Among the provisions of the said last-mentioned Act are the following:

Sect. 3. The board may enter upon, take, and use for the purposes of this Act any of the lands defined on the deposited plan, and described in the book of reference thereto. [Incorporation of Lands Clauses Acts, as by sect. 15 of the Act of 1863.]

Sect. 4. The board may, in the situation and lines, and within the limits of deviation, and on the lands defined on the deposited plan and described in the book of reference thereto, and according to the levels shown on the deposited section, make and execute the works hereinafter described, namely:

The improvement of the approaches to Palace New Road, in continuation of the improvements authorised by the Act of 1863, and the widening and improvement of a portion of the street called Stangate, commencing from the Westminster Bridge Road; and the widening of Palace New Road from Stangate to Crozier-street.

The stopping up of Crozier-street from Palace New Road to Stangate, and of a portion of the street called Stangate, leading from the main street of Stangate to Crozier-street, aforesaid, and the appropriation and use of the part of the street so stopped up.

Sect. 6. [Act to be construed as one with Act of 1863.]

6. By sect. 133 of the Lands Clauses Consolida-

tion Act 1845 (8 Vict. c. 18), it is enacted as follows:

If the promoters of the undertaking become possessed by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor's rate, they shall from time to time, until the works shall be completed and assessed to such land tax or poor's rate, be liable to make good the deficiency in the several assessments for land tax and poor's rate, by reason of such lands having been taken or used for the purpose of the works, and such deficiency shall be computed according to the rental at which such lands, with any buildings thereon, were valued or rated at the time of the passing of the special Act; and on demand of such deficiency the promoters of the undertaking, or their treasurer, shall pay all such deficiencies to the collector of the said assessments respectively.

7. In pursuance of the powers thus given, the defendants proceeded to construct the said embankment and the other public works, and for that purpose took various lands in the parish of St. Mary, Lambeth. [Plan showing lands taken, and ground plan of houses demolished, and in respect of which rates had been theretofore received, except as excepted in the latter part of paragraph 3, made part of the case.]

8. The construction of the said embankment and other works was commenced in 1865. On the 11th May 1870, the roads and footways of the new streets were completed. The following certificate was given, as the certificate required by sect. 14 of the Act of 1863:

To the clerk of the peace for the county of Surrey.

Pursuant to sect. 14 of the Thames Embankment Act 1863, I, John Thwaites, Knight, chairman of the Metropolitan Board of Works, do hereby certify that the roadway, new streets, and approaches respectively referred to in the said section of the above-mentioned Act have been made and executed by the said board, and are completed.

Dated the 11th May 1873.

(Signed) J. THWAITES.

The notice of the certificate was given to the clerk of the peace, as required by that section, and a duplicate was on the 12th May 1870, served on the vestry of the said parish. The embankment and works mentioned in the said Act of 1863 (s. 1, pars. 1, 2, and 6), except as hereinafter mentioned, were at that time completed, and the roadways and footways mentioned in pars. 3, 4, 5, of that section were completed, but the land at the sides of the said roadways and footways was not covered with houses, nor was it all let or disposed of by the defendants, but some of it still remains waste in their hands, unlet and undisposed of. [See par. 15]. There was, however, at that time a plot of ground, part of the land, purchased and cleared by the defendants for the purposes of the works, lying waste, hereinafter referred to as Plot C, being 2r. 18p. in extent, which was in May 1872 inclosed by the defendants with iron railings, and planted by the defendants as an ornamental garden, but to which the public were not admitted. There was also on the said 5th April 1872, other small plots of land which had been also purchased and cleared for the purposes of the works, and were then lying waste, being respectively 2r. 2p., 1r. 19p., and 2r. 9p. in extent. One of them, Plot E, had in July 1861, been appropriated as hereinafter mentioned. They are described as D, E, F, in par. 12. Plots D and F are still unappropriated.

9. Since the works had been in progress, the defendants had not been called upon to make any contribution to the poor's rate until the claim and demand next hereinafter mentioned.

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10. The first claim made on the defendants was by a letter dated the 6th April 1872, written under the plaintiffs' direction by their clerk, and addressed to the defendants, in which there were inclosed, first, a statement of deficiency in the poor's rate in the parish of St. Mary, Lambeth, by reason of lands situate in the said parish having been taken or used for the purpose of the works authorised to be made pursuant to the provisions of the Thames Embankment Act 1863, and the several Acts incorporated therewith; and, secondly, a written demand of payment of the said deficiency, dated the 5th April 1872, signed by the plaintiffs, the then acting churchwarden and overseers of the said parish. They had been elected and acted as churchwardens and overseers from Easter 1871 to Easter 1872, but all the plaintiffs were then still in office and acting in their several capacities, the churchwardens having been re-elected, and the plaintiffs, the overseers, continuing to act until their successors were appointed, after the date of the said letter and demand, viz., on or about the 5th April 1872.

11. With respect to plaintiffs' said statement of deficiencies and claim, the following details are necessary. The total deficiency claimed is the sum of 6319*l.* 17*s.* 9*d.*, being the aggregate of the poor's rates from year to year, reckoned from the various dates in the years 1865 to 1869 inclusive, at which the lands were respectively taken by the defendants up to Christmas 1871. The said deficiency has been computed according to the rental at which the lands, with any buildings thereon, were valued or rated at the time of the passing of the Act of 1863, i.e., the 20th July 1863. The said deficiency and claim are in respect of the whole of the lands taken by the defendants, as mentioned in par. 12. The said deficiency includes an item of claim in respect of certain land taken by the defendants in Jan. 1865, which was then and at the time of the passing of the Act of 1863 in the occupation of her Majesty's Commissioners of Works for public purposes, as servants of the Crown, and which, although in the valuation lists, had not while in the occupation of the commissioners, been assessed to the poor's rate, but had, before the commissioners came into occupation, been previously assessed.

12. The following statement shows the total measurement of land taken by the defendants:

	A.	R.	P.
(a) Public highways, being carriage roads and footways	7	1	6
Land thrown into the river, and being part of the river highway	2	0	0
(b) Site of St. Thomas's Hospital, together with a triangular piece of land sold to and now belonging to the hospital	8	3	19
(c) Land inclosed and planted as ornamental garden	0	2	18
(d) Building land	0	2	2
(e) Land sold to Messrs. Doulton and to James Stiff	0	1	19
(f) Land unappropriated	0	2	9

13. The lands in class (a) were used entirely for executing part of the works authorised by sect. 1 of the Act of 1863, and these works as completed are not assessed. The board have power under the Thames Embankment Act 1862 (ss. 32-34), incorporated by the Act of 1863, to let on building leases the lands so purchased by them for the purposes of the Act of 1863, but have not done so, and still retain portions thereof in their own possession as building land: (see par. 15.)

14. The lands in class (b) were sold by the defendants to the Governors of St. Thomas's Hospital on the 19th Nov. 1863: (see 25 & 26 Vict. c. i, private Act; Lands Clauses Act 1845.) The hospital was built on these lands, the cost of building being defrayed out of the funds of the hospital. The building, commenced in Aug. 1865, was completed at Christmas 1871. On completion it was assessed to the poor's rate, but the governors dispute their liability to assessment in respect thereof, and the question is still pending. The small triangular space is still vacant.

(14a.) The land (c) is used as ornamental gardens (see par. 8), and not assessed.

15. The small pieces of land in class (a) are vacant lands intended to be let by the defendants for building purposes, but none has yet been let and none is assessed.

16. The small piece of land in class (e) was superfluous land, part of which was conveyed by defendants to Messrs. Doulton in July 1868, as part of the compensation payable to them by the defendants for injury done by making the embankment, and the other part to J. Stiff in like manner. These lands have been assessed since they were so conveyed to Messrs. Doulton and Mr. Stiff, who from the dates mentioned became respectively the beneficial occupiers thereof: (see Act of 1862, s. 27; Act of 1863, s. 21.)

17. The small piece of land in class (f) has not yet been appropriated, and is not assessed.

18. [Acts referred to made part of case.]

19. The accounts of the parish for the years 1865 to Easter 1871, including the poor rate accounts, have been duly audited by the Poor Law Auditor, and are in fact closed, except in so far as they may be deemed to be kept open by the pending claim.

The questions for the opinion of the court are (1), Whether the defendants are liable at all to pay the deficiency or any part thereof in poor's rates on lands taken by them under the powers and for the purposes of the Thames Embankment Acts? (2, 3, 4), Whether the defendants are liable to pay the deficiencies in poor's rates on the lands in clauses a, b, c, d, e, f, respectively, and if so up to what dates respectively? (5), Whether the defendants are liable to pay the deficiency in respect of the land mentioned in par. 11? (6), Whether the defendants can legally demand and enforce payment in a lump sum or otherwise of the arrears in deficiency in the poor's rates for the several years before mentioned, viz., in the rates for the years 1865 to 1871 inclusive, and if they can legally demand and enforce payment of any such deficiency, for and in respect of which of such rates can they do so? It is agreed between the parties that a verdict and judgment shall be entered up in accordance with the decision of this court, for a sum or sums to be agreed upon thereafter, as the 6319*l.* 17*s.* 9*d.* claimed can be readily apportioned after the questions asked of the court shall be answered. Costs to be in the discretion of the court.

Theisiger, Q.C. (with him *F. M. White*), for the plaintiffs. — The defendants are "promoters," within the meaning of sect. 133 of the Lands Clauses Act 1845; and, secondly, these are "works" within the meaning of that section. That persons may be "promoters," although the undertaking which they promote be not carried on for profit, is now established law. The expression,

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"works," includes everything which is taken for the purpose of the special Act :

Whitchurch v. East London Railway Company, 28 L. T. Rep. N. S. 635; 27 L. T. Rep. N. S. 424; 30 L. T. Rep. N. S. 412; L. Rep. 7 Ex. 248, 424; 41 L. J. 168, Ex.;

Reg. v. The Metropolitan District Railway Company, L. Rep. 6 Q. B. 608; 40 L. J. 113, M. C.;

Wheeler v. Metropolitan Board of Works, 20 L. T. Rep. N. S. 984; L. Rep. 4 Ex. 303; 38 L. J. 165, Ex.

Metropolitan Board of Works v. West Ham, 23 L. T. Rep. N. S. 490; L. Rep. 6 Q. B. 193;

Mayor, &c., of London v. St. Andrew's, Holborn, 16 L. T. Rep. N. S. 668; L. Rep. 2 C. P. 574; 36 L. J. 292, C. P.

Galloway v. Mayor, &c. of London, 14 L. T. Rep. N. S. 865; L. Rep. 1 E. & I. App. 34; 35 L. J. 477, Ch.; 2 De G. J. & S. 213, 639;

Quinton v. Mayor, &c. of Bristol, 30 L. T. Rep. N. S. 112; L. Rep. 17 Eq. 524; 43 L. J. 783, Ch.

[Sir H. James intimated that the first point was conceded.] It is contrary to the principle of their special Act that the defendants should take away land from the parish, thus depriving the parish of the rates, and leave the land bare. The scheme of the Act is that the defendants should either utilise the land for purposes of recreation, or sell it. The plaintiffs are not precluded from suing for arrears. In *Reg. v. The Metropolitan District Railway Company* (*ubi sup.*), two years' arrears were sued for, but no objection was taken. It is conceded that the plaintiffs cannot recover subsequent to the date of the certificate.

Sir H. James, Q.C. (with him R. S. Wright).—The principal part of the land taken—nearly eighteen-twentieths—is taken up by the public highway and by the site of St. Thomas's Hospital, neither of which can ever become the subject of assessment. It is very beneficial to the parish that large buildings should be erected thereon, although no rates may be derivable therefrom. [LUSH, J.—Has not the parish lost assessable property by the defendants taking this land?] It would be unjust to hold the defendants liable during the construction of works which can from their nature never become assessable. In *Wheeler v. The Metropolitan Board of Works* (*ubi sup.*), it was said by Bramwell, B.: "We are met by this difficulty, that sect. 133 supposes that the works when finished will be subject to poor rates, and that this street will not be so. It may possibly be that the defendants' construction of the Act is so far right, that the clause is to be read with this qualification, 'where the character of the works is such that when completed they will be subject to poor rates.' It may be so; and it would certainly be strange if the promoters are to make good the deficiency caused during the progress of their works, although as soon as the works are completed the parish will for ever be deprived of the assessment." It was not, however, necessary to decide the point in that case. The parish officers are endeavouring to benefit future at the expense of past ratepayers. In *Reg. v. The Inhabitants of Chiddington* (31 L. J. 121, M.C.), in auditing the accounts of a poor law union, the cost of maintenance of a pauper, irremovable by five years' residence, having since March 1854 been charged to the parish, and allowed in the half-yearly audits, at the audit of the half-yearly accounts up to Michaelmas 1860, objection was taken by the parish, and the auditor disallowed the cost for those six months against the parish, and charged it to the union, but refused to reopen the accounts previously audited, and the

court held the auditor to be right. On this point he also cited

Reg. v. Churchwardens of Wigan, 30 L. T. Rep. N. S. 569; L. Rep. 9 Q. B. 817;

R. v. Goodcheap, 6 T. R. 159.

[DENMAN, J., referred to *Harrison v. Stickney* (2 H. of L. Cas. 108).] In *R. v. Goodcheap* (*ubi sup.*) Lord Kenyon said: "As to the question of law, it is impossible to raise a doubt about it; the overseers ought not to include in their accounts charges for several years, but all the items of the account should be confined to that year when the accounts are directed by the Act to be paid; otherwise, as the inhabitants of the parish are a fluctuating body, the inhabitants will be burdened with the expenses of their predecessors." Lastly, the plaintiffs are not the proper persons to maintain this action. They are the officers of the year 1871-72, and they sue in respect of a claim which might have been made in 1865. On this point he referred to

43 Eliz. c. 2, s. 4;

17 Geo. 2, c. 38, s. 11;

4 & 5 Will. 4, c. 76;

22 & 23 Vict. c. 49;

Overseers of East Dean v. Everett, 3 L. T. Rep. N. S. 700; 30 L. J. 117, M. C.; 7 Jur. N. S. 124.

[LUSH, J.—We are not asked whether the action is maintainable.]

F. M. White, in reply, pointed out that the Act 22 & 23 Vict. c. 49, was passed *alio intuitu* in in favour of the overseers, not against them, and that the Statutes of Limitations were no bar to a claim for rates.

Cur. adv. vult.

Nov. 25.—The written judgment of the court (Keating, Lush, and Denman, JJ.) was delivered by

DENMAN, J.—The questions submitted to us in this special case are: First, whether the defendants are liable at all to pay the deficiency, or any part thereof, in poor rates on lands taken by them under the powers and for the purposes of the Thames Embankment Acts; and, secondly, if so, whether the plaintiffs can legally demand and enforce payment in a lump sum or otherwise of the arrears of deficiency in the poor rates for the years 1865 to 1871 inclusive; and if they can legally demand and enforce payment of any such deficiency, for and in respect of which of such rates can they do so? There are several subordinate questions having reference to particular classes of property which we are requested to answer, in order that the amount payable, if any, may be precisely ascertained. The Thames Embankment Act 1863 is the one which authorised the works in question; and the 15th section of that Act incorporates the whole of the Lands Clauses Consolidation Act 1845, with the exceptions of sects. 34 and 92, relating to the costs of arbitration and to the taking of parts of buildings, and to matters connected therewith respectively. The 133rd section, of that Act, therefore, is incorporated with and must be read as part of the Embankment Act; and it is upon the true construction of that section, as applied to the facts stated in the special case, that the liability of the defendants depends. That section enacts that: "If the board" (who by the first section of the Embankment Act 1862, are to be taken as intended by the words "promoters of the undertaking") "become possessed by virtue of the special Act of any lands charged with the land tax

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or assessed to the poor rate, they shall from time to time, until the works shall be completed and assessed to such land tax or poor rate, be liable to make good the deficiency in the several assessments for land tax and poor rate by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act; and on demand of such deficiency, the promoters of the undertaking or their treasurer, shall pay all such deficiencies to the collector of the said assessments respectively." It was contended on behalf of the defendants, that as this clause contemplates a time when the works authorised to be done shall become assessable to the poor rate, it cannot apply to the streets and public places to be made by the board, and, therefore, that they are not liable to pay in respect of property which stood upon the sites of such streets and places, seeing that these can never become assessable to the poor rates; and some observations of Bramwell, B., in *Wheeler v. The Metropolitan Board of Works* (*ubi sup.*) were quoted in support of that argument. In that case, however, the court did not think it necessary to decide the point, and although the learned Baron, in the course of his judgment, spoke of it as one of difficulty, his opinion on the whole appears to have inclined to an opposite conclusion. In the case before us, however, it is necessary to decide the question. We have fully considered the language of the clause, and are satisfied that such is not its meaning. Pushed to its legitimate conclusion, the argument would go to neutralise the section altogether in relation to the present case, for the works enumerated in the 1st section, which it was the purpose of the Act to accomplish, are all of them public ways and places which never can become assessable to the poor rate. Only such pieces of land as may happen to be taken and not to be required for these public purposes will ever become assessable to the poor rate; and these are not the "works" authorised to be done. The clause is imported from an Act which was framed for railways, canals, and other undertakings, which, though of a public nature, would, when completed, become rateable subjects. If it had been drawn expressly for insertion in this Act, it would no doubt have been differently worded. But as it is incorporated and made part of this Act, we must adapt its language to the subject-matter, and give it the effect which it is fairly capable of. The words, "until the works shall be completed and assessed to the poor rate," mark the period during which compensation shall be paid to the parish, not the measure of that compensation, the event upon which the liability is to end, not the extent of liability; that is defined in the other parts of the section, and is measured by the "lands assessed to the poor rates and taken for the purposes of the Act." Whatever those lands paid or would have paid the board are to pay until "the works are completed." If the words, "and assessed to the poor rate," are to be read as inseparable from the others, if the two together constitute the condition, whatever the nature of the works may be, it follows either that the clause in this Act is inoperative, or that the liability of the board will continue for ever. That was certainly not the intention of the Legislature. Giving the clause the widest sense it can have in its applica-

tion to the purposes of this Act, it cannot mean more than that the board shall make good the loss to the parish until the "works," that is the embankment and streets authorised to be made, are completed, and the land required for public purposes, if assessable, is assessed to the poor rate. This, we think, is the construction to be put upon the section. That event happened when the certificate mentioned in the case was given on the 11th May 1870, and from that period the liability of the board ceased. It was further contended that as the parish accounts had been duly audited from year to year, and closed, "except so far as they may be deemed to be kept open by the pending claim," the overseers must have rated the remainder of the parish at a higher rate, and so have obtained sufficient for their purposes without the aid of this clause, and, therefore, that there was no "deficiency" in the assessments. This objection, which is extremely ingenious, besides that it assumes what certainly is not explicitly stated nor necessarily to be implied from the language of the 19th paragraph, supposes that the word "deficiency" means that sum, if any, which shall be found wanting to make up the amount required by the parish. But we are satisfied that this is not the true meaning of the clause. It may be that the overseers ought not to have increased the amount of the rate so as to surcharge the other ratepayers, by reason of the buildings taken by the board being withdrawn from the assessment. We do not know that they have done so; but even supposing that they have, that does not relieve the board from liability. What the clause means is, that the board shall stand in the place of the occupiers of the demolished houses, and pay what they would have paid upon each assessment if the houses had not been taken, and they had continued assessed at the rateable value which they bore in the assessment at the time the Act passed. The amount payable by the board is therefore what the parish lost upon each assessment. The period during which they are to make this compensation to the parish is, until the works shall be completed. Another objection which was much pressed by Sir Henry James was, that the board are discharged from liability by reason of the deficiency not having been demanded from time to time as the rates were made and collected; and that when the time for collecting the rate was passed the liability was extinguished. This objection was enforced by arguments, founded both upon the wording of the clause and upon considerations based upon the acknowledged principles of rating. It was argued that, as the parishioners are a fluctuating body, the payment now of deficiencies of bygone years cannot be applied in relief of the ratepayers for the time being as the statute intended it should be; and on the other hand, that the board, if it had been called on year by year as the rates were made, to pay the deficiency in the rates, would have been able to collect the amount from the ratepayers for the time being, and that they cannot now pay it without a retrospective rate, which the law does not allow; and that in short, by reason of the lapse of time, the real debtors cannot be got to pay, nor the real creditors to receive; and that the words of the section must receive such a construction as will carry out this fundamental principle of rating. We were much impressed at the time with the arguments on this branch of the case. But upon

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[Ex.]

consideration, they appear to us to be more specious than sound. The principle of rating relied upon, viz., that those who incur the debt shall pay, and those who are entitled to the relief shall receive it, is necessarily elastic, and is one which cannot be rigidly applied. Every rate is made upon an estimate of what it may be reasonably expected to produce, allowance being made for probable defaulters; and in most cases where the rates fall in arrear for any considerable time and are afterwards recovered, some will have paid more than their due share, and some are relieved at the expense of others who have suffered. And when a parish is required to pay a bygone debt, which may be the case now within a given limit (see 22 & 23 Vict. c. 49) some are called on to contribute for a debt, which should have been paid by their predecessors. It is impossible so to adjust a system of rating, as that none shall pay or receive more than is strictly their due. We therefore must fall back upon the words of the Act, and, construing them in their ordinary sense, ascertain what the intention of the Legislature was, and not strain them in order to prevent a speculative hardship. The Act says the board "shall from time to time be liable to make good the deficiency," and shall pay all such deficiencies on demand. The liability, by the express terms of the clause, accrues from time to time as the rates are made; the payment is to be made on demand. Do the words "on demand" qualify the liability, or do they point to the time of payment? Do they import a condition, or a duty? The argument requires us to read the words "on demand," as if they were "provided the deficiency be demanded," that is, as words of condition, instead of words of obligation. This is not the natural ordinary meaning of the words; and we cannot see any sufficient reason for construing them in any other sense. We conclude therefore that the liability of the board was not extinguished by the delay in demanding payment, and that the arrears of all deficiencies down to the date of the certificate (May 11th, 1870) may legally be demanded in a lump sum. We have dealt with the argument as it was presented to us, upon the supposition that the board would have to pay the arrears out of the rates; and we desire to add, in order to avoid misapprehension, that if we had thought there was any validity in the argument, we should nevertheless have found ourselves bound to give judgment for the plaintiffs, and have left that question, viz., the ability of the board to pay or raise money by legal means to be decided when steps were taken to enforce payment. But, in truth, the assumption is founded on a mistake. The embankment works are not paid for out of rates, but out of a special fund provided for the purpose. The last objection was, that the overseers in each year in which the deficiency accrued, are the proper parties to sue, and that the overseers of 1871-2 are not the persons entitled to recover. Whether any such objection would have availed in an action, it is not necessary to decide—the question proposed to us being, whether the defendants are liable to pay, and whether the plaintiffs are entitled to demand and enforce payment in a lump sum of the arrears. We are of opinion that the plaintiffs are the only persons who were, when the demand was made, entitled to receive the money and enforce payment; whether by order, *mandamus*, or any other form of proceeding, we need not consider. The

answers to the second, third, and fourth questions follow from what we have said. The amount payable by the board is the aggregate of the rates which would have been payable from time to time in respect of the property taken, if the property had remained as it was at the time of the passing of the Act; but as soon as any new buildings were erected and assessed, or became liable to be assessed, the rateable value of such new buildings should be credited against this sum. And, in answer to the fifth question, we are of opinion that that as no rates were, at the passing of the Act, paid in respect of the property occupied by the Commissioners of Works, the board are not liable for the rateable value of that property.

Judgment for plaintiffs—no costs.

Attorneys for plaintiffs, J. and C. Rogers and Sons.

Attorney for defendants, W. Wyke Smith.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

THE ATTORNEY-GENERAL v. ALEXANDER AND OTHERS.

Friday, Nov. 20, 1874.

Revenue—Income tax—Liability to of foreign corporation having an agency in England—Profits accruing abroad—16 & 17 Vict. c. 34, sect. 2, schedule D.—"Person residing within the United Kingdom"—Business "carried on within the United Kingdom"—Residence of a corporation—Where and what it is.

The Imperial Ottoman Bank is a Turkish corporation, incorporated by the Sultan's firman, and by the imperial concession it was established as the State Bank of the Ottoman Empire, with, in addition to the right of carrying on the ordinary business of bankers, the exclusive privilege of issuing, in Turkey, notes in the Turkish language payable to bearer on demand, payable at Constantinople or at the branches, and bearing the seal of the High Commissioner of the Government. It was also charged with the receipt of the imperial revenues and the payment of all drafts issued upon it by the Minister of Finance, and its seat was fixed at Constantinople. In pursuance of a power, given to it by the concession, to establish as many branches and agencies as it might think fit, the bank established an agency in London for the ordinary business of a bank, which was managed by a committee resident in London, and was elected by the general body of the shareholders. The annual general meeting, and all extraordinary meetings of the shareholders of the bank were held in London, and at such annual meetings the report of the committee of the bank, with the accounts for the preceding years were read, the dividends declared, and the members of the general committee elected.

The defendants, the London members for the time being, of the committee charged with the management of the London agency of the bank, admitted their liability to pay income tax on, and made a return of, the amount of profits accruing to the bank from the trade of bankers exercised within Great Britain, but declined to make any return of the profits accruing from the business carried on by the bank elsewhere, which the Crown contended the defendants were bound to make, and to pay income tax upon.

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Held, by the Court of Exchequer (Kelly, C.B., and Cleasby and Amphlett, BB.), that the bank, as a corporation, "resided," if anywhere, at Constantinople, where its seat was fixed by the imperial statutes, and that it did not "reside within the United Kingdom" within the meaning of sect. 2, schedule D., of the 16 & 17 Vict. c. 34; and therefore the defendants were not bound to make a return of, or to pay income tax upon, the profits accruing to the bank from the business carried on by them elsewhere than within the United Kingdom.

THIS is a proceeding by the Attorney-General against the defendants for the forfeiture of a penalty of 50*l.* for neglecting to deliver in a proper return of profits, under the Income Tax statutes, and by consent and under a Master's order, dated 29th April 1874, for the purpose of obtaining the opinion of the court as to the extent of the liability of the Imperial Ottoman Bank to the payment of income-tax, was stated the following CASE.

1. By 16 & 17 Vict. c. 34, certain duties are granted to Her Majesty upon profits arising from property, professions, trades, and offices (*inter alia*), sect. 2.

Schedule D.

(1.) For and in respect of the annual profits or gains arising or accruing, to any person residing within the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall respectively be carried on in the United Kingdom or elsewhere.

(2.) And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any profession, trade, employment, or vocation exercised within the United Kingdom.

2 & 3. By sect 5 of the 16 & 17 Vict. c. 34, the duties imposed by the said last-mentioned Act are directed to be assessed under the regulations of the statute 5 & 6 Vict. c. 35, and the Acts therein mentioned or referred to; and by sect. 40 of the 5 & 6 Vict. c. 35, it is enacted that all bodies politic, corporate, or collegiate, companies, fraternities, fellowships, or societies of persons, whether corporate or not corporate, shall be chargeable with such and the like duties as any person would, under and by virtue of the said Act, be chargeable with, and that the chamberlain or other officer acting as treasurer, auditor, or receiver for the time being of every such corporation, company, fraternity, fellowship, or society, shall be answerable for doing all such acts, matters, and things as shall be required to be done by virtue of the said Act, in order to the assessing such bodies corporate, companies, fraternities, fellowships, or societies, to the duties granted by the said Act, and paying the same.

In paragraphs 4 to 11 of the case, sects. 41, 44, 51, 53, 54, 100 and 106 of the 5 & 6 Vict. c. 35, are set out.

12. By sect. 192 of 5 & 6 Vict. c. 35, it is enacted that wherever in the Act, with reference to any person, matter, or thing, any word or words are used importing the singular number or the masculine gender only, yet such word or words shall be understood to include several persons as well as one person, females as well as males, bodies politic or corporate, as well as individuals, and several matters or things as well as one matter or

thing, unless it be otherwise specially provided or there be something in the subject or context repugnant to such construction.

In paragraphs 13 and 14, sect. 2 of 5 & 6 Vict. c. 80, and sect. 10 of 16 & 17 Vict. c. 34, are set out; and at paragraph 15 it is stated that the duties granted by 16 & 17 Vict. c. 34, have been continued at various rates by a series of subsequent Acts; and that the Act imposing the duty for the year 1874 is the 34 & 35 Vict. c. 21.

16, 17. Towards the close of the year 1862 the Ottoman Bank of London, which was a banking company established and carrying on business in London, arranged to transfer its business to the Imperial Ottoman Bank, which was a Turkish corporation incorporated according to the laws of Turkey by a firman of the sultan. The transfer of the business was completed in the beginning of the year 1863 by the issue of shares in the capital of the Imperial Ottoman Bank to the amount of 250,000*l.* (part of the total capital of 2,700,000*l.*) to the shareholders of the Ottoman Bank of London, and the business, in London, of the Imperial Ottoman Bank, as bankers, was then commenced in London, under the management of the London members of the committee hereinafter referred to, in the premises theretofore occupied by the Ottoman Bank of London. The remainder of the capital was subscribed in Constantinople, Paris, London, and other places. Immediately on the formation of the Imperial Ottoman Bank preparations were made to commence business in Constantinople, and it actually commenced business there on the 1st June 1863.

18, 19. The affairs of the Imperial Ottoman Bank (hereinafter called the bank) were then and have ever since continued to be regulated by a concession from the Government of Turkey and certain statutes. (See Appendix of documents attached to the case.) By the concession above mentioned, and which is dated 4th Feb. 1863, the bank is established as a state bank for the Ottoman Empire, and is made subject to the general laws of the empire, and its seat is fixed at Constantinople, with power to establish branches and agencies at other places.

20, 21, 22. The concession provides that the Ottoman Government shall exercise its control over the bank by means of a high commissioner chosen by the government, who has the right to take cognizance of its operations, though without power to interfere in its administration, and who is to see to the faithful execution of the statutes. It further provides that the bank shall be administered at Constantinople by a board of two or three members and a council of administration of three members, both to be named by a committee chosen by the London and Paris founders, and this committee is to have power, in conformity with the statutes, to guide, control, and superintend the operations of the bank. It fixed the capital of the bank for the present at 2,700,000*l.* or 67,500,000 francs, divided into 135,000 shares of 500 francs each, and prescribed that the certificates, when 250 francs each should be paid thereon, should be to bearer, which amount has actually been paid on all the shares of the bank. It further grants to the bank, in addition to the right of carrying on the ordinary business of bankers, the exclusive privilege of issuing in Turkey, notes, payable to bearer on demand, payable at Constantinople, or at the branches. These

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notes are made legal tender in certain parts of Turkey. They must be in the Turkish language, and must bear the seal of the High Commissioner of the government.

23, 24, 25. The concession charges the bank at Constantinople with all the operations of the Government Treasury, that is to say, the receipt of all the revenues of the empire coming to the Imperial Treasury at Constantinople, and the payment of all drafts issued upon it by the Minister of Finance. The bank may further be charged at certain branches in Turkey with the receipt of the provincial revenues. For these services the concession provides that the bank is to receive a fixed annual payment of 20,000*l.* It specially charges the bank with the payment of interest upon, and the redemption of, the Public Interior Debt, with the transmission of funds for the payment of interest and redemption of the exterior debts, for which it is provided that the bank shall receive a commission at a fixed rate of one per cent. And it further constitutes the bank the recognised financial agent of the government both at home and abroad, and charges it with all operations concerning the withdrawal from circulation of the *beschiks* (a kind of paper money then in circulation).

26. By the statutes above referred to, the seat of the bank was fixed at Constantinople, where accordingly, as already stated, in or about the month of June 1863, and some months after the commencement of its business in London, the bank commenced business. By the same statutes the bank was authorised to establish such branches and agencies as it should think fit. The capital of the bank is defined to be 67,500,000 francs, or 2,700,000*l.*, divided into shares of 500 francs, or 20*l.* each, and the liability of the shareholders is limited to the amount of their shares. There is no register of shares, but according to the provisions of the statutes, all the certificates of shares are made out to bearer, and the shares themselves are transferable by delivery of the certificates, and the dividends payable thereupon are payable, at the option of the holders, at Constantinople, Paris, or London, by means of coupons attached to the certificates.

27. By the said statutes, the administration of the bank in Constantinople is confided to a director general, one or two assistant directors, and a council of administration of three members. These are appointed by a committee of from twenty to twenty-five members, of whom ten at least must be English or resident in England, and ten at least French or resident in France. This committee has the general guidance, control, and superintendence of the operations of the bank, and its members are elected by the general meeting of shareholders. The statutes further require that the committee shall meet four times a year, alternately in London and Paris, and the committee has in fact met, and still does meet, sometimes in London, and sometimes in Paris. The execution of the decisions of the committee, and the more immediate supervision of the affairs of the bank, is assigned, under the statutes, to a sub-committee (appointed by the general committee) consisting of eight members, of whom four are chosen from the English and four from the French section of the general committee.

28. It is also provided that the London members of the committee shall be charged, under the

control of the sub-committee, with the management of the London agency of the bank, and since the early part of 1863, when the business of the bank in London commenced, until the present time, the London business of the bank, being the ordinary business of bankers, has been carried on, under the management of the London members of the committee, in premises in the city of London. The said last-mentioned persons have the receipt of all the gains and profits arising and accruing from the trade or business of the bank carried on within Great Britain.

29. It is further provided that the annual general meetings of the shareholders in the bank, and all extraordinary general meetings, shall be held at such places as the committee shall fix. Such meetings in fact have always been, and still are, held in London, and at such annual general meetings the report of the committee, with the accounts for the preceding year, are received, the dividends are declared, and members of the general committee are elected.

30. The leasehold premises in Throgmorton-street now occupied by the bank are held under an assignment of the same made to the bank by the name of the "Imperial Ottoman Bank"; such assignment was executed by the bank under seal. By the law of Turkey a common seal is not required to authenticate the acts of a corporation, and the bank does not use any seal except in the case of documents executed in England.

31, 32. The profits made by the bank from the year 1863 to the year 1872 inclusive, and the general condition of the affairs of the bank, appear from the ten annual reports presented by the general committee to the shareholders during the above period (see appendix), and the total amount of profits and gains made by the bank for the year ending the 5th April 1872, estimated upon an average of such profits for three preceding years, is 278,395*l.*

33. On or about the 5th April 1872 the following return, in respect of the assessment to be made for income-tax under schedule D. for the year ending the 5th April 1872, was tendered by the defendants as a proper return on behalf of the bank:

"The London Agency act in the character of agents for the Imperial Ottoman Bank, which resides at Constantinople in the empire of Turkey.

"The said London Agency consists of the following persons: Mr. James Alexander, 10. King's Arms Yard, E.C." [Here follow the names and addresses of the nine other gentlemen who are the co-defendants in this proceeding.]

"The amount of profits and gains accruing to the said bank from the trade of banker exercised within Great Britain, viz. at London, for the year ending 5th April 1872, computed on a fair and just average of three years ending the 31st Dec. 1871, the last-mentioned day being the day on which the accounts of the said bank have been usually made up, and deducting that part on which income tax has been already paid by deduction, is 40,893*l.*

"The London Agency of the bank decline to make any return of the profits accruing to the bank from business carried on by the bank elsewhere than in the United Kingdom, being advised that such profits are not liable to income tax."

The statements in the said return are true in fact.

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34. On or about the date of the last-mentioned return, the defendants (being the persons calling themselves the London Agency), further gave notice to the Commissioners of Inland Revenue, in pursuance of the 16 & 17 Vict. cap. 34, sect. 10., that they were entrusted with moneys for the payment of dividends, in respect of the year ending 5th April 1872, upon the shares of the bank, to persons some of whom were or might be in the United Kingdom, such moneys being beyond and in addition to the profits accruing to the bank from business carried on within Great Britain during the past year, and that they were ready, on demand by the inspector authorised for that purpose, to deliver to him for the use of the Income Tax Commissioners for special purposes, true and perfect accounts of the amounts of such dividends, so far as the knowledge, information, and belief of the said London Agency enabled them to do so.

35. The defendants were the London members for the time being of the committee, and were the persons charged with the management of the London agency of the bank, and having the receipt of the gains and profits accruing within Great Britain, in the manner stated in paragraph 28.

36, 37. The Commissioners of Inland Revenue contend that the said bank is bound, under the Income Tax Acts, to make a return in respect of all its annual profits, whether made in the United Kingdom or elsewhere, and is chargeable to income tax thereon under Schedule D, and the question for the opinion of the court is—Whether the bank is bound to make a return in respect of all its annual profits, whether made in the United Kingdom or elsewhere, and is chargeable to income tax thereon, or whether, as is contended on the part of the said bank, the London agency of the bank is only bound to make a return under 5 & 6 Vict., c. 35, in respect of the profits made in the United Kingdom, together with a return or statements and accounts, under 16 & 17 Vict., c. 34, of so much of the profits made abroad as may be actually remitted to this country for distribution in London, and income tax is chargeable on the amount appearing from such returns, statements, and accounts.

If the court shall decide the above question in favour of the Crown, then judgment is to be entered up for the Crown for the nominal sum of one shilling, with costs; and if the court shall decide the above question in favour of the defendants, then judgment is to be entered for the defendants, with costs.

Points of argument for the Crown.—First that the Imperial Ottoman Bank, being a corporation, and carrying on the business of bankers in London, is bound, under the Income Tax Acts, to make a return of the whole of the annual profits of the corporation, whether made in England or elsewhere; secondly, that in the case of a corporation carrying on business in the United Kingdom, it is immaterial whether the corporation is an English or a foreign corporation; thirdly, that there is no analogy whatever between the bank, as constituted in the manner described in the case, and an ordinary partnership, some of the members of which may be resident abroad; fourthly, that section 10 of the 16 & 17 Vict., c. 34, referred to in the case, and relied on by the defendants, has no application to the present case; fifthly, that, if the principle contended for on the part of the bank

were adopted, duty would not be paid upon a large portion of the profits made, by the bank, which is clearly liable to duty under the Income Tax Acts.

Points for the defendants.—First, that the bank is not chargeable with income tax under Schedule D, as a person residing in the United Kingdom; secondly, that a foreign corporation cannot, for the purpose of income tax, reside elsewhere than in the country in which it is incorporated; thirdly, that on the facts of this case the bank resides in Turkey and not in the United Kingdom; fourthly, that, the bank being a person not resident within the United Kingdom, only its profits accruing in the United Kingdom are chargeable under Schedule D; fifthly, that sections 40 and 54 of 5 & 6 Vict., c. 35 do not apply to the bank, or its officers, or the defendants; sixthly, that the defendants are not chargeable with income tax or liable to make any return under that Act, otherwise than as agents having the receipt of profits; seventhly, that an agent, or person having the receipt of or entrusted with any money, cannot be chargeable with income tax, or liable to make any return or statement in respect of any money not actually received by or entrusted to him; eighthly, that the return and statement made by the defendants were good and sufficient; ninthly, that the contention of the commissioners stated in paragraph 36 is bad in law.

The *Attorney-General* (Sir R. Bagge, Q.C.), with whom were the *Solicitor-General* (Holker, Q.C.) and *Pinder*, appeared on the part of the Crown. By the 16 & 17 Vict. c. 34, s. 2 (clause 1, schedule D), the liability to income tax upon profits arising from "any profession, trade, employment, or vocation, carried on in the United Kingdom or elsewhere, is imposed upon any person "residing within the United Kingdom," and by 5 & 6 Vict. c. 35, sects. 40 and 192, this bank is chargeable as a "society of persons" or "corporation," and with such and the like duties as a "person" would be chargeable with; so that the question for determination is, whether or not the bank can be said to be "residing within the United Kingdom." Take the case of a private banker, living in Paris, and having a bank there, which he personally carries on, and having also another bank in London which he carries on there by means of clerks and servants; he would have a residence in London by virtue of the business so carried on there, and he would be a "person residing within the United Kingdom" for the purposes of this Act of Parliament. There is clear and high authority for saying that a person may reside in more than one place. See per Lord St. Leonards in *The Carron Iron Company v. MacLaren* (5 H. of L. Cas. 450), where that learned lord said he thought that the company might, for the purposes of carrying on their business, have two domiciles, one in England and one in Scotland. The Court of Queen's Bench, in *Newby v. Van Oppen and others* (26 L. T. Rep. N. S. 164; L. Rep. 7 Q. B. 293; 41 L. J. 148, Q. B. approved of and adopted that view of Lord St. Leonards, and held that an American company incorporated according to American and not according to English law, which had its chief place of business in America, with a place also in England, at which it, *de facto*, carried on a branch business, must be treated as resident in England, and might be served with a writ and sued in an action in this country. "Such a corporation," says Blackburn,

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J. in that case, "does for many purposes reside both in England and in its own country." The view adopted by the considered judgment of the Queen's Bench in that case has never been disputed, and, assuming it to be a correct exposition of the law on the subject, the bank in this case is clearly "residing within the United Kingdom" by virtue of the business carried on by it in London. The present is, in fact, a far stronger case. London is the residence, not one of the residences, of the corporation; the annual meetings of the shareholders are held there, and the accounts are made up and passed, and dividends are declared there, and, substantially, all the business of the corporation is carried on there. No doubt the charter says that "the seat of the bank is at Constantinople," but the mere saying so, when the business is, in fact, conducted in London, is not sufficient. If it were, every kind of liability might be avoided. [KELLY, C.B. refers to the *Attorney General v. Sully* (4 H. & N. 769; 28 L. J. 320, Ex.; in error 5 H. & N. 711; 29 L. J. 464, Ex)]. That case is distinguishable. There, an American firm whose place of business was at New York, where all the partners, but the one who managed a branch in England, resided, had a branch in England managed by the defendant, the business of which consisted of purchasing goods in England, and shipping them to America, where they were sold, and where the profits by the sale of them were realised, and it was held by the Exchequer Chamber (reversing the decision of this court below) that the whole of the profits of the firm were not taxable under clause 2 of schedule D., but only the defendant's share of them, who resided in England, which was not disputed. There no trade was carried on in the United Kingdom to render the firm liable, though there was enough to fix the person resident here, with liability, under the portion of the section applicable to the case, for his share of the profits of the trade carried on in America. [KELLY, C.B.—If the carrying on business within the United Kingdom constitutes residence within the United Kingdom, of what use are the words in the second clause of schedule D, "whether a subject of Her Majesty or not, although not resident within the United Kingdom," and what possible meaning can be attached to them? They imply that a trade may be carried on in this country by a person though he may not reside here]. It is impossible not to feel that there are difficulties; but in the case of A. and B. carrying on business as partners in London and Paris, A. living in London and B. in Paris, by the first clause of schedule D, A. is taxable for his share of the entire profits accruing both from the Paris and the London business; and by the second clause B. is liable for his share of the London profits. A corporation must reside in one place, and cannot, like a partnership, reside partly in one place or country, and partly in another.

H. Matthew, Q. C. (with him was A. Wilson), for the defendants, *contra*.—The defendants are only liable, and they are ready to pay, upon the profits of the business carried on by them within the United Kingdom, and also, under another statute, upon so much of the profits of the bank as they actually distribute to shareholders in this country. The two clauses of schedule D. indicate a clear difference between two classes of persons, namely "resident" and "non-resident." The argument of the Attorney General is that carrying on business constitutes "residence," at any

rate for a corporation; but, as was pointed out by the Chief Baron that argument is conclusively met by the language of the schedule itself. By the first branch of it the tax is imposed on "residents" in the United Kingdom, whether the business is carried on there or elsewhere; it supposes that, though a trade is carried on exclusively abroad, yet, if the person carrying it on resides in England, he is liable to tax on all his profits; that is pregnant with the suspicion that he may reside entirely within the United Kingdom, though his business is exclusively carried on in a foreign country. The second branch of the schedule bears the same construction still more plainly, because, as the Lord Chief Baron observed, that branch would be useless if "residence" and "carrying on business" meant the same thing. That second clause deals with trade in the United Kingdom irrespectively of residence. The language of the section itself overrules the whole argument of the Crown. There is a broad and clear distinction between residence for purposes of jurisdiction and residence for fiscal purposes. The word, as used in schedule D., is used in its ordinary and popular sense, and does not mean the mere momentary, bird of passage sort of, presence in a place, which is sufficient to create "residence," in order to found jurisdiction. That this is so is shown by the language of sect. 39 of the 5 & 6 Vict. c. 35, which is not set out in the case. (a) The mere landing for a moment on English soil is a sufficient residence for purposes of jurisdiction, whereas the residence contemplated by the Income Tax Act, and by the express terms of the Act, is a six months' residence at the least. The *Attorney General v. Sully* (*ubi sup.*) is a decisive authority against the Crown. If the Crown's argument to-day is sustainable, there was a business in that case, the carrying on of which in England by one of the firm of American partners, was a residence of the firm in England, and they would have been liable on their whole profits both English and American; but no such suggestion was ever made there as that the mere carrying on business constituted residence. The point raised in that case depended on the second clause of schedule D, and the question was whether the American firm, as a whole, were liable to the tax on the English profits. The court below

(a) Sect. 39 of 5 & 6 Vict. c. 35 enacts, "That any subject of Her Majesty, whose ordinary residence shall have been in Great Britain, and who shall have departed from Great Britain, and gone into parts beyond the seas, for the purpose only of occasional residence, at the time of the execution of this Act, shall be deemed, notwithstanding his temporary absence, a person chargeable to the duties granted by this Act, as a person actually residing in Great Britain, and shall be assessed and charged accordingly (in manner hereinafter directed), upon the whole amount of his profits or gains, whether the same shall arise from property in Great Britain or elsewhere . . . or from any profession . . . in Great Britain or elsewhere: Provided always that no person who shall on or after the passing of this Act, actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who shall not actually have resided in Great Britain, at one time or several times, for a period equal in the whole to six months in any one year, shall be charged with the said duties mentioned in schedule D, as a person residing in Great Britain in respect of the profits or gains received from or out of any possessions in Ireland, or any other of Her Majesty's dominions, or any foreign possessions, or from securities in Ireland or any other of Her Majesty's dominions or foreign securities . . .

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held that they were, but the court of error, overruling that decision, held that there had been no trade carried on in England within the second branch of schedule D. The whole case would have been idle if the Crown's present contention be right. To hold that carrying on business is equivalent to residence would be overruling the Exchequer Chamber in that case. What then, within the Income Tax Acts, is the residence of a corporation? A difficulty arises in applying a real thing such as "residence" to a mere legal fiction such as a corporation. The word may have different meanings for different purposes. In *Newby v. Van Oppen*, "residence" was decided solely with reference to jurisdiction purposes. In the *Kilkenny and Great Southern and Western Railway Company v. Fielden* (6 Ex. 81; 29 L. J. 141 Ex.), although the plaintiff's place of business and offices were in London within the jurisdiction of the court, and where their registers and books were kept, and where all their personal property and effects were situate, and four-fifths of their shareholders permanently resided in this country, yet it was held that they "must be considered as an Irish corporation and on the same footing as an individual resident in Ireland," and must therefore give security for costs. So, in *Adams v. The Great Western Railway Company* in this court (3 L. T. Rep. N. S. 631; 6 H. & N. 404; 30 L. J. 124, Ex.) the defendants were held to "dwell" at their principal offices at Paddington, within sect. 128 of 9 & 10 Vict. c. 95; and in *Shiels v. The Great Northern Railway Company* in the Court of Queen's Bench (4 L. T. Rep. N. S. 479; 30 L. J. 331; Q. B. B. & S. 7 Jur. N. S. 631) the defendants were held to carry on business, within sect. 60 of the same statute, at their principal station at King's Cross. To the same effect also is the case of *Brown v. The London and North-Western Railway Company* in the same court (8 L. T. Rep. N. S. 695; 4 B. & S. 326; 32 L. J. 318 Q. B.). Much light is thrown upon the matter by numerous cases in the Supreme Courts of America, the result of which would seem to show that this bank, being a corporation in Turkey only, and created such by an Imperial Act in that country, its existence may be recognised as a matter of comity by other countries, but that it dwells, and can only dwell, in Turkey, the country which created, and which fosters and supports it. See *The Bank of Augusta v. Earle* (13 Peter's Rep. 509); *The United States v. Arnesley* (11 Wheat. 412) (see pp. 588, 589 of 13 Peters); *Beaton v. The Farmers' Bank of Delaware* (12 Peters, 135); *The Ohio and Mississippi Railroad Company v. Wheeler* (1 Black's Rep. 286); *The Baltimore and Ohio Railroad Company v. Glenn* (28 Maryland Rep. 287); *The Blackstone Manufacturing Company v. The Inhabitants of Blackstone* (13 Gray's Rep. (Massachusetts) 488). In the last mentioned case, a company, incorporated by the State of Rhode Island but empowered by the State of Massachusetts to hold real estate in Massachusetts, and carrying on business there, was held not to be resident in Massachusetts for taxation purposes.

The *Solicitor-General*, in reply, contended that the *Attorney-General v. Sully* was really not applicable, and had nothing to do with the present case, or with the question of residence. The American cases did not help the matter. In the *Kilkenny Railway* case, it was a question whether it was an English or Irish corporation, and the case is in favour of the Crown, it being held that the cor-

poration "dwelt and carried on business" where the bulk of its business was transacted. A corporation can't reside anywhere as an individual resides, but it can reside in a place by carrying on its business there.

KELLY, C.B.—The question in this case is, whether the defendants, representing a corporation called the Imperial Ottoman Bank, are liable to be assessed to the income tax in respect, not of the amount of profits realised by the branch or agency established in London, for the defendants admit their liability to that extent, but in respect of the whole amount of profits realised by the bank, not only in England, but in France and Turkey. That it is a question of great importance to every corporation possessing establishments in different countries is at once apparent, from the fact that whilst in the present case the amount of profits realised by means of the branch or agency in London amounts to but £40,000 a year, the aggregate amount of the profits of the entire corporation realised in London, Paris, and Constantinople, and on which the Crown claim to be entitled to charge income tax, is no less than the sum of £278,395 a year. The ground on which that contention on the part of the Crown is based is, that the corporation comes within the first clause of the 16 & 17 Vict. c. 34, sect. 2, schedule D (set out in paragraph 1 of the case). There are two clauses, and the first of them, upon which the learned Attorney-General relied is this—The income tax is payable "for and in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere." Now, undoubtedly, for some purposes in the Income Tax Acts the word "person" is to be read as including a "corporation;" and the question is, whether that word, in this clause of schedule D, applies to the corporation in question, or, in other words, whether the Imperial Ottoman Bank can be said to "reside," or to be "residing within the United Kingdom" within the meaning of that clause. I am far from saying that, for the purpose of construing certain Acts of Parliament, such, for example, as the Acts regulating the service of process at home and abroad, a corporation may not be deemed to be "resident" in a particular place, and in a particular country. If an Act or charter of incorporation be granted by the State in this country to a body of persons, who are thereby incorporated as a railway company, it may be that, for certain purposes, that corporation may be said to be resident at its chief place or seat of business, as, for instance, the Great Western Railway Company are resident at Paddington; and it is possible that a banking corporation also may be said to be resident at whatever place is their chief seat of business. But, if that be so, I am clearly of opinion, upon the case now before the court, that the Imperial Ottoman Bank cannot be said to be "resident" in this country; that, with respect to the business of the bank, which is carried on in London, it is a mere branch or agency, and is not the bank itself, and that London is not the chief seat at which the principal business of the bank is carried on. This point, I think, is conclusively settled by the language of what we may call the charter of incorporation, but which is called "The Convention relating to the Concession." We find also the matter

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thus spoken of in the statutes of the bank, under the title, "Duration and Seat of the Society." Article 3 says, "The duration of the society is thirty years," and Article 4 is, "The society has its seat at Constantinople." If therefore this corporation can be said to be "resident" or "residing" anywhere, it must be at Constantinople, where alone it has its seat, under the express terms of its charter. Article 4 further says "it can establish as many branches and agencies as it may think fit," and under this very provision it has established an "agency" in London, as it has also done in Paris. Call it by what name we will, it is not the corporation, not the bank itself, not, in the language of this charter or concession, the place in which "the society has its seat." It is only an agency or a branch, and not the establishment or bank itself, the seat of which is at Constantinople. But, beyond the language of the concession, which is plain and clear enough, it may be observed that the establishment in London is throughout the case alluded to and described, not as the bank, or the chief seat of the corporation, but, as an "agency," more especially is this so in paragraph 33 of the case, where the "Return" made by the defendants is stated. It is there said "The London agency act in the character of agents for the Imperial Ottoman Bank, which resides at Constantinople, in the Empire of Turkey." It then goes on as follows: "The London agency of the bank decline to make any return of the profits accruing to the bank from business carried on by the bank elsewhere than in the United Kingdom, being advised that such profits are not liable to income tax;" and then follow these words, on which I do not very much rely, "The statements in the said return are true in fact." That may apply only to the figures, but, whether it does or not, the establishment in London is described, and, having reference to the charter of incorporation, most accurately described, as "The London Agency," and as that alone. I think, therefore, that, under the words of the first clause in Schedule D., "any person residing within the United Kingdom," this corporation cannot be held to be "a person so residing." It is important to observe the distinction between the liability to income tax of "a person," and that of a "Corporation." Supposing that the present were the case of a private individual, A. "residing within the United Kingdom," and carrying on a business, say as a banker, in partnership with B., both in London, and also abroad, say at Paris or Constantinople, and that B. resided abroad, then in such a case A. would be liable, as a resident within the United Kingdom, to pay income tax on the profits accruing from the entire business so carried on both in England and abroad, but not upon the whole amount of the profits of the partnership, but only on his, A.'s share or portion of such profits, whatever that might be. And in the case of an individual banker living in London and carrying on a bank there, and having another bank in Paris, and a third in Constantinople, he being the whole and sole proprietor of all these three establishments, he would be liable to assessment in respect of the aggregate amount of the profits of the three establishments. So a corporation, such as this Imperial Ottoman Bank, if it is to be taken as "a person residing within the United Kingdom," and if it derived profits

from the business carried on at all its establishments, both in England and elsewhere abroad, would be chargeable with the payment of income tax upon the whole of such profits. It may be important, therefore, to ascertain whether the liability to the tax in the present case is imposed on a "person" or on a "corporation." Without, however, saying whether the language of the clause is applicable or not to this corporation, or whether the bank is or not a "person residing" at all, so as to bring it within the first clause of schedule D., I am clearly of opinion, upon the statements in the case, and looking at the purview and terms of the Act of Parliament, that, if this corporation can be said to "reside" anywhere at all, it must be at Constantinople, where, expressly by the terms of the charter of incorporation, the society is declared to have its seat. I think, therefore, that this is not a case which comes within the first of these two clauses of schedule D. It is only necessary to refer to the second clause to say that that may well be held to provide for the case that where a business is carried on in this country the profits of such business are liable to be taxed wherever the person acquiring them may happen to reside. Here, therefore, this branch establishment existing within the United Kingdom, and a profit to the amount of 40,000*l.* a year being realised thereby, the corporation, as represented by the defendants, are no doubt liable to assessment to the amount of that sum and no more. It seems to me to be perfectly clear that the corporation having no residence or seat in England, or elsewhere than in Turkey, are not liable to be assessed in respect of the aggregate amount of profits earned or acquired at all the three establishments constituting their entire undertaking, and therefore the defendants are entitled to the judgment of the court.

CLEASBY, B.—I am of the same opinion. The question arises upon the first clause of schedule D. The word "person" occurs both in the first and second clauses; but we must recognise the existence of a "corporation" as coming within the meaning of the word "person" in both clauses, because we find that by the 5 & 6 Vict. c. 35, s. 40, a person is appointed to make the return in respect of a corporation, which has been done in the present case; and by the interpretation clause, the word "person" includes "corporation." I will merely say, before going further, that it has not been contended in this case, and it cannot be said, that the whole business of the corporation is carried on in London, although some of the paragraphs of the case, showing that the annual general meetings of all the shareholders have always been held there, seem to point in that direction, but it has not been contended here to-day that that is so. "Person" means "corporation" as before mentioned. Now, if "residence" cannot be predicated of a corporation, and if the idea of it is not applicable to a corporation in this Act of Parliament, then, of course, the first clause of schedule D does not apply, because, although the word "person" includes a "corporation," yet it must be "a person residing within the United Kingdom." If then it cannot be said that this corporation "resides" anywhere, there is an end of that part of the case. But the argument is hardly, and indeed it is not, put upon that ground, and we have to consider whether it has been made out here, not only that the word "per-

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son" is fulfilled by this corporation, but whether the condition of "residing within the United Kingdom" is also fulfilled by them. Now, no doubt, when we are dealing with a corporation, which is a different thing from the persons composing it, the question of residence presents a difficult matter to deal with. Without attempting to define the word "residence," there are in this Act of Parliament certain clauses which limit the meaning of that word, and afford some guide in considering whether a person does or does not come within the words "residing within the United Kingdom." The learned counsel for the defendants has cited the case of the *Attorney-General v. Bully (ubi sup.)*, as I understood him, as if it decided that a person who carried on a business as a partner in England, was not, and could not be considered as, "resident" here. But, in point of fact, that case does not decide anything of the kind, because what was held there, was that there was no business at all carried on in England, not that it was partly carried on in England and partly elsewhere, but that none at all was carried on in this country which was liable to income tax. That decision, therefore, really has no bearing at all upon the present case, because, undoubtedly, here business is carried on in England. What then have the learned counsel for the Crown referred to as showing that this corporation can be regarded as "residing in England?" They have referred to the various paragraphs of the case which show that certain acts were done in this country. For myself, I can only say, following the course taken by my Lord, that it appears to me to be sufficient to say that, when we look at the constitution of the bank, it is clear that it did not carry on business in England in such a sense that we should be justified in saying that it "resided" in England. The Ottoman Bank of London had undoubtedly carried on its business, and had also "resided," in England; but that bank transferred its business to the Imperial Ottoman Bank, which was an entirely different institution; and when we look to see what its constitution is, we find, first of all, that it is established as the State bank of the Ottoman Empire; that its seat is fixed at Constantinople; that the State concession moreover grants to the bank, in addition to the right of carrying on the ordinary business of bankers, the exclusive privilege of issuing in Turkey notes payable to bearer on demand, payable at Constantinople or at the branches; that these notes must be in the Turkish language and must bear the seal of the High Commissioner "of the Government." Then the bank is charged with "the receipts of all the revenues of the empire coming to the Imperial Treasury at Constantinople, and the payment of all drafts issued by the Minister of Finance," and so on, and as a bank they are to be paid in a particular way in respect of all these things. Now it would, I think, be most unreasonable to hold that this Imperial Ottoman Bank, which issues notes which must be in the Turkish language, establishing the currency of Turkey, and whose business it is to receive all the revenues of the Turkish Empire in the imperial treasury at Constantinople, and to pay all the drafts issued by the Turkish Minister of Finance for carrying on the Government there, is a bank or corporation either carrying on its business or residing in London. This is really sufficient for my judgment in this

matter, which is that the Crown has failed to make out that this bank is resident in England, or is even carrying on its business in this country, although some business is carried on at a branch here. Our judgment, therefore, ought to be for the defendants.

AMPHLETT, B.—I am of the same opinion. In reality the question entirely depends upon whether or not, under the circumstances of this case, the Imperial Ottoman Bank is a "person residing within the United Kingdom" within the meaning of this Act of Parliament. Now the way in which the Attorney-General first proposed to argue the case was this: he began by saying (though he afterwards, I think, very fairly recoiled from the proposition) that an individual carrying on business in London or elsewhere might reasonably be said to reside where he was carrying on his business; so that, if he happened to have two or three businesses established in two or three different countries, he might be said to reside in every and each of those countries. I then asked him whether he meant to carry his argument so far as to say that if a banker, M. Lafitte, for instance, lived, in the ordinary sense of the term, only in Paris, but had a business established and carried on in London in his own name, by his clerks or agents, he could be regarded as a person "residing" in London as well as in Paris, so as to be chargeable to income tax upon the whole of the profits which he made, not only in London but also in Paris. The learned Attorney General said that he did not wish to carry his argument so high as that. It would, indeed, be attended with such monstrous consequences that I do not wonder that he did not insist upon it. Now, if that is so, I want to know why, if an individual cannot be said to "reside" where he carries on his business, a foreign corporation, not a corporation according to the law of this country at all, should be said to "reside within the United Kingdom" for no other reason than that it carries on business here, if the carrying on of business alone, in the case of an individual, would not suffice to make him a resident within the United Kingdom. It appears to me that the same rule must apply in both cases, and that the mere circumstance of a corporation carrying on business in London does not make that corporation resident in London. But then we must try to find out, and to put some reasonable meaning upon the language of the statute, and ascertain what is meant by a corporation "residing" anywhere. The reasonable meaning of it is that a corporation may be said to "reside" where it has its seat. Now, here, looking not only at the language of the convention which established the bank in Turkey, but also to the duties which the bank has to discharge, one would hesitate to say that this bank—which exists as a corporation only in Turkey, and is not a corporation anywhere else, and which has its seat at Constantinople, where it is the imperial bank—"resides" in the United Kingdom. We should, I think, be putting a very great strain indeed upon language if, where a corporation is not only in language, but actually according to the fact, carrying on only a branch business in London, the main part and the most important part of its business being carried on in Constantinople, we were to hold that that Turkish corporation was residing as a corporation within the United Kingdom merely because it had a branch bank here. If

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it "resides" anywhere it is at Constantinople. For these reasons, I think, the question which is asked of us, whether or not the corporation are chargeable under the first part of Schedule D. must be answered in the negative.

Judgment for the defendants.

Attorney for the Crown, *The Solicitor of Inland Revenue.*

Attorneys for the defendants, *Bircham, Dalrymple, Drake and Co.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

Wednesday, Nov. 11, 1874.

KITTOW AND OTHERS (apps.); THE ASSESSMENT COMMITTEE OF LISKEARD UNION (resps).

Rating—Surface and buildings connected with non-rateable mine—Licence to work mine—Cost-book company—Actual occupation.

Appellants were grantees of "liberty, licence, power, and authority, to dig, work, mine, and search for metals and minerals in and throughout certain lands" for a term of twenty-one years, and also shareholders in a cost-book company got up for the purpose of carrying out the mining operations under the above-mentioned licence, the indenture granting which reserved to the grantors leave to enter on the surface at any time, and contained provisions for the protection of cattle belonging to tenants of the grantors which might be on the surface from time to time. Under powers given by the deed the company erected sheds and other buildings on the surface land, and made tram and other roads, for the purpose of carrying on the mining operations.

Held, that the shareholders of the company were rateable in respect both of the surface land and of the sheds and other buildings erected on it for the purpose of carrying on the mining operations.

Actual occupation, irrespectively of title, is the only circumstance which determines rateability.

THIS was an appeal against a rate made for the relief of the poor in the parish of St. Cleer, Cornwall, on the appellants, as occupiers of surface land of South Caradon Mine, with the houses, buildings, machinery, tramways, and plant. The gross estimated rental was 1432*l.*, and rateable value 1157*l.* and extent of ground 8 acres. The rate was made in conformity with the valuation list, and was duly objected to before the assessment committee, who declined to interfere, and before appeal to the quarter sessions, by consent of the parties and by a master's order, a case was stated under 12 & 13 Vict. c. 45, s. 11.

1. By an indenture, dated the 6th May 1862, the Reverend George Poole Norris, and Mary Anne his wife, the owners in fee of the lands in question, granted unto Richard Kittow and Thomas Kittow, two of the above-named appellants, and to one Peter Clymo, since deceased, their respective executors, administrators, and assigns, liberty, license, power, and authority to dig, work, mine, and search for metals and minerals in and throughout certain lands, part of Caradon.

A copy of the said deed is annexed to and forms part of this case.

2. The operations under the above sett or licence have been and still are carried on by a company

constituted in accordance with one of the covenants in the sett, on what is known within the Stannaries of Devon and Cornwall as "The Cost Book System," and such a company is called a "Cost Book Company." A cost book company is usually formed in the following manner: a grant or licence having been obtained to one or more persons from the owner, either by way of sett or licence, to search for minerals, or the right to mine and get them (which grant or licence is considered to be held in trust for the company when formed), a meeting is held of the persons intending to become shareholders in the proposed adventure, the number of shares into which it is to be divided is determined, and with the names and addresses of the shareholders, and the number of shares allotted to or taken by them respectively, is entered in a book called "The Cost Book" of the mine. It is also usual to appoint an officer called the purser, by whom the accounts of the adventure are kept and entered in the cost book, by whom also meetings of the adventurers are convened, and who acts generally for the adventurers in the intervals between the general meetings. In certain defined equity proceedings in the Stannaries Court the purser can sue and be sued on behalf of the adventurers, and by the Stannaries Act 1869, can sue in other courts for calls made on the shares, but in other respects there is not any officer or agent of a cost book company who is authorised by virtue of his office to represent the company, or to sue and be sued, or accept service of process on behalf of the company, which, not being registered or incorporated under any of the statutes relating to joint stock companies, is a species of common law partnership.

A cost book company has no fixed amount of capital, nor are its shares of any fixed amount, but calls are made upon the shareholders from time to time as money is required for the purposes of the undertaking, and profits when made are divided amongst the shareholders in proportion to the shares held by them respectively. In the cost book are entered also the appointments of purser or manager or agents for the mine, and the resolution from time to time passed at the meetings of the shareholders, and the accounts so passed and allowed thereat. In some cost book companies, instead of a purser, a managing committee is appointed from amongst the shareholders, by whom, with the secretary, the duties which would ordinarily devolve upon the purser are performed. In the case of the South Caradon Mine there is a purser, but not a committee of management or secretary. The shares in a cost book company are transferable at pleasure without any *delectus personae*, and each shareholder has the right at his pleasure to sell his shares, and insist upon his vendee (subject to sections 14, 15, and 35 of the Stannaries Act, 1869) being accepted as a member of the partnership in his place or stead. Upon a sale or transfer of shares notice is given by the transferor to the purser or other proper officer of the company of the transfer of the shares, and by the transferee of his acceptance of them, and on such transfer being entered or noted in the cost book, the transfer is complete, and the transferee is substituted for the transferor as the holder of the shares. No deed of transfer or other written document is required. A shareholder can also put an end to his partnership by relinquishment of his shares by notice in writing delivered to the

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purser, or if no purser to the secretary for the time being, or if no secretary to the principal agent for the time being of the company. General meetings of the company are held at fixed intervals, usually every two or three months. At such meetings calls are made, or profits divided, as the case may be. Agents of the mine are appointed or removed, and the general business and operations of the company discussed and considered, and any necessary orders and directions given with reference thereto. The grantees of the sett under which the mine is worked and carried on, although immediately liable to the grantors under the covenant and provisions of the deeds, are considered to be only trustees for the cost book company, whether there has been a declaration of trust in writing or not, and entitled as between themselves and the company to be indemnified and held harmless in respect thereof, and practically such grantees, *quâ* grantees, cannot interfere in the operations which are conducted under the authority and by the directions of the cost book company only.

3. The shareholders of the South Caradon Mine constituting such cost book company have in accordance with the powers and provisions of the said deed, and for the purposes of the operations of the company, built and erected certain houses and buildings, sheds and steam engines, and fixed machinery, and made certain tram and other roads, and have, within the limits so granted, all necessary fixed plant, appliances, and apparatus requisite for pumping water, drawing, crushing, stamping, washing, dressing, lifting, and conveying ores, and for the general working of the mine and carrying on of such operations. All the houses, buildings, sheds, steam engines, machinery, and other matters described in this paragraph are on the surface land, and, together with such land, form the subject of the rate in question.

The deed granting the licence reserved to the grantors leave to enter on the service at any time; and also contained provisions for the protection of cattle belonging to tenants of the grantors which might be on the surface from time to time.

4. The said appellants, Richard Kittow and Thomas Kittow, are the surviving grantees under the said deed, and are also shareholders in the said cost book company. The said appellants, Christopher Childs, John Hodge Lawrence, and John Baby, are three of the shareholders in the said company, and the said Thomas Kittow is the purser of the said mine.

The questions for the opinion of the court are—

1. Whether under the circumstances above stated the appellants, or any, and which of them, are rateable in respect of surface land of South Caradon Mine, with the houses, buildings, machinery, tramways, and plant, or either of them?

2. Whether the said appellants, or any and which of them, are occupiers of the said property, and liable to be rated in respect of the same?

3. If none of them are the occupiers, then the court to say who are the occupiers.

It is agreed that a decision in conformity with the decision of this court shall be entered on motion at the sessions to be holden next or next but one after such decision shall have been given, and for such costs as the court shall adjudge.

Lopes, Q.C. (with him *Pinder*) for the appellants.—The property in the present case is like that in *Rex v. Bilston* (5 B. & C. 851), where the

owner and occupier of an ironstone mine erected an engine for the purpose of drawing the water from the mine, and used it for no other purpose, and it was held that he was not rateable to the poor in respect of the engine. "The occupier of the mine as such," said Bailey, J., "is not rateable under the provisions of the 43 Eliz. c. 2. In many such mines there are railroads underground which greatly enhance the value of the mine, and therefore of the land; but they cannot be rated, and in principle they are on the same footing as this engine. This is a mode of drawing the water from the mine; the railroad is to facilitate the conveyance of the ore to the foot of the shaft. Each is of use in carrying on the mining operations, but of no other use. Suppose a conveyance or lease of this mine with the machinery had been made, it is clear that the engine would have passed to the grantee or lessee; it must, therefore, be considered as part and parcel of the mine, and is, as well as the mine itself, exempt from poor rates." (See also *Morgan v. Crawshaw*, L. Rep. 5, Eng. & Ir. App. 304.) No interest in the soil itself was given to the present appellants by the deed granting a licence to dig for metals, &c.; their interest is similar to that of galees, who, in the case last cited, were held not rateable in respect of the mines occupied by them. "There has been," said Lord Chelmsford, "a common consent of all the judges to whom the question has been submitted, as to the non-rateability of the defendant in error. The Court of Queen's Bench, upon the special case stated by consent, gave judgment *pro forma* for the defendant in error without argument. The Court of Exchequer Chamber consisted of six judges who, after a short argument for the now plaintiff in error, and without calling upon the other side, briefly stated that they 'thought it wise (in the language of Chief Justice Tindall, in *Oressé v. Savole*, 2 Q.B. 886) to abide by the construction which numerous decisions have given to the words of the statute, and which has been for a long time acted upon,' and they therefore held the occupier of an iron mine not to be rateable, coal mines alone being mentioned in the statute.' . . . After these uniform decisions, after more than two centuries and a half of practical acquiescence in the construction of the statute of Elizabeth, there not being a single instance of any other mines than coal mines having been rated to the relief of the poor during this long period, unless it clearly appeared that the decisions had commenced and had been continued in error, your Lordships would be very reluctant to disturb what has invariably been regarded as the settled law upon the subject." [LUSH, J.—The question was not brought before the House of Lords, in that case, whether there was not a rateability in respect of the soil. BLACKBURN, J.—The question there was quite different, being "whether the respondent being, in the manner stated in the special case, a galee of certain mines of iron ore in the township of East Dean, is or is not liable to be rated to the relief of the poor." LUSH, J.—Further, the grant of a gale gave merely "a licence to work the mine vein, or pit therein comprised;" it gave no interest whatever in the surface.] It is submitted that the grant in the present case did not amount to more than a licence to dig, and gave no interest in the land itself. In *Doe v. Wood* (2 B. & Ald. 724) the owner of the fee

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granted to A., his partners, fellow adventurers, &c., free liberty to dig for tin and all other metals throughout certain lands described in the deed; and to raise, make merchantable and dispose of the same to their own use; and to make adits, &c., necessary for the exercise of that liberty, together with the use of all waters and water courses, excepting to the grantor liberty for driving any new adit within the lands thereby granted, and to convey any water course over the premises granted, habendum for twenty-one years; covenant by the parties to pay one-eighth share of ore to the grantor, and all rates, taxes, &c., and to work effectually the mines during the term: and then, on failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor. Notwithstanding the words italicized, this court held that the deed did not amount to a lease, but contained a mere licence to dig and search for minerals, and that the grantee could not maintain an ejectment for mines lying within the sett, but not connected with the workings of the grantee. "This indenture," said Abbott, C.J., "in its granting part, does not purport to demise the land, or the metals, or minerals therein comprised. The usual technical words of demising such matters are well known and usually adopted in a formal deed, where the intent is to demise the land, or metals, or minerals; but the purport of the granting part of this indenture, is to grant for the term therein mentioned, a liberty, licence, power, and authority to dig, work, mine, and search for metals and minerals, in and throughout the lands therein described, and to dispose of ore, &c., that shall within that term be there found, to the use of the grantee, &c.; and it gives also further power for the more effectual exercise of the main liberty granted. Instead, therefore, of parting with, or granting, or demising all the several ores, &c., that were then existing within the land, its words import a grant of such parts thereof only as shall, upon the licence and powers given to search and get, be found within the prescribed limits, which is nothing more than the grant of a licence to search and get (irrevocable, indeed, on account of its carrying an interest) with a grant of such of the ore only as shall be found and got, the grantor parting with no estate, or interest in the rest. If so, the grantee had no estate or property in the land itself, or any particular portion thereof, or in any part of the ore, &c., ungot therein; but he had a right of property only, as to such part thereof, as upon the liberties granted to him, should be dug and got." Unless, the grantor in the present case has parted with the exclusive occupation to the appellants, they are not liable to be rated. This was the test applied in *Allan v. The Liverpool Union* (30 L. T. Rep. N.S. 93; L. Rep. 9 Q.B. 180). [BLACKBURN, J.—The question discussed there was whether the appellant was in actual occupation or not.] The necessity of exclusive occupation to rateability was certainly the ground of the decision of this court in *Rex v. The Trent and Mersey Navigation* (4 B. & Cress. 57), where the proprietors of certain limestone quarries agreed to deliver to a canal company yearly such quantities of good limestone as the canal company should direct, at the rate of 7d. per ton; and if they should at any time neglect to deliver the quantities required it should be lawful to the company to enter into or upon the lands or lime-

stone quarries of any of the proprietors, and to take such quantities of limestone as they should think proper, paying 2d. per ton. The proprietors of the limestone quarries having failed to supply the limestone required, the company entered and continued for more than twenty years to work the quarries, and to take the limestone at 2d. per ton. It was held, however, that the company had not any exclusive occupation, but a mere privilege, and consequently that they were not liable to be rated to the poor. Abbott, C.J., in delivering the judgment of the court, said: "The right of the company was merely to get there what stone they might think fit; there was nothing in the contract to prevent the owner from giving to others, also the privilege of getting stone in the same quarry. The company, therefore, had not any sole and exclusive occupation, but a mere privilege, and, consequently, were not liable to be rated to the relief of the poor." In the present case leave is expressly reserved to the grantors to enter on the surface at any time. In the next place, assuming that the occupation is a rateable one, are the appellants occupiers? It is submitted that they are not; they are mere trustees for a body of persons. [BLACKBURN, J.—And also shareholders themselves.] The shareholders are only persons entitled to a share of the profits of the mine. In *Watson v. Spratley* (10 Ex. 222) it was held (per Martin and Platt, BB.) that shares in a company, conducted on the cost-book principle, for working a mine, were not an interest in land within the 4th section of the Statute of Frauds. "The interest of the shareholder," said Martin, B. "in incorporated joint-stock companies, and the law as applicable to the sale of shares in them, has been the subject of legal decision, and is now well established. These shares have been held not to be an interest in land within the 4th section of the Statute of Frauds, or goods within the 17th. Their nature and character have been defined to be what is above stated (*Bligh v. Brunt*, 2 Y. & C. 294; *Duncuft v. Albrecht*, 12 Sim. 189), and the judgments of the learned judges who decided these cases seem to me conclusive to show that the true nature of the interest of a shareholder in a joint-stock company incorporated by an Act of Parliament (a part of whose capital stock is land) is such as is above described, and that it is not an interest in land within the meaning of the 4th section of the Statute of Frauds. It is true that the employment and use of land are essential to the profits of the undertaking, but land is merely a part of the joint-stock capital, and the real substantial interest of the shareholder, and that which the share represents is the participation in and the right to participate in the profits of a trading partnership, in the joint stock or capital of which machinery and plant as well as land, together with money and skill and labour, largely combine." And what individual shareholders out of the whole body could be singled out to be put on the rate book? [LUSH, J.—Any the parish like; and if the individuals put on the rate book do not like it, they can get the rate amended by having the names of all their partners added.] It is a very strong argument against the rateability of the shareholders in cost-book mining companies that they have never hitherto been rated.

Sir Henry James, Q.C. (with him Poland) for the respondents, was not called upon.

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BLACKBURN, J.—I think there is no doubt on any one of the points which have been argued. Mines were not rateable under the former Poor Law Acts, and there was also an idea, arising from a dictum of Bayley, J., in *Rez v. Bilston* (*ubi. sup.*), that because the mines themselves were not rateable, that part of the surface occupied by sheds and other buildings erected for the purpose of working the mines were not rateable either, being considered part of the mine. But that was a mistaken idea; and I understand that in the case of *Guest v. East Dean* (*ubi. sup.*), we expressed our opinion that it was a mistaken idea, and that wherever there is an exclusive occupation of the surface by buildings, &c., though for the purposes of the mine, it is as much rateable as if the occupation were for the purpose of a canteen, or it were a case of water, or anything else which is not itself rateable. The difficulty in *Guest v. East Dean* was merely as to the question of *quantum*, a difficulty which does not arise here. Here it is found as a fact that the deed—a point which I do not decide—conveyed nothing but a licence. Nevertheless the licensees, acting under it, have been permitted to build, and have “built and erected certain houses and buildings, sheds and steam engines, and fixed machinery, and made certain tram and other roads, and have, within the limits so granted, all necessary fixed plant, appliances, and apparatus requisite for pumping water, drawing, crushing, stamping, washing, dressing, lifting and conveying ores, and for the general working of the mine, and carrying on of such operations”; and as I take it, the licensees are in *de facto* occupation of all these by their servants, and all of which they are in occupation are above the surface of the land, and not a part of the land itself. They are, therefore, rateable in respect of these. I understand the surface of the mine to be about 400 acres in extent; if there is any portion of that not exclusively occupied by them or their servants, that will be a different question, but for whatever portion they are in *de facto* occupation of, they must be held rateable—the value is to be settled elsewhere. I answer the two first questions put to us in the affirmative, and that being so, it is unnecessary to answer the third.

MELLOR, J.—I am of the same opinion. The question is really one of fact. As soon as it is determined as a fact that the appellants are in exclusive occupation of these sheds and other buildings, it follows that they are rateable, whatever may be their title to them—a question which does not at all concern the parish. The parish has only to see who have the beneficial exclusive occupation, either in person or by means of servants, those persons being rateable. The parish has nothing whatever to do with the question of title, but simply with the fact of beneficial occupation, it being immaterial to the parish whether the occupiers could maintain trespass for ejectment. I quite agree that there may be a species of occupation which is ostensible merely, and not real or exclusive, and that would be a different case altogether. But there is nothing of that sort here; there is nothing to show that any other person is in occupation of these buildings, and I think that the appellants were rightly rated in respect of them.

LUSH, J.—I am of the same opinion. I am sorry to find that the case of *Guest v. East Dean* (*ubi.*

sup.) has been misunderstood, and I hear it with surprise. The case did not proceed at all on the question whether the occupier had a right to occupy or not. That question is wholly immaterial, the only material question, when dealing with rateability, is the fact of actual occupation. It was certainly our intention to decide the case on that ground, and to hold the appellant liable to be rated in respect of all the surface land in his actual occupation, though the mine itself was not rateable. The decision certainly did not proceed on the narrow ground that the appellant was liable to be rated only as to that portion of the surface to which he was entitled under the grant. It is not a correct way of expressing it to say that iron mines are “exempted” from the statute of Elizabeth; they were only omitted from the statute, and were therefore held to be exempted by implication. In the present case there is a portion of the surface undoubtedly occupied by somebody, for there are tramways, houses, sheds, and other buildings, which must be occupied by someone. Therefore they are rateable. The only remaining question is, by whom are they occupied? Surely by those who occupy the mine, that is, by the shareholders of the company, standing in the relation of partners to each other, but with this peculiarity, that they have the right of disposing of their shares without any formality other than a notice given to the purser or other proper officer of the company.

Judgment for the respondents.

Attorneys for the appellant, *Childs and Batten* for *Childs and Son*, Liskeard.

Attorney for respondents, *J. E. Fox* for *Glub*, Liskeard.

[NOTE.—37 & 38 Vict. c. 54 sect. 3 now enacts that “from and after the commencement of this Act, the Poor Rate Acts shall extend to the following hereditaments in like manner as if they were mentioned in the recited Act of the 43rd year of the reign of Queen Elizabeth, that is to say . . . to mines of every kind not mentioned in the recited Act.” Sect. 11 provides that “this Act, for the purpose of enabling any hereditament to be included in, or omitted from, or valued for the purposes of a valuation list, or a supplemental or provisional valuation list, which will come into force after the 6th day of April, 1875, shall come into operation on the passing thereof; but save as aforesaid, or as is otherwise expressly provided by this Act, shall come into operation on the 6th day of April, 1875; and the expression “commencement of this Act” shall in this Act be construed accordingly.]

Thursday, Nov. 12, 1874.

THE PLUMSTEAD BOARD OF WORKS v. THE BRITISH LAND COMPANY.

Rating—Owners of land—Public roads—Metropolis Management Acts 1855 and 1862 (18 & 19 Vict. c. 120, ss. 105, 250; 25 & 26 Vict. c. 102, s. 77).

A land company, the owners of certain lands, having laid them out for building purposes, and made roads and ways across them communicating with certain ancient highways outside the same lands, sold nearly the whole to different purchasers, and conveyed to them by metes, bounds, and admeasurements set forth on coloured plans. Each lot had a frontage upon one of the roads, and in the conveyance was stated to be situate on the side of, and adjoining, such road, but neither the measurement nor the colouring on the plan on the conveyance included any part of the road. The

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roads became public highways so far as the company could, by any act of theirs, dedicate them to the use of the public, and they were used by the public for all the purposes of a way, but no proceedings had been taken under the Highway Acts to make them repairable by the parish.

The land company being assessed under sect. 77 of 25 & 26 Vict. c. 102, by the board of works of the district, who had paved the new streets formed by the houses built on the plots sold by the company, in respect of these new streets, where bounding or abutting on the sides or ends of the streets, and also in respect of two ancient highways not maintained and repaired by the company bounding their estate.

Held (on a case stated, in which the board of works were plaintiffs and the land company defendants), that the land company were properly assessed in respect of these streets as owners of land abutting on them, the streets being "land" within the meaning of sect. 77 of 25 & 26 Vict. c. 102, and the form of the conveyances from the company to purchasers of building plots showing that it was not intended to pass the soil in the streets.

THIS was a special case stated by order of Nisi Prius. The action was to recover from the defendants a proportionate amount of the expenses of paving certain streets in the Plumstead district.

1. The plaintiffs were, and are, the Board of Works for the Plumstead district, appointed and acting under the provisions of the Metropolis Local Management Acts, 1855 and 1862 (18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102.)

2. The defendants are a company constituted and formed for the purpose of purchasing land and hereditaments in Great Britain and Ireland, and of improving the same by draining and laying out, and making thereon roads and other ways, and parks, gardens, pleasure grounds, playgrounds, and other places for recreation, or promoting health or convenience, and of erecting suitable buildings thereon, and of selling or letting the same, either before or after the erection of buildings, or the execution of works thereon, and for all other purposes incident to those before-mentioned, and the said company were registered under the Joint Stock Companies' Act 1856.

3. In or about the year 1863, the defendants then being the owners of certain lands situate at Plumstead and within the district of the plaintiffs, laid out the same lands for building purposes, and made roads and ways upon and across the same communicating with certain ancient highways outside the same lands, and also laid the sewers in such roads. The defendants' estate having been laid out in the manner shown on the estate plan, nearly the whole of it was sold in lots to different purchasers, and conveyed to them by metes, bounds, and admeasurements set forth on coloured plans. Each plot had a frontage upon one of the roads, and in the conveyance was stated to be situate on the side of and adjoining such road, but neither the measurements nor the colouring on the plan on the conveyance included any part of the roads, nor is there in the conveyance any expression indicating any intention to convey the soil of the road; but the defendants nevertheless contend that the soil of the road to the centre thereof passed by the conveyance of each lot.

4. The roads so laid out by the defendants became and were public highways, so far as the

defendants could by any act of theirs dedicate the same to the use of the public; and have, ever since they were made, been used by the public for all the purposes of a way, but no proceedings have ever been taken under the provisions of the Highway Acts to render them repairable as public highways by the parish of Plumstead or any other public body. In exercise of their respective statutory powers, the plaintiffs altered some of the sewers made by the defendants in the said roads, including the new streets hereinafter mentioned, and sanctioned the construction of the drains from the houses and lands abutting on the said roads and streets into the said sewers. The gas and water companies laid their mains and pipes in the said roads and streets for public and private use, and the plaintiffs have set up and used public gas lamps in the said roads and streets in the same manner as in other streets within their district.

5. Certain portions of the said roads when built upon, and before the apportionment hereinafter mentioned became and were the several new streets mentioned in the declaration and particulars of demand in this action, and the plaintiffs, finding it necessary that such new streets should be properly paved from time to time, undertook and performed the necessary works, and also from time to time apportioned the costs, charges, and expenses among the owners of the houses forming the said new streets, and the owners of lands bounding and abutting on the said new streets, and in so doing assessed the defendants in respect of the said new streets and roads where abounding or abutting on the sides or ends of the said streets paved, and also charged the defendants in respect of two ancient highways, not maintained and repaired by the plaintiffs, bounding the defendants' estate, the soil of which (at least, to the centre of the ways) is assumed to have been conveyed to the defendants. One of these old ways abuts upon the east side of Herbert-road, near to the north end thereof, and was charged to the paving thereof, and the other is called Shrewsbury-lane, and abuts upon the south-east end of Eglinton-road, and was charged to the paving thereof.

6. The roads charged as land abutting upon the sides of the streets paved are, in most cases, roads intersecting such streets; for example, in the apportionment for the paving of Herbert-road, the roads called Ripon-road, Paget-road, and Whitworth-road, are charged in respect of their abutments on both sides of Herbert-road.

7. The roads charged as abutting on the ends of the streets paved, are for the most part roads leading past the end of such streets; for instance, in the apportionment for the paving of Llanover-road, the road called Herbert-road, and Eglinton-road, are charged for their respective abutments upon Llanover-road.

8. But in one case some of the roads or new streets charged as abutting upon the ends of the street paved are continuations of such street. One of the resolutions was for the simultaneous paving of Fox Hill-terrace, Edge Hill-road (which extends from Fox Hill-road, up steps shown on the plan, to Fox terrace, and Fox-lane, and which, taken together, run out of Herbert-road, at the north end thereof, and return into Herbert-road at a point about fifty yards further south. In Dec. 1871, the surveyor of the plaintiffs, at their instance, prepared a plan for paving those three streets, and estimated the expense of such paving in three several sums,

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amounting in the whole to 429*l.* 10*s.*, and the plaintiffs, by a resolution, ordered such paving to be done according to such plan and estimate, and apportioned the said sum of 429*l.* 10*s.* over the whole of the houses and lands abutting upon the three streets so ordered to be paved, and apportionments were made upon the defendants in respect of the soil of Fox Hill-terrace, for its abuttal upon Edge Hill-road, and in respect of the soil of Edge Hill-road, for its abuttal upon Fox Hill-terrace, and the like was done with Edge Hill-road and Fox-lane.

9. The defendants contend that even if the soil of highways is liable to be charged for the paving of new streets upon which those highways abut, it was not competent for the plaintiffs, under the circumstances stated, to charge the last-mentioned three roads for their reciprocal abutments upon each other; and the defendants further contend that no public road is liable to be so charged. The question for the opinion of the court is whether the defendants are liable for all or any of the said apportionments. If the court should be of opinion that the defendants are liable in respect of all the apportionments so made by the plaintiffs, then the verdict entered for the plaintiffs is to stand.

If the court should be of opinion that the defendants are not liable to the apportionments made in respect of the abutments of the two ancient ways mentioned in the 5th paragraph, then the verdict is to be reduced by the sum of 17*l.* 11*s.* on that account.

If the court should be of opinion that the defendants are not liable in respect of the side abutments mentioned in the sixth paragraph, then the verdict is to be reduced by 192*l.* 7*s.* 6*d.* on that account.

If the court should be of opinion that the defendants in other cases are not liable to the apportionments made in respect of such of the roads as abut on the ends of the streets paved, mentioned in the 7th paragraph, then the verdict is to be reduced by the sum of 85*l.* 19*s.* on that account.

If the court should be of opinion that the defendants are not liable to the apportionments made for the reciprocal abutments of Fox Hill-terrace, Edge Hill-road, and Fox-lane, mentioned in the 8th paragraph, then the verdict is to be reduced by the sum of 20*l.* 5*s.* on that account.

If the court should be of opinion that the defendants are not liable to any of the apportionments made by the plaintiffs in respect of the said roads, the verdict of the plaintiffs is to be set aside, and a verdict entered for the defendants with costs of suit.

Barrow (with him *Morgan Howard*, Q.C.), for the plaintiffs.—By sect. 105 of 18 & 19 Vict. c. 120, the vestry may pave any new street, “and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement, &c.,” the “owner” being defined by sect. 250 to mean “the person for the time being receiving the rackrent of the land or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent.” This is enlarged by 25 & 26 Vict. c. 102, s. 77, which provides that “where any vestry or district board shall, under the

powers given by the 105th section of 18 & 19 Vict. c. 120, have paved, or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses, or estimated expenses, of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the costs of paving at the points of intersection of streets, and all or incidental costs and charges shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; and it shall be lawful for the vestry or district board at their discretion to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty-one years, and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board.” It is submitted, first, that these roads are not public highways. [*BLACKBURN, J.*—The fourth paragraph of the case expressly states that “the roads so laid out by the defendants became and were public highways, so far as the defendants could by any act of theirs dedicate the same to the use of the public; and have, ever since they were made, been used by the public for all the purposes of a way, but no proceedings have ever been taken under the provisions of the Highway Acts to render them repairable as public highways by the parish of Plumstead or any other public body.” The defendants have dedicated them to the use of the public, though the roads have not thereby become repairable by the parish.] In the next place, are the defendants the “owners” of the roads? It is submitted that they are. [*BLACKBURN, J.*—Subject to what the other side may have to urge, we are of opinion that they are owners.] If so they come within the words of sect. 77 of 25 & 26 Vict. c. 102, as “owners of the land bounding or abutting on such street.” It makes no difference that the land is not at the side of the street but at the end, extending it; it equally “bonds and abuts” whether at the end or the side. The decision in *Lord Northbrook v. Plumstead Board of Works* (L. Rep. 7 Q. B. 183; 25 L. T. Rep. N. S. 461), shows that a public highway, though repairable by the parish, may be a “new street” within the meaning of the Metropolitan Management Acts, and that the owners of land bounding or abutting thereon, are liable to contribute to the expense of paving it. No question arises in this case as to the exact amount for which the defendants are liable.

Prentice, Q.C. (with him *G. Shaw*), for the defendants.—In the first place it is submitted that the property in the roads, *usque ad medium filum*, passed by the conveyances to the purchasers of the adjoining plots. This is always the presumption which it requires clear words to rebut. In *Lord v. The Commissioners for the City of Sydney* (12 Moore P. C. C. 473), it was held that a grant by the Crown of land expressed to be bounded on the south by a particular creek, passed, nevertheless, the soil of the creek, *ad medium*

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filum aquæ. Coleridge, J., said: "The learned counsel for the respondent's contended that, according to the plain and literal meaning of the words, which must alone be looked to, that which was described as bounding the subject-matter of a grant, must be something beyond the limits and excluded from it. But this will not be found to be a test which can be practically applied. Words in an instrument of grant, as elsewhere, are to be taken in the sense which the common usage of mankind has applied to them in reference to the context in which they are found. If lands granted were described as bounded by a house, no one could suppose the house was included in the grant; but if land granted were described as bounded by a highway, it would be equally absurd to suppose that the grantor had reserved to himself the right to the soil *ad medium filum*, in the far greater majority of cases wholly unprofitable. . . . The same learned author who has already been cited (Kent Com. vol. 3, p. 433), and who may be safely relied on in any question of general principle, lays it down that it may be considered as the general rule that a grant of land bounded upon a highway or river carries the fee on the highway or the river to the centre of it, provided the grantor at the time owned to the centre, and there be no words or specific description to show a contrary intention." In *Berridge v. Ward* (10 C. B., N. S., 400), it was also laid down that where a piece of land which adjoins a highway is conveyed by general words, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it. "I am of opinion," said Erle, C.J., "that where a close is conveyed with a description by measurement and colour on a plan annexed to and forming part of the conveyance, and the close abuts on a highway, and there is nothing to exclude it, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance." Williams, J., added: "In the case of *The Marquis of Salisbury v. The Great Northern Railway Company* (5 C. B., N. S., 174), which has been referred to, there was enough on the face of the conveyance, which was set out in the special case, to show that a moiety of the adjoining highway was not intended to pass. That case is, therefore, out of the general rule which I take to be this—that a conveyance of a piece of land to which belongs a moiety of an adjoining highway, passes the moiety of the highway by the general description of the piece of land." Finally, the apportionment in the present case as to that part of the road, which was ancient highway, is clearly excessive.

BLACKBURN, J.—I think we need not trouble Mr. Barrow to reply. It seems to me that the case, clearly enough, is to be decided in favour of the plaintiffs on all the points. In the first place it is said that the soil in the roads adjoining the houses was conveyed away from the building company, who were the owners of the land, to the owners of the houses. Now, to take one instance, the houses adjoining Cantwell-road, the terms of the conveyance which has been handed up to us are: "In consideration of 108*l.* the company do hereby grant and convey unto the purchaser and his heirs all that piece of land situated in the parish of Plumstead, on the north-west side of and

adjoining a road there, called Cantwell-road, and which piece of land is part of an estate which was offered for sale by public auction by Mr. Whittingham, at the Town Hall, Woolwich, in twenty-nine lots, according to certain printed particulars, and a lithographic plan published therewith, in which particulars and plan the said piece of land was distinguished as lot 368, and the position and extent of this piece of land are indicated by the plan hereon, whereon the site of it is coloured pink." Now, when we look at the plan which is attached to the conveyance, we find that lots 369, 368, and 367, which are adjoining each other, are carefully marked out, so as not to include any part of the road at all, and are separated from it by a strong line. Mr. Prentice has pointed out that in the cases where the conveyance was of a plot of land adjoining a river or a road, the presumption is that it includes all *usque ad medium filum*, and it is not enough to rebut that *prima facie* presumption to show that the conveyance designates it as adjoining to or abutting upon the river or road, even where the acreage is mentioned. But, on the other hand, it is said to be enough, and has always been held to be so, to show anything which manifests the intention of the parties that no part of the road should be conveyed. In the present case I have great difficulty in seeing how, without express words denying that no part of the road should be conveyed, the parties could have expressed their intention more plainly. I think there is enough to show that the defendants remained the freeholders of the land which they have dedicated to the public as roads, and which the public have a right to use. Then comes the question does that prevent the defendants being owners of land within the meaning of the Act, so as to make them liable to have a part of the expenses of repairing and paving the neighbouring streets apportioned to them, and as to this it has been argued that as the owner has been defined to be the person who receives the rack rent, he must be the owner of land which is capable of being let. But I think that is not so. In the case of *Lord Northbrook v. The Plumstead Board of Works* (L. Rep. 7 Q.B. 183; 25 L. T. Rep. N.S. 461), the same objection was taken, and was decisively overruled. Lord Northbrook had laid out portions of his estate for building houses, very much as here; streets also being laid out. But he had not—as is very common with building owners—made these streets public streets, but had kept them to himself (just as the Duke of Bedford and Mr. Lowndes, and other freeholders of squares in London have done), and put up placards, &c. But he had covenanted with the persons to whom he had sold the land and houses adjoining that they should have the right to use the roads as private ways. It was argued on behalf of Lord Northbrook that he was not liable to be rated in respect of these roads; but Cockburn, C.J., said, "These pieces of land forming the soil of the road, if still occupied in the ordinary way, would be liable to the rate. Why are they to be exempted because they are converted into roads? Either Lord Northbrook receives direct compensation for the use of the roads in the shape of payment, or has the advantage of such roads for the occupiers of his property, which enhances the value of the houses which he lets. He therefore gets compensation for the loss of this land as regards the purposes for which otherwise it would be applicable in the shape of rents that he gets for those houses. Lord Northbrook

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has, therefore, the valuable use of these roads, and this is no reason why he should not contribute to the expense of paving the street upon which these roads abut, just as if the roads were land used for agricultural or other purposes." Then I refer to the same thing, and allude to the argument in *Bowditch v. Wakefield Board of Works* (L. Rep. 6 Q.B. 567), as follows, "*Bowditch v. Wakefield Board of Works* seems to be in point. The question there was whether a trustee of a school was liable to the expenses of paving the street along which the school fronted. It was argued that as he was a bare trustee, and could not let the school or derive any benefit from it, he ought not to be held liable. But there was no reason for holding that a building used as a school should not be rated. The trustee was owner of the land, and would probably get back the expenses from those for whom he was trustee. I cannot see why, in the present case, Lord Northbrook is not the owner of land merely because he chooses to use it for an artificial purpose." I suppose "artificial purpose" was hardly the phrase I used, which was probably "limited purpose," or "peculiar purpose." In the present case the roads have been dedicated to the public, instead of the owner merely binding himself by covenant to allow the use of them to the occupiers of the houses; but I do not think that can make any difference. When settling the amount which the defendants should pay, the Plumstead Board of Works ought to consider the actual benefit which the defendants derive from these roads, and if they find that the roads are valuable to the defendants, and that the paving of the roads would be very advantageous to them, because, in consequence of the street being put into good order the rest of the building land belonging to the defendants would be enhanced in value, then the sum apportioned should be greater; but if this be not the case then the sum apportioned should be smaller. If the defendants had disposed of all their interest in the adjoining land, then the keeping of these roads in repair would be of no importance to them; and I am a little struck with the observation that as to that part which was ancient highway, the apportionment should only be a nominal sum; but no question as to the apportionment is reserved to us. The only question we have to determine is whether anything at all should be apportioned in respect of the roads which the defendants have dedicated to the public, but we have no power to review the apportionment or to determine any question as to how it was made. I think the plaintiffs should have judgment for all that is apportionable. I think there is some ground for doubt as to the apportionment upon the ancient highway, but as to the rest there is no ground for any doubt.

ARCHIBALD, J.—I am of the same opinion. I entirely agree as to the first point, that on the construction of these conveyances they were not sufficient to pass the road. If this were decided in favour of the defendants, it would decide the case in their favour. I agree that in conveyances of old inclosures or farms abutting on an ancient highway, the property in the road *usque ad medium flum*, would pass by the conveyance; but here, I think, there is sufficient to show that there was no such intention. Another point is whether the defendants were owners within the meaning of the 77th section of 25 & 26 Vict. c. 102. As to

this we have first to be guided by the decision in *Lord Northbrook v. The Plumstead Board of Works* (*ubi sup.*), which decided that he was liable to be rated as the owner of land under circumstances similar to those of the present case. I cannot see any difference as to this point between the case of a public and a private way; in each case the public have an easement over the land. Lord Northbrook had no more enjoyment of the land than if it had been a public way. I also concur in what has been said by my brother Blackburn with regard to the ancient highway. The question of amount is not for us, and the other point not being reserved for us, we cannot determine anything about it. *Judgment for the plaintiffs.*

Attorneys for plaintiffs, Newman, Dale, and Strelton.

Attorneys for defendants, R. and A. Russell.

Saturday, Jan. 16, 1875.

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Insane prisoner—Inquiry concerning settlement—Prison contract—Justices of contracting and receiving authority—3 & 4 Vict. c. 54—27 & 28 Vict. c. 29—28 & 29 Vict. c. 126.

By sect. 1 of the Insane Prisoners' Act 1840, two justices of the peace of the county, city, borough, or place where an insane prisoner is imprisoned, may inquire, with the aid of two physicians or surgeons, as to the insanity of such person. By sect. 2 such two justices, or any other two justices of the peace of the county, city, borough, or place where such person is imprisoned, may inquire into and ascertain such person's legal settlement with the object of ordering payment of the costs of his maintenance. Sect. 1 of this Act is repealed by the Insane Prisoners' Act Amendment Act 1864, and other provisions are made for inquiry into a prisoner's insanity by visiting or other justices with physicians or surgeons, and in certain cases by physicians or surgeons only. The Prison Act 1865 provides for contracts between prison authorities for the detention of prisoners, and enacts (sect. 57) that every prison, wheresoever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison; and also (sect. 66) that the prison of the receiving authority shall for all the purposes of and incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority or any of such purposes according to the tenor of the contract be deemed to be the prison of the contracting authority.

Held (upon demurrer to return to a mandamus, directing the justices of a county, in the prison of which an insane prisoner had been detained under a contract with a borough, to ascertain the settlement under sect. 2 of the said Act of 1840), that there is nothing in the said two later Acts of 1864 and 1865 to alter the duty of making this inquiry from the justices of the county in which the prisoner was actually in prison to the justices of the borough which contracted for the prisoner's detention; and that any expense to the county in consequence should be provided for in its contract with the borough.

THIS was a demurrer to the return to a writ of mandamus, which had been granted on the prosecution of Her Majesty's Secretary of State for the Home Department. The writ was directed to the

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visiting justices of the county prison of Lewes, in the county of Sussex. It recited that by warrant under the royal sign manual, bearing date the 23rd June 1861, that the Broadmoor Criminal Lunatic Asylum, in the county of Berks, was appointed to be an asylum for criminal lunatics, under 23 & 24 Vict. c. 75; that by a charter of incorporation, dated 1st April 1854, the powers and provisions of 5 & 6 Will. 4, c. 76, were extended to the inhabitants of Brighton, in the county of Sussex aforesaid, and by letters patent, dated 16th Dec. 1854, Her Majesty granted a separate Court of Quarter Sessions to the borough of Brighton, pursuant to the provisions of the said Act; that on the 16th Jan. 1872, at the Central Criminal Court, one Christiana Edmunds was found guilty of murder committed within the limits of the said borough of Brighton, and was sentenced to death; that while under sentence of death the said Christiana Edmunds was received into and imprisoned and maintained in the said county prison at Lewes, in the said county of Sussex, being a prison to which visiting justices are appointed, under a contract entered into in pursuance of sect. 31 of the Prison Act 1865 (28 & 29 Vict. c. 128) between William Kirby Johnson Langridge, being the clerk of the peace of the county of Sussex for and on behalf of the justices of the peace acting in and for the eastern division of the county of Sussex in quarter sessions assembled of the one part, and the mayor, aldermen, and burgeses of the town of Brighton aforesaid by their council of the other part: that while so confined and imprisoned in such prison under such sentence as aforesaid, it was made to appear to the Right Honourable Henry Austin Bruce, then Secretary of State for the Home Department, and one of the principal Secretaries of State, that there was good reason to believe that the said Christiana Edmunds, then in confinement under such sentence as aforesaid, was then insane; and, thereupon, the said Henry Austin Bruce, under and in pursuance of the provisions of 27 & 28 Vict. c. 29, s. 2, did appoint two physicians duly registered as such under the provisions of 21 & 22 Vict. c. 90, to inquire into the insanity of the said Christiana Edmunds; that upon such inquiry the said Christiana Edmunds was found to be then insane, and the fact was duly certified in writing by the said physicians to the said Right Honourable Henry Austin Bruce, then Secretary of State as aforesaid; that on receipt of the said certificate, the said Right Honourable Henry Austin Bruce, then Secretary of State as aforesaid, in pursuance of the statute in that case made and provided, directed, by warrant under his hand, that the said Christiana Edmunds should be removed, and the said Christiana Edmunds has accordingly been removed to the said Broadmoor Criminal Lunatic Asylum, and has thenceforward been, and now is, insane, and confined and maintained as insane therein; that the said Right Hon. Henry Austin Bruce, being such Secretary of State as aforesaid, no one of the principal Secretaries of State having otherwise directed, did by a requisition dated the 22nd Feb. 1873, require the said justices or any two of them to inquire into and ascertain, by the best evidence or information that could be obtained under the circumstances of the personal legal disability of the said Christiana Edmunds, the place of the last legal settlement, and the pecuniary circumstances of the said C. Edmunds;

and if it should not appear that she was possessed of sufficient property which could be applied to her maintenance, by order under their hands, or the hands of any two of them, to direct the overseers of the parish where the said justices or any two of them should adjudge the said C. Edmunds to be lawfully settled, or in case such parish should be comprised in a union declared by the Poor Law Commissioners, or should be under the management of a board of guardians established by the Poor Law Commissioners, then the guardians of such union, or of such parish, as the case might be, to pay on behalf of such parish in the case of the said Christiana Edmunds so removed as aforesaid, all reasonable charges for inquiring into her insanity and for conveying her to Broadmoor Criminal Lunatic Asylum aforesaid, and to pay such weekly sum as the said justices or any two of them, or any two justices, should by writing under their hands as aforesaid, or from time to time, direct for her maintenance in the asylum in which she is confined; and if the place of settlement of the said C. Edmunds could not be ascertained, to make such order as is in that case made and provided by the 2nd section of 3 & 4 Vict. c. 54; but if it should appear upon inquiry that the said C. Edmunds was possessed of property, to make such further or other order, and to take all such lawful steps as are in that case directed by the statute in that case made and provided; and that the said visiting justices had wholly refused, and still refuse to comply with the said requisition, and had not, nor had any of them inquired, nor ascertained nor directed nor adjudged nor made order as aforesaid, nor taken any such steps as aforesaid, contrary to the statute in such case made and provided, and in contempt of Her Majesty and her officers, and to the great damage and grievance of the said criminal lunatic asylum and the superintendent thereof. Therefore, as the writ proceeded to state, Her Majesty being willing that due and speedy justice should be done in this behalf, as it is reasonable, commanded the said visiting justices of the county of Sussex, firmly enjoining them that immediately after the receipt by them of this writ of *mandamus* they should without delay inquire into and ascertain the place of the last legal settlement and the pecuniary circumstances of the said Christiana Edmunds, and make all such orders and give all such directions and take all such lawful steps for the payment of all reasonable charges for inquiring into her insanity, and for conveying her to Broadmoor Criminal Lunatic Asylum aforesaid, and for the payment of all such sums for her maintenance in the said asylum in which she is confined, as is provided by sect. 2 of 3 & 4 Vict. c. 54; or that the said justices signify to Her Majesty cause to the contrary thereof, lest by their default the same complaint should be repeated. Dated 29th Oct. 1873.

The following was the answer of the said visiting justices of the county prison of Lewes, in the county of Sussex, and each of them to the said writ:—

We, the visiting justices of the county prison of Lewes, in the county of Sussex, to whom this writ is directed, do most humbly certify and return to our Sovereign Lady the Queen, at the time and place in this writ mentioned. That the council of the borough of Brighton are a prison authority within the meaning of the Prison Act

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1865, and were so at the time of the making of the contract in the said writ and in this return thereto hereafter mentioned. The justices of the peace in and for the eastern division of the county of Sussex are also a prison authority within the meaning of the said Act, and were so at the time of the making of the said contract, and the county gaol at Lewes was and is their prison within the meaning of the said Act. In conformity with sect. 31 of the said Act, the said council of the borough of Brighton, on the 16th Oct. 1867, entered into a contract with the said justices for the receipt and maintenance in the said gaol at Lewes of all prisoners maintainable at the expense of the borough of Brighton, such contract to continue in force for the term of fifty years from the 1st Jan. 1868. The said contract is the contract mentioned in the said writ. The said Christiana Edmunds in the said writ mentioned, was, after the making of the said contract, to wit, on the 8th Sept. 1871, committed to the said gaol under a warrant of the deputy stipendiary magistrate in and for the borough of Brighton, to take her trial upon a charge of attempting to murder Emily Beard within the limits of the borough of Brighton at the Sussex Winter Assizes, held on the 21st Dec. 1871; an indictment for the murder of Sydney Albert Barker, and indictments for attempting to murder the said Emily Beard, and two other indictments for attempts to murder other persons were preferred before the grand jury, and true bills thereupon found. All the offences charged in such indictments were alleged to have happened within the limits of the borough of Brighton. The said C. Edmunds was tried at the Central Criminal Court upon the said indictment for murder committed within the limits of the borough of Brighton so found as aforesaid, and was found guilty and was sentenced to death. While under such sentence of death the said C. Edmunds was received into and imprisoned and maintained in the said county prison at Lewes under the said contract between the council of the borough of Brighton and the said justices of the said eastern division of the county of Sussex, and while she was so imprisoned and maintained therein pursuant to such contract it was made to appear to the Right Hon. Henry Austin Bruce, Secretary of State for the Home Department, that she was insane, and having been so found upon inquiry by two physicians appointed by the said Secretary of State, she was by warrant under the hand of the said Secretary of State, directed to be removed to Broadmoor Lunatic Asylum, and was so removed accordingly, as in the said writ is mentioned. Afterwards the said requisition, in the said writ mentioned, was made to us by the said Secretary of State, requiring us, or any two of us, to inquire into the place of the last legal settlement and pecuniary circumstances of the said C. Edmunds, and otherwise to do the acts and make the orders in the said requisition mentioned. We are advised, and most humbly submit, that at the time when the said Christiana Edmunds was so removed to Broadmoor, as aforesaid, she was actually imprisoned within the county gaol of Lewes, of which we are visiting justices, yet having regard to the provisions of The Prison Act 1865, sections 57 and 66, and other the statutes in such case made and provided, she was constructively and in contemplation of

law imprisoned within the prison of the council of the borough of Brighton, and not within the prison of the said Justices of the Eastern Division of Sussex, and that any such requisition as in the said writ mentioned, if made at all, should, pursuant to the statutes of 3 & 4 Vict. c. 54; 23 & 24 Vict. c. 75; 27 & 28 Vict. c. 29; and the said Prison Act 1865, have been made to such council, or to two justices in and for such borough, and could not be, and was not lawfully made to us, and we were not bound to comply with the said requisition.

To this return the Home Secretary demurred.

The following were the points of argument on demurrer on behalf of the prosecution:—First, that the said Christiana Edmunds was not imprisoned within the limits of the council of Brighton, within the meaning of sect. 2 of 3 & 4 Vict. c. 54; secondly, that the 57th section of the Prison Act 1865, is not applicable to the circumstances mentioned in the writ; thirdly, that none of the purposes mentioned in the writ are purposes of or incidental to the commitment, trial, detention, or punishment of the said Christiana Edmunds within the meaning of the 66th section of the Prison Act 1865; fourthly, that the return discloses nothing to relieve the visiting justices of Lewes gaol from compliance with the duty imposed on them by sect. 2 of 3 & 4 Vict. c. 54.

The following were the defendants' points of argument on the demurrer:—First, that under sects. 4 and 5 of the Prison Act 1865, the council of the borough of Brighton were a "prison authority" within the meaning of the said Act; secondly, that under 5 & 6 Vict. c. 98, s. 15, the borough of Brighton was liable at law to maintain a separate prison if accommodation were not provided for its prisoners in the prison of some other jurisdiction, and therefore the said borough had a separate prison jurisdiction within the meaning of sect. 9 of the said Prison Act 1865, and was bound to maintain adequate accommodation for its prisoners under sect. 8 of the said Prison Act 1865; thirdly, that the justices of the peace for the eastern division of the county of Sussex are also a prison authority within the meaning of the said Act, and Lewes gaol is their prison; fourthly, that the contract between the council of the borough of Brighton and the justices of East Sussex set out in the writ and return under which Christiana Edmunds was received into Lewes gaol, is a contract under sect. 31 of the said Act; fifthly, that under sect. 57 of the said Act, Lewes gaol must for all purposes connected with Brighton prisoners be deemed to be situate within the limits of the borough of Brighton; sixthly, that under sect. 66 of the said Act, Lewes Gaol must for all purposes incidental to the commitment, trial, detention, and punishment of Christiana Edmunds be deemed to have been the prison of the borough of Brighton; seventhly, that, therefore, the place where Christiana Edmunds was imprisoned within the meaning of 3 & 4 Vict. c. 54, s. 2, must be deemed to have been the Borough of Brighton and not the Eastern Division of the county of Sussex, and the requisition of the Home Secretary ought to have been made to the justices of the peace for the borough of Brighton, and not to the visiting justices of Lewes Gaol; eighthly, that the construction suggested in the preceding paragraph is supported by

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the fact that later in the same section (3 & 4 Vict. c. 54, s. 2) it is enacted that when the place of settlement cannot be ascertained, an order for maintenance shall be made upon the treasurer of the place where the person shall have been imprisoned. This must in fairness mean in the present case the borough of Brighton, whereas, the effect of reading the place "where the person was imprisoned" as meaning the county of Sussex would be to transfer the cost of maintenance if the settlement cannot be ascertained from the borough of Brighton to the county of Sussex. It would seem to follow that in the earlier part of the section the place of imprisonment must be interpreted to be the borough of Brighton.

On the 2nd June 1873, when the rule for the writ of *mandamus* was made absolute. Blackburn, J., observed in his judgment that by the first Act, as originally passed in 1840, the justices who were to inquire under the 1st and 2nd sections must be justices of the place where the prisoner was actually physically resident, the object and reason being probably that they and the physicians were to inspect the prisoner in order to determine whether he was insane or not. With respect to the further inquiry concerning the settlement, the amount to be paid is not the expense of the imprisonment or the punishment, but that of ascertaining whether the prisoner is insane, which may include the costs of witnesses, and the expense of removal to the lunatic asylum, together with his maintenance there. Then the section proceeds to say that if the settlement cannot be ascertained, the expense shall fall upon the treasurer of the county where such person shall have been imprisoned. "Now as to all that part of the legislation," he said, "it seems to me clear that the two justices who were to do all this were the justices in the place in which he was physically detained." . . . "Then there comes the enactment which was passed for the purpose of altering this, which takes away the authority to any two justices of the place to which the prison belongs, and in case of sentence of death, says let it be without the justices at all; let two or more physicians certify, and the Secretary of State on the receipt of such certificate shall direct what is to be done with the prisoner. That is the subsequent enactment, but all the rest of the earlier Act is to remain as it was before. The duty is still left in the two justices of the place where the person is imprisoned." The learned judge expressed his opinion that sect. 57 of the Prison Act 1865 merely related to county prisons built within the boundaries of boroughs or cities, or counties of such boroughs or cities, in the midst of the counties at large; and not to prisons detaining the prisoners of other jurisdictions by contract. As to the 66th section, he thought it meant to say that Lewes Gaol should be Brighton Gaol for all purposes connected with and incidental to the trial, commitment, detention, and punishment of prisoners from Brighton, and also for the purpose of determining who should pay the expenses arising out of that imprisonment, but not for the purpose of inquiring concerning the insanity and the settlement. It seemed to him a straining of words to say that inquiring into the settlement before ascertaining who should bear the expenses could be considered as incident to the punishment, commitment, and detention of a prisoner. He thought the justices of Sussex Gaol, or of the district to which the gaol

belonged, were the parties to inquire into all these things; and he refused altogether to concur in the defendant's argument that the consequence of an inquiry by the Sussex justices must be that the county of Sussex would have to support the lunatic in the event of no settlement being found. Qnain, J., agreed that the writ should go, but stated that his impression was that this second inquiry was incidental to the imprisonment, and that it should be determined by the justices of Brighton. He considered that the object of the Legislature in allowing any jurisdiction to send prisoners elsewhere than to a prison within it, was to leave the liability as nearly as possible in the same position as if the prison were built within it.

The *Solicitor-General*, Sir J. Holker, Q.C. (with him *Bowen*), argued for the Crown against the validity of the return.—Although sect. 1 of the Insane Prisoners' Act 1840, is repealed by the Insane Prisoners' Act Amendment Act 1864, the 2nd section is not in any way affected by subsequent legislation. By the repealed section "two justices of the peace of the county, city, borough, or place where such person is imprisoned," are empowered "to inquire with the aid of two physicians or surgeons, as to the insanity of such person." The 2nd section commences by authorising "such two justices or any other two justices of the peace of the county, city, borough, or place where such person is imprisoned, to inquire into and ascertain, by the best evidence or information that can be obtained under the circumstances of the personal legal disability of such insane person, the place of the last legal settlement, and the pecuniary circumstances of such person." The section proceeds to authorise the proceedings directed in the writ of *mandamus*. By the Prison Act 1865, sect. 5 describes the prison authorities. By sect. 31, "Any prison authority may contract with any other prison authority having a prison in conformity with the requisitions of this Act that the latter authority is to receive into and maintain in its prison or one of its prisons all prisoners maintainable at the expense of the former authority, or any particular class or classes of such prisoners: Provided, that no such contract shall be valid unless the prison of the latter authority is approved by one of Her Majesty's principal Secretaries of State as being a fit prison to receive the prisoners contracted to be received there." By sect. 32, "A contract entered into between prison authorities for the reception into, and the maintenance in the prison of the one authority of the prisoners maintainable by the other authority, may include the costs of conveying the prisoners to prison, and all other costs incurred in respect of such prisoners." By sect. 57, "Every prison, wheresoever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison." And by sect. 66, "Where a prison authority, in this section called the contracting authority, has contracted with any other prison authority, in this section called the receiving authority, that the receiving authority is to receive into and maintain in its prison any prisoners maintainable at the expense of the contracting authority, the prison of the receiving authority shall, for all the purposes of and incidental to the commitment, trial, detention and punishment of the prisoners of the contracting authority,

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or any of such purposes, according to the tenor of the contract, be deemed to be the prison of the contracting authority, except that the contracting authority shall have no right to interfere in the management of the prison of the receiving authority." [COCKBURN, C.J.—Why is the writ directed to the visiting justices of the prison? The 2nd section of the Act of 1840 gives the inquiry to any two justices of the place of imprisonment. *Cohen*, Q.C.—The defendants make no objection on that ground; they admit that the visiting justices are justices of the county of Sussex. The only point they desire to have decided is whether the *mandamus* ought to have been directed to them or to the justices of the borough of Brighton.] The Home Secretary has acted in literal accordance with the requisitions of the 2nd section of the Act of 1840, and it is submitted on his behalf that there has been no legislation since then touching upon this point.

Cohen, Q.C. for the defendants.—Notwithstanding what was said by Blackburn, J. upon the argument of the rule, I submit that it is clear the expense of maintenance, if the lunatic's settlement cannot be found, must fall upon the treasurer of that place, upon the justices of which the duty to make inquiry is imposed. The 2nd section of the Act of 1840, after directing "such two justices or any other two justices of the peace of the county, city, borough, or place where such person is imprisoned" to inquire and make orders upon the union of settlement, proceeds, "and when the place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county, city, borough, or place where such person shall have been imprisoned." The interpretation of these latter words must follow that of the same words in the earlier part of the section. This being so, the imposition of the duty to make inquiry upon the county justices is opposed to the policy of the Legislature, which appears throughout the whole of these provisions for maintaining prisoners by contract to avoid any alteration of the then existing liability for all expense to which either prison might be put. It was never intended that Brighton was to escape the expense of this lunatic's maintenance merely because it has no prison within its borough, and because it contracts to have its prisoners detained in the county gaol. There can be no ground of convenience for placing this inquiry upon the county justices, for usually it must take place after the lunatic has been removed from the prison to an asylum which may be as far from the receiving as from the contracting authority. This is not so with respect to the first inquiry concerning insanity; and probably for that reason, when the provisions for contracting were made, the justices were in certain cases omitted and the two physicians were left to conduct that inquiry by themselves. The defendants rely upon the words of the 57th section of the Prisons Act 1865, "Every prison, wheresoever situate, shall for all purposes be deemed to be within the limits of the place for which it is used as a prison." [COCKBURN, C.J.—Surely those words cannot be interpreted to contemplate this case.] At all events it comes within sect. 66, "the prison of the receiving authority shall, for all the purposes of and incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority, or any of such purposes, according to the tenor of the contract, be deemed to be the prison of the con-

tracting authority, except that the contracting authority shall have no right to interfere in the management of the prison of the receiving authority." [MELLOR, J.—Why should not the contract between the authorities provide for these expenses of maintenance? The *Solicitor-General*.—The contract in this case contains words under sect. 32 wide enough to cover the whole of these expenses; whether they fall, therefore, first on the county or the borough, they must be paid eventually by the borough.] The defendants have not considered the contents of the contract, but, whatever they may be, they cannot affect the question whether this *mandamus* should be directed to the county or borough justices.

The *Solicitor-General* was not heard in reply.

COCKBURN, C.J.—I think it clear that this *mandamus* is rightly directed to the justices of the county of Sussex. Under 3 & 4 Vict. c. 54, there could be no question of this kind, for every jurisdiction had to provide its own prison, and the justices of that jurisdiction were directed to make both the inquiries required concerning insane criminals. By 27 & 28 Vict. c. 29, the first section of the Act of 1840 is repealed, and other provisions are made instead, but nothing is enacted in any way altering section 2. The only question, therefore, for us is whether sect. 66 of the Prisons Act 1865 (28 & 29 Vict. c. 126) meets this case. By that section the prison in which prisoners are detained under a contract shall be deemed to be the prison of the contracting authority for "all the purposes of, and incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority." The inquiry directed by this *mandamus* concerns the settlement of a lunatic prisoner, to be made after removal from the prison at which her detention was contracted for, and with the object of determining her place of settlement. I do not think this proceeding comes within either of the purposes described in that section, and I think it was not contemplated by the Legislature in passing that enactment. At first I imagined that it was a *casus omisus*, and that hardship might fall in consequence on the receiving authority; but it is clear that the parties to such contracts as these may, by covenant, remedy any hardship of this kind, and it appears that in this case provision has been made in the contract for any expense which would otherwise fall upon the wrong party. There is no necessity, therefore, to strain the words of the 66th section here, even if we should assist the policy of the Legislature by doing so. The prosecution must prevail, and our judgment must be for the demurrer.

MELLOR, J.—I am of the same opinion. When we consider that every separate jurisdiction must have a prison within it or contract with another for the reception of its prisoners, it must have been the intention of the Legislature to free the receiving authority from all expenses incurred in consequence of their contract. The 66th section, however, only prescribes the powers of the contracting authority over its prisoners, and the parties are left to their contract to make provision for the consequent expenses. There is nothing in the Prisons Act to alter the 2nd section of 3 & 4 Vict. c. 54, and our judgment must therefore be against the defendants.

QUAIN, J.—I am of the same opinion.

Judgment for prosecution.

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Attorneys for the prosecution, *Raven and Bradley* for the *Solicitor to the Treasury*.

Attorney for the defence, *H. J. Jones, Lewes*.

Saturday, Jan. 16, 1875.

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Stopping a highway—Reservation—Footpath—
13 Geo. 3, c. 78—55 Geo. 3, c. 68.

By 13 Geo. 3, c. 78, justices were empowered to divert and stop up certain highways, and to sell the part stopped up; but by sect. 17, if they found it necessary, the old highway was to be sold subject to the right of way and passage to any lands, house, or place, according to the ancient usage in that respect.

In 1827 orders for diverting, stopping, and selling a portion of a highway were confirmed at quarter sessions, containing the reservation of a free passage for persons on foot only over and along the land and soil of the said highway to and from a certain public footpath communicating therewith at the letter E., as delineated on an annexed plan, according to the ancient usage thereof:

Held, upon appeal by the landowner against a conviction for obstructing the highway, that the effect of these orders was to render another public footpath which communicated with the old highway at another point, and was not marked in the annexed plan, a *cul de sac*; and that the appellant was justified in closing a door at the point of communication.

THIS was a special case stated by the Quarter Sessions of the county of Gloucester, upon an appeal by John Waller against a conviction by justices at petty sessions on the 23rd May 1872, "for that the said John Waller, on the 3rd Jan. 1872, at the parish of Henbury, unlawfully and wilfully did obstruct the free passage of a certain highway there, to wit, a highway leading from Filton to the Charlton and Brentry road, by closing and fastening a door across the same, and thereby preventing one William Tillet, a surveyor of highways, from passing thereon." The defendant was fined 1s., and ordered to pay costs.

Upon the appeal against this conviction being heard at Gloucester, on the 2nd July 1872, the quarter sessions affirmed the conviction, subject to the following case:

The appellant is the owner of certain lands and premises in the parishes of Westbury and Henbury, in the said county, and also occupies the mansion called Pen Park House, with the farm premises attached.

Up to and before the year 1827, a public highway and carriage road ran close to the house and farmyard, as shown by a certain plan annexed. And there was a public footpath named on the said plan as "old footpath intended to remain," leading from Upper Pen Park and the village of Filton, and coming into the said carriage road to a point marked E on the plan, and thence to the letter C and through the gateway across the top of land of the appellant, now used as a fold yard.

At the Gloucestershire Trinity Sessions 1827, an order was made (a copy of which, with the said plan and other papers were made part of the case), of which the following is material:

It is ordered by this court that the order for diverting and turning a certain part of a public highway, being of the length of 520 yards or thereabouts, and of the breadth

of 30ft. or thereabouts, and passing and extending through and over certain land, the property of George Bengough, Esquire, situate in the parish of Henbury, in this county, lying between the turnpike road leading from the city of Bristol to the passages across the River Severn and the tything of Charlton, in the said county, and particularly delineated on a certain plan to the said order annexed, and thereon denoted as lying between the letters A, C, and D (reserving, nevertheless, a free passage for persons on foot only, over and along the land and soil of the said highway to and from a certain public footpath, communicating therewith at the letter E, as delineated on the said plan, according to the ancient usage thereof), to a course proposed for a new highway in lieu thereof through other part of the said land of the said George Bengough of the length of 440 yards or thereabouts, and of the breadth of 30ft., also particularly delineated in the said plan by the colour brown, and thereon denoted as lying between the said letters A and D, under the hands and seals of Gabriel Goldney and Henry Wenman Newman, Esquires, two of his Majesty's justices of the peace of and for this county, be confirmed and enrolled amongst the records of this court.

The consent of the landowner, the said George Bengough, described the reservation in the same words as those used in the order of quarter sessions, with the exception that the consent had, after the word highway, the further words, "so to be diverted and turned." After reciting the intention to divert the said highway, the owner stated that he did, "in consideration of such old highway being diverted and turned, and of the soil thereof being exchanged to and vested in me (subject to the said right of footway over the same), hereby consent in writing, under my hand and seal, to the making and continuing a new highway in lieu thereof, to run and extend from the said letter A through and over my said land unto the said letter D," . . . "and to the forming and completing such new highway at my expense."

The order or certificate of view made by two justices, on the 12th June 1827, and confirmed by the quarter sessions, contained the reservation exactly in the same words as those of the landowner's consent.

The same two justices made a further order on the 13th Oct. 1827, describing the reservation in the same words as their previous order, and certifying that the new highway was in good condition and fit for the reception of the public; it then proceeded as follows:

And we do therefore hereby order the said old highway, being of the length of 520 yards or thereabouts, as described in the said plan, to be stopped up and the soil thereof to be vested in the said George Bengough, his heirs and assigns (subject to the said right of footway over the same).

This second order of justices was duly received and enrolled at the subsequent court of quarter sessions.

[The plan mentioned showed the diverted part of the old highway together with the new highway; they formed a nearly right angled triangle; the side formed by the new highway being about 440 yards long, and the other two sides containing the right angle being about 520 yards. The points at which the old and new highways joined were marked A and D on the plan; C was the point, almost exactly at the right angle, where the alleged obstruction, for which appellant was convicted, had taken place. The house and farm premises of Pen Park extended from this point C towards D, on the side of the old highway further from the new highway, and was marked B on the plan. The reserved footpath communicated with the old highway at the point E, between C and D,

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much nearer the former than the latter, and along the side of Pen Park House. The plan contained no mark nor notice whatever of any footpath communicating with the old highway at the point C; but the other at point E was clearly represented as "old footpath intended to remain."]

Many years ago, but subsequently to the making of the above order of sessions, the appellant removed the gate shown on the plan at the point C, and built a wall between the appellant's premises, called "The Fold," and a part of the said diverted highway, and placed a door in such wall near the point C, which door was occasionally kept locked, though evidence was given of continued user of the footpath in question by some of the public.

Upon the trial of the appeal, the court of quarter sessions holding that there was evidence of an ancient footpath across the fold to the point C, from thence to the point E, confirmed the conviction with costs against the appellant, subject to the opinion of the Court of Queen's Bench as to the effect of the order of Justices confirmed by the Trinity Quarter Sessions, 1827, above referred to. If the Court of Queen's Bench should be of opinion that the effect of the said order was to stop the footway across the appellant's land to the point C, and thence over the diverted highway to the point E, rendering the footpaths at such points *culs de sac*, then the conviction was to be quashed, otherwise to be confirmed.

Sawyer and Gough showed cause against the rule to quash the orders of quarter and petty sessions. The sessions have found as a fact, which cannot now be disputed, that there was before 1827 an old footpath over the appellant's land, and leading into that part of the highway which was then diverted, at the point C. No public path could be stopped under the old or the new Highway Acts without proper notice; it devolves, therefore, upon the appellant to show that notice was publicly given of his intention to shut up this particular footpath: (*Reg. v. Marquis of Downshire*, 4 A. & E. 698.) The omission of any mention of the path in the plan, or in any of the documents made evidence at the trial of the appeal, shows of itself that no such notice was ever given.

Lopes, Q.C., T. W. Saunders, and James Lewis, for the appellant, *contra*.—We make no claim to stop the footpath from A, through E, to Filton, and the only question can now be as to the effect of these orders made in 1827 upon the then existing public right to pass over the part of the highway which was then stopped up from or to the footpath communicating with it at C; that is, whether by these orders that footpath over the fold yard was made a *cul de sac*. As the orders were made, no question can be now raised as to the sufficiency of the notices; *omnia rite presumuntur acta*; more especially as a power of appeal against such orders existed under 13 Geo. 3, c. 78, and was confirmed by 55 Geo. 3, c. 68. Sect. 19 of the former Act of 1773, concerning highways, diverted with consent of their owners, was repealed by the latter Act of 1815, but by the 2nd section of the latter Act it was practically re-enacted, and two justices were empowered by order "to divert, turn, stop up, and inclose, sell and dispose of, such old highway or bridleway, and to purchase the ground and soil for such new highway, bridleway, or footway, by such ways and means, and subject to such exceptions and conditions in all respects as in the said recited Act

mentioned with regard to highways to be widened or diverted." This reference is to sect. 16 of the Act of 1773, by which, upon order of justices and payment of recompense to the owners, highways might be enlarged or diverted. By sect. 17: "When any such new highways shall be made as aforesaid, the old highway shall be stopped up, and the land and soil thereof shall be sold by the said surveyor, with the approbation of the said justices, to some person or persons whose lands adjoin thereto, if he, she, or they shall be willing to purchase the same; if not, to some other person or persons, for the full value thereof; but if such old road shall lead to any lands, house, or place which cannot, in the opinion of such justices respectively, be accommodated with a convenient way and passage from such new highway, which they are hereby authorised to order and lay out, if they find it necessary, then and in such case the said old highway shall only be sold subject to the right of way and passage to such lands, house, or place respectively, according to the ancient usage in that respect." The several orders made by the justices, and confirmed and enrolled at quarter sessions, are drawn in the words of the schedules to the Act of 1773, the reservation of the footway being expressed as in schedule 18. The words in that schedule are put in a parenthesis: ("Reserving, nevertheless, to , a free passage for persons, horses, cattle, and carriages, through the land and soil of the said old highway to and from the (land, &c.) belonging to him, called , according to his ancient usage thereof.") By the side of this schedule is a marginal note: "This to be inserted where necessary, and to be varied as the circumstances of the case may require." In *Rees v. Winter* (8 B. & C. 785), the court expressed some doubt whether justices could reserve a public footway over a stopped carriage way; but all the authorities agree that when the orders were confirmed on appeal, the soil of the stopped highway became the fee simple of the person purchasing it, subject only to the reservation appearing on the face of the orders. *Gwyn v. Hardwicke* (1 H. & N. 49) is an authority very nearly in point; there an Inclosure Act empowered commissioners, with the concurrence of two justices, to stop up, divert, or turn, and direct to be discontinued, any public road or footpath through any part or parts of the lands and grounds in the parish of T., which to the commissioners should appear useless, subject to an appeal to quarter sessions. The commissioners and two justices made an order stopping up a public footpath in the parish of T., which was continued as a footpath into the parish of S., whereby the part in the latter parish became useless as a public way. It was held that the commissioners had power to stop up the part of the footpath in the parish of T., and that if any injury was thereby done, the remedy was by appeal. Although this was a decision upon an Inclosure Act, Alderson, B., in his judgment, expressly alludes to this Act of 1815, and observes upon the similarity of its provisions. [LUSH, J.—That case would be exactly in point if there were no reservation at all in this order of 1827.] The reservation is "for persons on foot only, over and along the land and soil of the said highway to, &c., from" this particular public footpath. It was held in *Senhouse v. Christian* (1 T. R. 560), that under a grant of a way from A to B, in, through, and along a particular way, the grantee is not justified in making a trans-

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verse road across the same. [QUAIN, J.—How do you interpret “according to the ancient usage?” The case finds that the path used to be from C to E. MELLOR, J.—The ancient usage of the path from A to E is satisfied, although the right of passing from the footpath over the foldyard into the old highway is stopped.] The effect of the orders was to render the path over the foldyard, if it existed at all, a *cul de sac* at C.

MELLOR J.—I think on the whole the rule to quash the conviction and order of quarter sessions must be absolute. The reservation clearly does not relate to any path communicating with the diverted highway at the point C; and it is certain that if that part of the highway had been stopped altogether without any reservation, then the path over the foldyard would have become a *cul de sac* at C. We must consider, therefore, what is the effect of this reservation upon the public right to pass from the old road into a path not mentioned in it; the words are “Reserving, nevertheless, a free passage for persons on foot only over and along the land and soil of the said highway to and from a certain public footpath communicating therewith at the letter E, as delineated on the said plan, according to the ancient usage thereof.” These words clearly negative any intention to allow foot passengers to wander over the old carriage way or to pass from it at any other point than that mentioned: and their effect must be the same as if they were contained in an original grant of the right of footway. I think since 1827 the public have only had the right to use this old road when passing between the points A and E. This being the true construction of the order, the conviction was wrong, and the Quarter Sessions were wrong in affirming it.

LUSH, J.—I am of the same opinion. It is clear that if the whole road had been stopped up without reservation, which the Justices had power to do, the path would become a *cul de sac* at C. I think it was equally competent to the Justices to stop up one footpath, and at the same time reserve another. They have reserved a footway only to E, therefore there can be no public right to enter upon or leave this old road at C.

QUAIN J.—I am of the same opinion. The continuation of the public path communicating with the old road at C. is inconsistent with the express terms of reservation in the order of Quarter Sessions, which might have been appealed against.

Judgment for appellant.

Attorneys for appellant, Meredith and Co., for J. Dix, Bristol.

Attorneys for respondent, Latcham and Montagu, Bristol.

Tuesday, Jan. 19, 1875.

COMMISSIONERS OF WALTON v. WALFORD.

Local rates—Exemption—Limit—35 & 36 Vict. c. 79, s. 43.

By a local Act of 1841 commissioners were empowered to make rates upon owners and occupiers of houses and lands according to their annual value; but no person was to be rated on account of any arable meadow or pasture land exceeding two acres, or farm houses and buildings used exclusively for farming purposes.

These commissioners, having become an urban

sanitary authority, levied a rate under the Public Health Act 1872, sect. 16; the defendant, being rated on account of land and farm buildings exempt under the said local Act, refused to pay.

By sect. 43 of the said Act of 1872, any limit imposed on or in respect of any rate by any local Act of Parliament shall not apply to any rate under that Act.

Held, in an action by the commissioners to recover this rate from the defendant, that the defendant's exemption under the local Act was not a limit imposed on or in respect of a rate as contemplated by the Act of 1872.

This was an action brought by the above named plaintiffs, who are the Commissioners for improving the town and parish of Walton in the County of Essex, to recover from the defendant the sum of 32l. 17s., being the amount at which he was rated in the rate hereinafter mentioned, and by consent of the parties and by order the following case was stated for the opinion of the court, without pleading: By an Act of Parliament, 4 & 5 Vict., c. lxx., which received the Royal Assent on 21st June 1841, being an Act to authorize and provide for certain improvements in the parish of Walton-le-Soken otherwise Walton-on-the-Naze, in the county of Essex, and which Act may be referred to and is to be taken as part of this case, it was enacted that the vicar and curates of the said town of Walton, the incumbents of the parish of the Holy Trinity at Colchester, the lord of the manor at Walton aforesaid, and the churchwardens, overseers of the poor, surveyors of the highways of the said town for the time being, all respectively, together with certain persons therein named, and every person who should be assessed to the improvement rate hereinafter mentioned, at the yearly rent of 50l. and upwards, whether assessed as lessee, owner, or occupier, and who should have paid all arrears of the rate which should have been theretofore made upon him, and upon such premises, should be and they were thereby appointed commissioners for putting the said Act into execution. The Act contained powers as to sea defences, sewers, drains, streets, causeways, and nuisances, and other general provisions not necessary to be here referred to.

Section 230 of the said Act is as follows:—

And in order to raise money to pay the interest of the money to be borrowed and other expenses, and outlay for carrying the several purposes of the Act into execution, be it enacted that it shall be lawful for the commissioners at their first meeting or any adjournment thereof, and also twice in every year to be computed from the 31st Dec. now last past, and in every succeeding year, or when and as often as they shall think it desirable or necessary, to make one or more equal assessments or rates, to be signed by the commissioners or any three of them, assembled at any general, special, or adjourned meeting, upon the several owners, proprietors, lessees and occupiers of all houses, mills, shops, warehouses, coachhouses, stables, cellars, buildings, gardens, lands, tenements, hereditaments, and premises whatsoever within the limits of this Act, according to the annual value of the same, so as such rates or assessments do not exceed in any one year to be computed as aforesaid the sum of two shillings and sixpence in the pound on such annual value, except as herein provided; and unless it shall be otherwise ordered by the commissioners, such rates shall be made at the quarterly meetings in the months of May and August in every year.

By section 234:—

No person shall be rated in pursuance of this Act on account of any arable meadow, or pasture land exceeding two acres, excepting as is specially provided for in this Act,

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or of any tithes or composition in lieu of tithes within the limits of this Act, or the farmhouses and buildings used exclusively for farming purposes.

By section 278 :—

This Act shall be applicable to and be put in force for the improvement of the town and all other parts of the said parish of Walton.

Walton-on-the-Naze is a parish on the east coast, containing about 2380 statute acres. During the last fifty years it has been enlarged and altered from an agricultural parish, with a few farm houses and cottages, to a watering-place, consisting of small houses and a few streets, to which, in the season, visitors resort, but which is in the winter deserted, and the ordinary population of the parish is about 1200. A small portion only of the 2386 acres aforesaid is occupied by the town, and the value of the neighbouring land has not been increased by its proximity to the town, the season being a short one, and the class of visitors one by whom little money is brought into the place.

For a long time the said Act continued to be practically unused; but in or about the year 1868 the commissioners appointed a clerk, and have borrowed moneys under the Act, and in order to pay the interest thereon, and to defray the expenses they were put to, have levied assessments and rates in the manner by the said Act authorized. But no rate made down to the passing of the Public Health Act 1872 has exceeded one shilling and sixpence in the pound.

Down to the passing of the Public Health Act 1872 (35 & 36 Vict. c. 79), the Local Government Acts had never, nor have they since, been adopted by the commissioners, and no part of the district under the Local Act had or has any part of its area situated within a borough or Local Government District. It is contended on behalf of the plaintiff that by the said Public Health Act 1872, the town and parish of Walton-on-the-Naze was constituted an urban sanitary district, and that the commissioners became, and were constituted, and are the urban sanitary authority; and the court, acting on this assumption, held a meeting professedly as such authority in accordance with sect. 6 of this Act upon 4th Sept 1874.

Since the last mentioned date the said commissioners have appointed a medical officer of health, and an inspector of nuisances, and claimed to act as and to be an urban sanitary authority.

By sect. 7 of the Public Health Act 1872, it was enacted as follows :—

Subject to the provisions of this Act the Local Government Acts shall be deemed to be in force within the district of every urban sanitary authority, and from and after the first meeting of an urban sanitary authority in pursuance of this Act, there shall be transferred and attached to an urban sanitary authority, to the exclusion of any other authority which may have previously exercised or been subject to the same, all powers, rights, duties, capacities, liabilities and obligations within such district exercisable or attaching by, and to a Local Board under the Local Government Acts, and by and to the sewer authority, under the sewage Utilization Act, and by and to the nuisance authority, under the Nuisances' Removal Acts, and by and to the local authority under the Common Lodging Houses' Act, the Artizans and Labourers' Dwellings Act, and the Bakehouse Regulation Act, or by and to any of the said authorities under any of such Acts, or any Acts amending such Acts.

By sect. 16 it is enacted as follows :—

All expenses incurred or payable by an urban sanitary authority under the Sanitary Acts, shall, if the Local Government Acts, or the provisions of those Acts with respect to rating, were at or immediately before the passing of this Act, in force throughout the district of

such authority, or within a local government district wholly within such district, be defrayed in manner provided by those Acts; and if the Local Government Acts were not so in force at or immediately before the passing of this Act, be defrayed as follows: that is to say,

- (1) In the case of the council of a borough, out of the borough fund or borough rate.
- (2) In the case of improvement commissioners, out of any rate in the nature of a general district rate leviable by them as such commissioners throughout the whole of their district.

Provided that where an urban sanitary authority had, before the passing of this Act, power to levy within its district a rate or rates for paying, sewerage or other sanitary purposes, all expenses incurred by such authority in the performance of its duties under the Sanitary Acts shall be defrayed out of such rate or rates, except where at the time of the passing of this Act any such expenses were chargeable upon the borough fund or borough rate, in which case such expenses shall continue so chargeable.

Sect. 25 is as follows :—

After the passing of this Act, the Local Government Acts shall not, nor shall any provision thereof, be adopted in or by any place without the consent of the Local Government Board.

By sect. 33 it is enacted as follows :—

The Local Government Board may on the application of the sanitary authority of any district, by provisional order, wholly or partially repeal, alter or amend, any local Acts, other than Acts for the conservancy of rivers in force in such district, and not conferring powers or privileges upon corporations, companies, undertakers, or individuals for their own pecuniary benefit, which relate to the same subject matters as the Sanitary Acts.

By sect. 43 of the same Act, it is enacted that—

Any limit imposed on or in respect of any rate by any Local Act of Parliament, shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by a sanitary authority for sanitary purposes.

And by sect. 59 of the same Act, it is enacted that—

All powers given by this Act shall be deemed to be in addition to, and not in derogation of, any other powers conferred by Act of Parliament, law or custom, and such other powers may be exercised in the same manner as if this Act had not passed.

At a special meeting of the improvement commissioners, duly held on the 9th Sept. 1873, the plaintiffs alleging to act as the urban sanitary authority, purposed to levy a rate of one shilling and sixpence in the pound, upon all messuages, lands, tenements, and hereditaments, in and throughout the town, and all other parts of the parish of Walton aforesaid, for the purpose of defraying the expenses specified in a certain estimate, the details of which are not material to the point discussed on the argument of the case.

In making the assessment for this rate the plaintiffs assessed all rateable property within their limits at an equal rate according to the last assessment for the relief of the poor within their limits, and did not restrict the rating of the arable, meadow, or pasture land, held by any one occupier to a quantity not exceeding two acres. They also included farm houses and buildings used exclusively for farming purposes.

In the said rate or assessment the defendant was rated in the sum of 32*l.* 17*s.* on account of arable, meadow, and pasture land exceeding two acres, not being land falling within the exception referred to in sect. 234 of 4 & 5 Vict. c. lxx, as specially provided for in the said Act; and on account of farm houses and buildings used exclusively for farming purposes; and it is to recover this sum that the present action is brought.

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The defendant contends that under the above circumstances he is not liable to be assessed or rated as aforesaid, to or in the said rate, on account of his arable, meadow, or pasture land, exceeding two acres, and not falling within the exception aforesaid; nor on account of his farm houses and buildings used exclusively for farming purposes. The plaintiffs insist that the defendant is liable to be rated and assessed to the said rate, irrespective of any limit imposed by the said Walton Improvement Act.

The question for the opinion of the court is whether the defendant is liable to be rated to the said rate in the manner hereinbefore set forth. If the court shall be of opinion that the defendant is liable to be rated to the said rate in manner hereinbefore set forth, then judgment shall be entered up for the plaintiff for 37l. 17s., without cost of suit. If the court shall be of opinion that the defendant is not liable, then judgment without costs of suit shall be entered up for the defendant; the parties to this special case having agreed that each shall bear his own costs.

Brown, Q.C. (with him *Philbrick*, Q.C.) argued for the plaintiffs.—In the local Act relating to this case there is a limit as to the amount of the rate to be imposed, and a limit as to the acreage of the property to be assessed. By sect. 43 of the Public Health Act, 1872, both these limits are abolished, and there is now nothing to prevent the plaintiff from enforcing this rate. [*BLACKBURN*, J.—Sect. 234 of the Local Act exempts all arable, meadow, or pasture land exceeding two acres from being rated at all.] No, it seems to have been the custom to rate such land as if it were only two acres. [*LUSH*, J.—That cannot be the meaning of the section, for farmhouses and buildings are exempted also.] The plaintiffs' contention is in furtherance of the objects of Sanitary Acts, and if not adopted, the result will be to increase the burden upon urban residents.

Bowen for the defendant.—Sect. 234 of the local Act creates an exemption, and that word has a meaning perfectly distinct from the word limit. The Legislature has carefully observed the distinction in several statutes; e.g. in 11 & 12 Vict. c. 63, s. 88, where the proviso continues previous exemptions; similarly in 21 & 22 Vict. c. 98, ss. 55 and 77. [*LUSH*, J.—In this very Act provision is made by sect. 18 for exemptions in rural sanitary districts.] The plaintiffs' rating powers spring entirely from sect. 16 of the Public Health Act, 1872, and its amendment in 37 & 38 Vict. c. 89, s. 8, unless sect. 43 helps them. By the latter section, any limit imposed on or in respect of any rate by any local Act of Parliament, shall not apply to any rate required under this Act. The word exemption cannot there be read instead of limit. The language would be inartistic and inappropriate if provision were made concerning an exemption imposed on or in respect of a rate. Moreover, if this section applies at all to sect. 234 of the local Act, it should apply to the whole of it, and it is impossible to say that the exemption of farm buildings is a limit to a rate.

Brown in reply.

BLACKBURN, J.—As far as it is possible to get any definite idea of these Public Health Acts, I entertain no doubt that the defendant is entitled to our judgment. The 16th section of the Act of 1872 provides that all expenses incurred or payable by an urban sanitary authority under the Sanitary

Acts, shall, if the Local Government Acts were not in force, be defrayed, in the case of improvement commissioners, out of any rate in the nature of a general district rate leviable by them as such commissioners throughout the whole of their district. Then comes a proviso, which, as interpreted by sect. 6 of the Act of 1874, seems to have no relation to the present case. By a rate made by the plaintiffs under this section, they have relied upon the application of sect. 43 in order to impose upon the defendant a liability to which he was not before subject. By that section "any limit imposed on or in respect of any rate by any local Act of Parliament, shall not apply to any rate required to be levied" under this Act. By the Local Act of 1841, sect. 230 empowers the commissioners to "make rates upon the several owners, proprietors, lessees, and occupiers of all houses, mills, shops, warehouses, coach-houses, stables, cellars, buildings, gardens, lands, tenements, hereditaments, and premises whatsoever, within the limits of this Act, according to the annual value of the same, so as such rates or assessments do not exceed in any one year to be computed as aforesaid the sum of two shillings and sixpence in the pound on such annual value, except as herein provided." That section, no doubt imposes a limit of two and sixpence in the pound, which is abolished by sect. 43 of the Act of 1872. Sect. 234 provides that "No person shall be rated in pursuance of this Act on account of any arable, meadow, or pasture land exceeding two acres, excepting as is specially provided for in this Act," . . . "or the farm houses and buildings used exclusively for farming purposes." Now, I think this is not so much a limit to the size of land to be rated, or even an exemption of any assessment above two acres, as a provision that the rating powers given in the Act shall not apply at all either to land above the extent mentioned, or to any farm buildings. The Legislature must use clear language to destroy the benefits thus granted to owners of agricultural property. There are no words whatever in this Act of 1872 which can be construed to impose fresh taxes upon lands and farms which have been previously entirely exempted. Our judgment is therefore for the defendant.

MELLOR, J.—I am of the same opinion. The burden lies upon the plaintiffs to show that the rates are imposed upon different people under the Act of 1872, from those who were before liable; and the words of that Act do not support that contention.

LUSH, J.—I am of the same opinion. The language which could put an end to this exemption, ought to be unambiguous and decided. I do not think the 43rd section applies to this case at all.

Judgment for the defendant.

Attorney for plaintiff, *J. M. Morris*, for *Philbrick* and *Myddleton*, Harwich.

Attorneys for defendant, *Woodroffe* and *Plaskitt*.

Saturday, Jan. 23, 1875.

REG. v. BURNBY.

Obstruction of highway—Cul de sac—Public utility. A public footpath was rendered a cul de sac by buildings authorised by Act of Parliament; the defendant obstructed the path at a place between which and the end of the cul de sac there was no opening or thoroughfare. Upon an indictment for this obstruction, the jury found the defendant

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guilty; but they also found that this part of the path, which the defendant's obstruction stopped, had ceased to be of any public utility.

Held upon a special case reserved by the judge at the trial, that a public path was still a highway, although it had become a *cul de sac*; and that the measure of public inconvenience caused by the obstruction of such a highway could be considered only with regard to the ~~annihilation~~ annihilation of the person causing it.

This was an indictment for misdemeanour in obstructing a public highway. The jury found a verdict of guilty, but that the public highway in question was not of public utility. Thereupon under the direction of the Lord Chief Justice and by consent of the parties, the following case has been stated by the parties for the purpose of obtaining the opinion of the court on points of law raised at the trial on behalf of the defendant; either party to be at liberty to turn the decision of the court on this special case into a special verdict.

1. The prosecutor of this indictment is one William Escott, who occupies as tenant a certain public house called the King's Arms, which is built upon a certain river wall called the Marsh Wall.

2. The defendant, George Burney, is a tank manufacturer, who also occupies premises for the purpose of his business on the said Marsh Wall. The premises of the defendant are on the south of, and near to, the premises of the prosecutor.

3. The said Marsh Wall is an immemorial wall or embankment of earth erected along a portion of the shore of the Isle of Dogs, in the parish of All Saints, Poplar, in the county of Middlesex, as a defence against the Thames, which at this part runs nearly from north to south. This Marsh Wall originally extended round the whole of the Isle of Dogs. It is stated on behalf of the prosecution, but not admitted by the defendant, that the soil of the Marsh Wall is vested in the Poplar District Board of Works by virtue of 18 & 19 Vict. c. 120.

4. From time immemorial there has been, and at the time of the passing of the Act of Parliament, 27 & 28 Vict. c. cclv., entitled the Millwall Canal Wharfs and Graving Dock Act 1864, there was a public footway over a portion of the said Marsh Wall, running close by the river.

[A plan of the locality was annexed to and made part of the special case, from which it appeared that nearly parallel to this public footway, and about a hundred yards from the river is a public highway, called the Westferry-road. From this road to the said footway and the river there are several communications by public lanes and streets, but between a street named Union-street, on the north, and another street named Gaverick-street, on the south, both of which streets run nearly east and west between Westferry-road and the said footway, there is no public communication from Westferry-road to this footway. On the portion of the footway between these two streets and on the opposite side from the river are situated first towards the north the premises of the prosecutor, marked S on the plan, with public steps to the river just opposite. Next to the south are situated the defendant's premises, then Messrs. Fenner's, and then the premises of the Millwall Dock Company, the boundary of which last premises is built right across the footway, and by the authority of their Act of

Parliament has rendered the footway at this spot, which is marked C on the plan, a *cul de sac*. The southern boundary of the Millwall Docks has also rendered the portion of the footway between it and Gaverick-street another *cul de sac*. The obstruction for which the defendant was indicted is situated at a point marked O O in the plan, and crosses the said footway at the spot separating the premises of the prosecutor from those of the defendant.]

5. The defendant at the time of the passing of the said Millwall Canal Wharfs and Graving Dock Act 1864, occupied, and from thence hitherto has occupied, and still occupies his said premises for the purpose of his said business, and the old public footway traversed the said premises as shown on the plan.

6. Soon after the passing of the said Millwall Canal Wharfs and Graving Dock Act 1864, and under the powers therein contained the Millwall Docks were constructed, and the said public footway was lawfully stopped up by a wooden fence at the spot marked C on the said plan. To the southward of the spot marked C for a distance of about 113 yards on the plan, the said public footway was also lawfully stopped up by the Millwall Dock Company's works, and a portion of the Marsh Wall actually cut through by the dock entrance as shown in the plan. A copy of the Millwall Canal Wharfs and Graving Docks Act 1864, formed part of this case, but the only material section is the 24th, which authorised the stopping up and discontinuing of any footways upon or over any lands acquired by the company.

7. Since the erection of the fence at C, under the circumstances aforesaid, the said public footway has not led, nor does it now lead to any public place south of the defendant's premises. In fact it forms a *cul de sac*, from the King's Arms landing-stairs. The nearest public highway leading from the Westferry-road to the said public footway to the north of the spot marked C is Union-road shown on the plan. The distance from C to S, is 136 yards, and from C to Union-road, 291 yards.

8. Since the said public footway has been so stopped up by the fence at C, that part of the said public footway which traversed the defendant's premises, has ceased to be, and is not at the present time of any public utility.

9. After the said public footway was so stopped up as aforesaid by the fence at C, and within the times mentioned in the said indictment, the defendant placed an obstruction at the spot marked O O on the plan.

10. Messrs. Fenner, who occupy premises to the south of the defendant's as shown on the plan, had also, at the time when the indictment was preferred against the defendant, placed another obstruction at the point marked N N on the plan. Messrs. Fenner were also indicted, but the trial has been postponed until after the argument of this case.

11. A copy of the indictment against the defendant accompanies, and is to form part of this case.

12. It was contended at the trial on behalf of the defendant that, as the said public footway had under the provisions of the Millwall Canal Wharfs and Graving Docks Act, 1864, been lawfully stopped up by the Millwall Dock Company at the point marked C, and thereby the terminus to which it originally led to the south could not be

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approached by means of the said footway, and as those parts of it which traversed the premises of the defendant, and of Messrs. Fenner had ceased to be of public utility; the said public footway had at the time of the obstruction, ceased to be an existing public footway at the spot O O, where the obstruction was placed, and that the indictment for such obstruction could not be supported against the defendant.

13. It was contended on behalf of the prosecution that the said public footway had never ceased to be a public footway at the spot O O where the obstruction was placed, and that its being stopped up by the Dock Company at one place, under the powers of an Act of Parliament, did not justify the defendant in obstructing it at another place without legal sanction.

The question for the opinion of the court is, whether having regard to the verdict, and the facts stated herein, the indictment against the defendant can be supported. If the court shall answer this question in the affirmative, the verdict of guilty is to stand.

If the court shall answer this question in the negative, the verdict of guilty shall be vacated, and a verdict of not guilty entered.

Huddleston, Q.C. (with him Poland) argued for the prosecution.—There are many dicta of judges to the effect, even if it has not been distinctly held, that a road continues a highway, even although it be made a *cul de sac*. In a case mentioned in a note to *Daniel v. North* (11 East, 375), Lord Kenyon is reported to have said with reference to this point, "as to this not being a thoroughfare, that can make no difference." It was held in *Young v. Outhbertson* (1 Macq. 455), that "the terminus of a public way may be sufficient, although it has not in the ordinary sense an exit. It may be a *cul de sac*." During the argument of *Res v. Marquis of Downshire* (4 A. & E. 698), Patteson, J., remarked at p. 713, "It has been held that, where there never was a right of thoroughfare, a jury might find that no public way existed; but it has never been settled that, where there had been a public right of passing through, the right of way was abolished by stopping one end of the passage." The point was considered in a case argued in this court last week, *Reg. v. Waller* (31 L.T. Rep. N.S. 777), and decided upon the authority of *Gwyn v. Hardwicke* (1 H. & N. 49); in the latter case the conclusion involved this point: Alderson, B., said, "If there be no absurdity in construing the words of this Act literally, why should we not do so, and say that the part of the footpath which is not stopped up will remain a public footway, and the other part will be no longer a footway but inclosed land." In *Bateman v. Bluck* (18 Q. B. 870), it was held that a public highway may in law exist over a place which is not a thoroughfare. Whether in fact it does exist or not is a question for the jury. Here the jury by their verdict have found this obstruction to have been placed on a highway. [BLACKBURN, J.—Subject to the statements in the special case, and the question whether, if otherwise a highway, the want of any public utility prevents its being so.] The special case, as well as the verdict, finds this place to be a highway. [BLACKBURN, J.—Your argument must be that the parish is bound to repair this useless *cul de sac*.] The defendant's proper course is to apply under the Highway Act for an order of sessions to stop it up, and if opposed a jury may then decide the

question of public advantage. In *Dawes v. Hawkins* (29 L. J. 348, C. P.), Byles, J., said, at p. 347, "It is also an established maxim, once a highway always a highway."

Watkin Williams, Q. C. (with him Trevelyan), for the defence.—In the first place my contention is that in consequence of the Millwall Act, the place of this obstruction is not any longer a highway; and in the next place, even if it be strictly a highway, the finding of the jury that this *cul de sac* has no public utility, renders the obstruction no public nuisance, and therefore the indictment will not lie. To be a public way a path must lead to a public place; this was held to be the law of England as well as of Scotland by Cranworth, L. C., in the case cited of *Young v. Outhbertson*, and also in the case immediately preceding it: (*Campbell v. Lang*, 1 Macq. 451.) Lord Cranworth said, at p. 453, "I believe the appellant is quite right in saying generally that a public right of way means a right to the public of passing from one public place to another public place." [LUSH, J.—Russell on Crimes, at p. 466, cites *Reg. v. Hawkhurst* (7 L.T. Rep. N.S. 268), where it was not doubted that there might be a highway which was not a thoroughfare. BLACKBURN, J.—And there are cases in which it has been held that owners of adjacent lands may open communication with the highway; there is nothing, therefore, to prevent this becoming again a thoroughfare.] As to my second point, the effect of the jury's finding was that the public suffer no injury by this obstruction. [BLACKBURN, J.—To interfere with a public right is a public injury.] In *Sir Roland Haywood's case* (Cro. Eliz. 148), an indictment for stopping a highway was discharged because injury was alleged only to divers not to all of the Queen's liege people; that decision involves the necessity that there must be inconvenience to somebody. A proceeding by indictment was never intended to interfere with a barren right. [BLACKBURN, J.—What authority have you for that. LUSH, J.—*Reg. v. The United Kingdom Electric Telegraph Company (Limited)*, mentioned in a note (2 E. & S. 647), is an authority against you.] This case goes further than that. It could not be said that telegraph posts are of no public utility.

BLACKBURN, J.—We need not hear a reply. The question is whether the legal abolition of a thoroughfare has the effect of rendering that part of it, beyond what is actually stopped, no longer a highway when it is useless for the public. There are dicta of Patteson, J., and other judges, that a *cul de sac* may be a highway, and there is authority that new openings may be made into a highway from the adjoining lands. Although this piece of unused road may be of little value, its obstruction cannot be absolutely no possible injury to any member of the public. The finding of the jury that the road is of no public utility should be an important consideration in deciding upon the punishment of the defendant, but it is not sufficient to justify him in depriving the public of a right. Our judgment must be for the prosecution.

LUSH, J.—I am of the same opinion. There is a public right over all or any part of a public highway; and when a highway is stopped by sessions order or by Act of Parliament, the public are not deprived of any more of their right than the order or statute expresses. The measure of inconve-

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once caused by an obstruction can be considered only as to the punishment of the person causing it.

Judgment for prosecution.

Attorneys for prosecution, Gellatly, Son, and Warton.

Attorneys for defence, Westall, Roberts, and Barlow.

Friday, Nov. 20, 1874.

THE LONDON AND NORTH-WESTERN RAILWAY COMPANY v. BUCKMASTER AND OTHERS.

Rating—Licence to use stables—Demise—Exclusive occupation—Form of action—Replevin.

A railway company granted to coalowners the use of certain stables (situate within the premises of the railway station, and approachable only through the gates between the station and the public roads), under agreements containing the following terms: "In consideration of the London and North-Western Railway Company permitting us to occupy and use a stable for the accommodation of four horses at or near the U. station of the said company, we do hereby undertake and agree that we will pay the said railway company the clear monthly rent or sum of 1l. 5s. without any deduction, &c. And we undertake and agree, so long as we shall occupy or use the said stable, to observe, perform, and be bound by the bye-laws, rules, and regulations which shall for the time being be issued or prescribed by the said railway company for the government and use of their railway station, premises and conveniences. And we further undertake and agree to give and deliver up possession of the said stable at the expiration of one month after a notice in writing for that purpose," &c. The railway company did not, in fact, exercise any control over or use any of the stables during the currency of these agreements; and none of the bye-laws, rules, or regulations of the company had reference to them. The railway company, having been rated to the poor in respect of these stables, and a distress warrant issued under which a levy was made, brought an action of replevin to test the validity of the rate.

Held, that the railway company, and not the coalowners, were occupiers of the stable, the agreement, under the circumstances of the case, not amounting to a demise, but only to a permission to use the stable, the control over which was retained by the railway company.

Where part of the property assessed is not occupied by the person rated, the point can be raised by replevin. (Semble.)

THIS was an action of replevin commenced by the plaintiffs against the defendants by a plaint in the County Court of Middlesex, holden at Bloomsbury, and removed by the defendants by certiorari into the Court of Queen's Bench.

The plaintiffs duly declared in replevin, and thereupon, by consent of the parties and by order of Mellor, J., the following case was stated for the opinion of the court.

CASE.

1. The plaintiffs are the London and North-Western Railway Company, and under the provisions of divers Acts of Parliament, have acquired and are the owners of certain lands near Clapham Junction Station, in the parish of St. Mary, Battersea.

2. The defendants were and acted in the distress, the subject of the replevin, as churchwardens and overseers of the said parish. The distress warrant was in the usual form, and the levy must be taken to have been made for the aggregate of the amounts of the respective rates therein mentioned together with 8s. 8d. the costs of the summons by warrant.

3. In the rate book for the said parish is an assessment for the relief of the poor, made the 28th May, 1870, in which the London and North-Western Railway Company were inserted as occupiers and owners of twelve lines of rails, nine turntables, stable and cottage, the gross estimated rental being 250l., the rateable value 200l., the poor rate being 13l. 6s. 8d., sewers rate 3l. 6s. 8d., lighting rate 2l. 10s., and general rate 10l.

7. The strips of land at the sides of the twelve lines of rail last mentioned are also owned by the plaintiffs, and are used for the purposes and in the manner hereinafter described.

8. The stable mentioned in the rate book is the property of the plaintiffs, and is by their permission used by coalowners under agreements identical in form, of one of which the following is a verbatim copy:—

We, the Clay Cross Company, of 12, Burwood-place, Edgeware-road, London, in consideration of the London and North-Western Railway Company permitting us to occupy and use a stable for the accommodation of four horses at or near the Clapham Station of the said company, do hereby undertake and agree that we will pay the said London and North-Western Railway Company the clear monthly rent or sum of 1l. 5s., without any deduction whatsoever (property tax only excepted), the first payment to be made on the 1st March next. And we undertake and agree, so long as we shall occupy or use the said stable, to observe, perform and be bound by the bye-laws, rules, and regulations which shall for the time being be issued or prescribed by the said London and North-Western Railway Company for the government and use of their railway stations, premises, and conveniences. And we further undertake and agree to quit and deliver up possession of the said stable at the expiration of one month after a notice in writing for that purpose, signed by any agent of the said London and North-Western Railway Company to be given at any time, shall be served on us our executors or administrators, either personally or by being affixed to any conspicuous part of the aforesaid stables, provided that in such case a proportionate part only of the rent for the then current month hereby reserved, shall be paid to the said London and North-Western Railway Company. As witness, &c.

The company have not in point of fact exercised any control over or used any of the stables during the currency of these agreements.

9. The offices are also the property of the plaintiffs. These offices are, and were at the time at which the rate was made, used by different coal owners, by the permission of the plaintiffs, under agreements identical in form of one of which the following is a copy:

We, the Clay Cross Company, of 12, Burwood-place, Edgeware-road, London, in consideration of the London and North-Western Railway Company permitting us to occupy and use the office for our accommodation, at or near the Clapham Station of the said company, do hereby undertake and agree that we will pay the said London and North-Western Railway Company, the clear monthly rent or sum of 16s. 8d., without any deduction whatever (property tax only excepted), the first payment to be made on the 1st Nov. next. And we undertake and agree, so long as we shall occupy or use the said office, to observe, perform, and be bound by, the bye-laws, rules and regulations which shall for the time being be issued or prescribed by the said London and North-Western Railway Company for the government and use of their railway stations, wharves, offices, premises, and conveniences,

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and we further undertake and agree to quit and deliver up possession of the said office at the expiration of one month after a notice in writing for that purpose, signed by any agent of the said London and North-Western Railway Company, to be given at any time, shall be served on us, our executors or administrators, either personally or by being left at the said office, or being affixed to any conspicuous part thereof. Provided that in such case, a proportionate part only of the rent for the then current month hereby reserved, shall be paid to the said London and North-Western Railway Company. As witness, &c.

These coalowners and not the plaintiffs are rated in respect of the occupation of these offices. There is a bank and fence between these offices and the rest of the property of the plaintiffs, and the doors of the offices open on to Falcon-lane. Access to the rest of the property is obtained by a gateway at the point at which the plaintiffs' approach road joins Falcon-lane, and there is another gate giving access to Lavender Hill from the approach road, near the cottage.

10. The "cottage" mentioned in the rate book is situated at the point where the approach road falls into Lavender Hill. This is inhabited by one of the company's servants, and it is admitted that the company are rateable for this. The uralin is used by all persons having business on the premises. The tool house is also used by the persons using the stable, and occasionally by other persons, and by the servants of the plaintiffs for the purpose of depositing tools, &c.

11. The twelve lines of rails or siding (except the three lines immediately adjacent to the north of the strip marked, "for goods traffic," which are partly used by the company for their own traffic), were and are, except in the special cases referred to in the next paragraph, used exclusively for the reception of trucks belonging, not to the plaintiffs, but to various coalowners and merchants, and to a stone merchant. In these trucks are brought coals from collieries connected with the plaintiffs' system of railways over such railways, and the main line of the West London Extension Railway, with which line the said twelve lines of railway are connected by a junction to the west. There is no junction to the east, but the siding coloured yellow is continued to a point more to the east than the limits of the land shown on the plan, where it is terminated by stop buffers. In others of the trucks stone is brought for the stone merchant in a similar manner.

12. As to certain spaces pitched with ordinary paving stones, there was not, nor is there any agreement in writing regulating their use, but the practice as to their use was and is as follows:—Part had, before the rate in question, and has since, been used by the plaintiffs as a platform or landing place and places of deposit for general goods, such as stone, &c., brought by the plaintiffs over their lines, and over the West London Extension Railway, as public carriers, in their own trucks. The extent of the platform or pitched space so used by the plaintiffs varied according as the space was not used by the coal merchants and coal owners or by the stone merchants, as hereinafter mentioned. The plaintiffs' trucks, used by them as carriers, were brought alongside so much of the pitched spaces as might be in use by them for the purpose and there unloaded. All the rest of these spaces were in use by the coal merchants and owners and a stone merchant. The stone merchant used as an

office a small wooden hut. Both he and the coalowners and merchants, by permission of the plaintiffs, used the residue of the pitched spaces, except the portion used by the plaintiffs for their own purposes, as aforesaid, for the purpose of storing and stacking the coal and stone which had been brought down to them in trucks as above mentioned. The spaces used by each were marked out by wooden stakes driven into the ground, and when they respectively first began to use them the space thus marked out was pointed out to them respectively, and they respectively continued, exclusively of each other, to use the space so pointed out without interruption for the stacking and storage of their coal and stone. When more space was required by any coal merchant or owner, and was not in use by any other, the stakes were removed and a larger space allotted. The coal merchants and owners to whom these spaces were allotted also used as offices the offices hereinafter referred to, and the numbers on the spaces are intended to correspond with the numbers of the offices used by the coalowners or merchants to whom at one time these particular spaces were allotted. But the spaces so numbered were not always necessarily allotted to the offices, or to the persons using offices with corresponding numbers. The spaces between, however (except the space allotted to the stone merchant), were pointed out and allotted to, and exclusively used by, coalowners and merchants who were at the time in occupation of the offices.

13. The mode in which the sets of rails were used was as follows: As has been said, three sets were used for the general traffic by the plaintiffs, and they were necessarily used in bringing the trucks through the junctions on to the twelve lines of rails. The line of rails south of the pitched space used by the plaintiffs as common carriers as a place of deposit for goods brought by them, was also used by them, so far as was necessary for the purpose of bringing up their trucks in which these goods were brought, and for discharging them, and these trucks remained on this line of rails until they were discharged. To the other pitched spaces the plaintiffs hauled the trucks of the various coalowners or merchants, and of the stone merchant to whom these spaces had been allotted, and these trucks respectively were left for the purpose of being discharged, and until they were discharged, upon the line of rails which might be alongside of the pitched space which had been allotted to the coalowner or merchant, or to the stone merchant to whom the particular truck loads of coal or stone belonged, and there they remained unless it was necessary to remove them in order to bring up alongside the other pitched spaces the trucks belonging to others of the coal merchants or owners, as, for instance, if there were trucks of coal standing in the line of rails, alongside No. 2, it might be necessary to remove them in order to permit of trucks being brought alongside No. 1. When the trucks had been discharged on to the pitched spaces, they were by men in the employ of the coalowners or merchants brought down to the turntables, and moved on to the middle lines, and made up by them into trains of empty trucks, and were taken away by the plaintiffs' engines which had brought down the full trucks as above-mentioned. The middle lines of railway were

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thus used for the standing of empty trucks until they were taken away.

14. After the coals were stacked on the pitched spaces allotted to the coal owners or merchants to whom the coals respectively belonged, they remained there until they were sold, or until the owners of them thought fit to remove them. The carts, &c., by which they were removed entered by the approach road. A machine for weighing and an office for the weigher, who was in the plaintiffs' employ, stood about the middle of the approach road.

15. No payment of other than the office rent and the office rates or tolls were paid to the plaintiffs by the coal owners or merchants, or by the stone merchant who enjoyed the use of the pitched spaces and lines of rails as hereinafter described. The difference in haulage rate between London and Chelsea and haulage to the depot at Clapham Junction is 1s. per ton on coal for collieries on the London and North-Western Railway system, and 1s. 3d. per ton on coals from collieries on other lines of railway. Clapham Junction is distant rather less than two miles from Chelsea. By the West London Extension Railway Act the companies using it are authorised to charge 1s. per ton for all coal or stone passing on to or over that line. These haulage rates or tolls paid to the plaintiffs for the haulage of the coals or stone brought to the land in question by the plaintiffs (including the 1s. or 1s. 3d. per ton above mentioned, have always entered into the rateable value of the railways of the plaintiffs and of the West London Extension Railway Company in the various parishes through which these railways pass, and the coals or stone were hauled, the haulage rates or tolls being apportioned in the usual manner, according to the proportion of the distances lying in those parishes respectively to the whole distance for which the haulage rates or tolls were paid.

16. The plaintiffs had due notice of the said rate pursuant to 27 & 28 Vict. c. 39, s. 5.

17. The plaintiffs objected before the assessment committee to the valuation list. The objections were overruled, and the assessment confirmed.

18. After such confirmation the plaintiffs were summoned before the magistrates to show cause why a distress warrant should not issue. They contended before the magistrates that they were not liable to pay the rate, because (1) They were not the occupiers; (2) The several coalowners who rented the offices ought to have been rated in respect of the matters aforesaid.

19. The magistrates decided that they had no jurisdiction to interfere with the rate unappealed against, and therefore the distress warrant issued, and a levy was made under such warrant, in respect of which this action of replevin was brought.

20. None of the bye laws, rules, and regulations mentioned in the agreement above set out are material to this case.

Unless the above mentioned facts, or any of them establish an occupation, the plaintiffs are not occupiers. The company contend that the levy was wrongly made for the following amongst other reasons.

1. That the rate is bad, as none of the property is in their occupation so as to render them liable to be rated.

2. That the rate is bad as including property

not in any sense in their occupation, e.g., the stables.

The defendants contend that the rate is good, and the distress rightly levied.

If the court shall be of opinion that the distress was wrongly levied, then the judgment of the court is to be entered for the plaintiffs, with costs, including their costs in the County Court.

If the court should be of opinion that the distress was lawful, then judgment is to be entered for the defendants with the like costs.

The following were the points marked for argument:

For the plaintiffs, that the rate was illegal, and the distress wrongful on the ground that they were not liable to be rated as occupiers of the premises, and that part of the premises, viz., the stables, were in the actual occupation of other persons liable to be rated in respect of such occupation.

For defendants: First, that the rate upon which the distress was founded was a valid rate; secondly, that the occupation by the plaintiffs of the premises included in the rate is such as to render them liable to be rated in respect thereof; thirdly, that the occupation by the plaintiffs of the premises mentioned in the rate is beneficial and exclusive; fourthly, that the plaintiffs have not parted with the exclusive control, possession, and management of the premises mentioned in the rate or any of them; fifthly, that the use by the coalowners and merchants and the stone merchant of the lines of rails and turntables mentioned in the rate is not a rateable occupation; sixthly, that the use by the coalowners and merchants and the stone merchant of the lines of rails and turntables mentioned in the rate is on sufferance only; seventhly, that the use by the coalowners and merchants and the stone merchant of the lines of rails and turntables mentioned in the rate is not exclusive; eighthly, that the use by the coalowners of the stables mentioned in the rate under the agreements made between them and the plaintiffs is not a rateable occupation; ninthly, that the agreement made between the coalowners and the plaintiffs, under which the coalowners use the stables, do not constitute such a tenancy as to make the coalowners liable to be rated; tenthly, that the use by the coalowners of the stable mentioned in the rate under the agreements made between them and the plaintiffs is on sufferance only; eleventhly, that the use by the coalowners of the stables mentioned in the rate under the agreements made between them and the plaintiffs is not exclusive; twelfthly, that the validity of the rate in question not having been appealed against cannot be disputed in this action.

Littler, Q.C. (with him *Grosvenor*), for the plaintiffs.—The question to be determined is whether the London and North-Western Railway Company are the occupiers of the whole of the property which is the subject matter of the rate. [*BLACKBURN, J.*—I thought that if a person was rated in respect of a greater quantity than the proper amount, this could only be questioned on appeal, and that in such a case replevin would not lie.] It is submitted that where the whole of the subject matter of the rate is not in the occupation of the person rated, the question of his liability can be raised in the present form. In the *Governor, &c., of Bristol v. Wait and others* (1 Ad. & El. 264), it was decided that if a party is assessed to the poor

rate for premises which he occupies and other district premises which he does not occupy, and his goods are distrained for the several rates jointly, he is not confined to the remedy by appeal, but may bring an action. Lord Denman, C.J., in his judgment said, "The defendants argued in the first place that this court could not inquire whether a rate was properly imposed, the court of quarter sessions having exclusive jurisdiction to determine that question. In support of this proposition the case of *Marshall v. Pitman* (9 Bing. 595), was cited, but we think it proves no such thing. . . . In the present case a rate has been imposed on the plaintiffs in respect of land which they did not occupy—a rate which the overseers had no power to make, nor the magistrates to enforce. It is like a rate on land situate in a different parish which, according to Holt, C.J., in *Groenvelt v. Burwell* (1 Ld. Ray. 471), is an illegal tax, which the justices have no right to confirm." In a later part of the judgment Lord Denman, C.J., says, "But it was argued that the distress was legal, inasmuch as a part of the premises assessed was liable to the rate, and that, by including more, the distress might indeed be excessive, so as to found an action on the case, but was not altogether void, so as to make the seizure illegal. Numerous authorities were quoted to show that a distress may be justified though the distrainer profess to act under an illegal warrant, provided he were at the time armed with a lawful one. This doctrine was much discussed in the late case of *Lucas v. Nockells* (4 Bing. 729; 10 Bing. 157), which was cited as an authority here, but seems to the court inapplicable to this case. The proposition is, however, established beyond question that an officer is not confined in court to the authority which alone he may have produced when he acted: he may certainly resort to an authority which he possessed that justified his proceeding. . . . Here the action is replevin; three out of the four causes of taking were justifiable; there were four separate warrants; each cause of taking was distinct; and the avowries being separate for each cause of distress, the plaintiffs cannot, by averring that all were acted on at the same time and that one was bad, invalidate those that were good." Though the court on this ground gave judgment for the defendants, the right to raise the question by action of replevin is affirmed. *Milward v. Caffin* (2 W. Bl. 1330) is an authority to the same effect when carefully examined. In *Charlton v. Alway* (11 A. & El. 993), where the plaintiff, the owner and occupier of the vicarial tithes and also occupier of the rectorial tithes, which belonged to another person, and on which the land tax had been redeemed, was assessed to the land tax in a gross sum for the vicarial and rectorial tithes, but refused to pay the sum at which the rectorial tithes had been redeemed, paying the residue of the assessment. The collector having distrained on him for the amount withheld, it was held that trespass lay for the distress, and that the plaintiff was not bound to appeal. "The only question," said Lord Denman, C.J., "is whether the plaintiff ought to have appealed to the commissioners. We think that he was not bound to do so. Being assessed in respect of that which was not subject to the land tax he had as much right to treat the assessment as a nullity as if it had been in respect of property not in his occupation." See also *George*

v. Chambers (11 M. & W. 149), where it was held that replevin may be brought to recover goods seized in execution or under a distress warrant issued by a justice of the peace in a case where he has no jurisdiction. In the *Rhyhney Railway Company v. Price* (16 L. T. Rep. N. S. 394), Shee, J., held in the Bail Court that replevin would lie for goods improperly taken for poor rates, even though an appeal against the poor rate has been disallowed by a court of quarter sessions. The contrary contention was, in the opinion of the learned judge, completely disposed of by the case of *Pearson v. Roberts* (Willes 672 n); *Milward v. Caffin* (*ubi sup.*), *Sabournin v. Marshall* (3 B. & Ald. 440); *Marshall v. Pitman* (9 Bing. 595), *Governors of Bristol v. Wait* (*ubi sup.*), and *Selby v. Bardone* (3 B. & Ad. 2). [BLACKBURN, J.—Subject to what the other side may have to say, the authorities appear sufficient to show that we must go into the question.] It is submitted, then, there was such a letting by the plaintiffs to the coalowners of the stables as gave exclusive occupation of them to the coalowners. There is a regular demise at a monthly rent of 1l. 5s.; and there is, on the part of the tenants, an undertaking "to quit and deliver up possession of the said stable at the expiration of one month after a notice in writing for that purpose." The agreement does, no doubt, reserve to the railway company power to make bye-laws, rules, and regulations for the use and government of their railway stations, premises, and conveniences, and contains an undertaking on the part of the coalowners to observe and be bound by such bye-laws, &c.; but this does not affect the question of exclusive occupation, for it is found in the case that the railway company have not in point of fact exercised any control over or used any of the stables during the currency of these agreements. In the case of *Allen v. Liverpool Union* (30 L. T. Rep. N. S. 93; L. Rep. 9 Q. B. 180), which will be relied on by the other side, the facts were that the appellants had appropriated to them certain docks, quays, and sheds, and the Mersey Docks Board fixed a charge per square yard per annum for the use of the shed space, such charge to commence from the date of occupation, this being a provisional agreement and made during the pleasure of the board; and when these appropriated premises were not actually in use by the appellants, they were, by direction of the board without appellants' consent, used by other vessels and their owners. The board's servants had also access to all the premises. The ground within the dock property which had been used by one of the appellants as a coal depot had been allotted to him for that purpose only and upon sufferance, he being bound to give it up at a week's notice, payment to be made for the use thereof at one penny per square yard per week. There is obviously a wide distinction between the terms of the agreements in that case and those of the agreements under which the coalowners occupy the stables in the present case. Blackburn, J. referred to the Mersey Docks Act Consolidation Act 1858, sect. 64 of which enables the board to "set apart and appropriate" any particular portion of any dock, &c., for the exclusive use and accommodation of any individual or company, and sect. 82 of which authorises the board to let any sheds or portions of quays they may think fit to appropriate, as special berths for ships, for such periods, and at and on

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such rents, terms, and conditions as they might deem expedient. But Blackburn, J. points out that "by the following section, during the time of the appropriation of any dock for this purpose, no portion of the cargo of any vessel lying therein shall, without the consent of the board, be loaded or discharged into or from such vessel except by persons employed by the board. This provision, perhaps, renders the occupation of persons renting these docks and sheds more like that of lodgers than any other, and puts the Mersey Dock Board somewhat in the position of a lodginghouse keeper. At all events, what took place in these cases was not so much a letting under sect. 82, as the grant of permission to use the premises under sect 64." Furthermore his Lordship pointed out that, although the word "occupation" occurred in the letters constituting the contract, "it must be borne in mind that by the Act of 1861 the board have power to impose a penal rent upon goods which have lain beyond a certain time, even upon these appropriated quay spaces, even if the goods belong to the persons to whom the spaces are appropriated. It would be impossible for the board to do this if they had parted with the occupation; it would be inconsistent with exclusive possession by the appellants, and a contradiction in terms," and again: "The appellants have no further right to shut out the board than a lodger with a key to his bedroom, or a locked cupboard would have against his landlord." It is clear that the decision in that case is not applicable to the circumstances of the present.

Theisiger, Q.C. (with him *A. Glen*), for the defendants.—The defendants do not intend to insist on the point that the question cannot be raised by replevin. But it is insisted that sufficient appears on the face of the agreement between the London and North-Western Railway Company and the coalowners to show that it was not the intention of the parties that a tenancy should be created, but that only a licence should be given to use the stables for the accommodation of four horses. There are in the agreement no words of demise, but only a "permitting to occupy and use a stable for the accommodation of four horses at or near the Clapham Station." The idea of a demise is further negatived by the undertaking "so long as we shall occupy or use the said stable, to observe, perform, and be bound by the bye-laws, rules, and regulations which shall for the time being be issued or prescribed by the said railway company for the government and use of their railway stations, premises, and conveniences;" and, as respects this, it is immaterial that in point of fact the railway company exercised no control over or used any of the stables during the currency of these agreements. In *Watkins v. The Overseers of Milton-neat-Gravesend* (L. Rep. 3 Q. B. 350; 18 L. T. Rep. N. S. 601), a document granting to W. "liberty and licence to fasten, and thenceforth keep fastened, his coal hulk to the moorings placed by the conservators in the river, until either party shall have given to the other one calendar month's notice in writing; in consideration thereof W. agrees to pay towards the expenses of placing and maintaining and repairing the moorings the annual sum of 30*l.*," was held by this court not to be a demise, but only to grant to W. a licence to use the moorings; and W. was therefore held not to be the occupier, and not liable to be rated. Black-

burn, J., said, "I think the exclusive right to moor the barge, which is given from month to month, though there would be a breach of the contract, and an action would lie if another barge were moored there, does not give such an occupation as would render the appellant liable to be rated. By this agreement the conservators bind themselves to let the appellant, and him only, use the moorings until they have given him a month's notice, and it is not a demise. The conclusion at which I have arrived is that the appellant is not the occupier, but is merely a person having a licence to use the moorings." [BLACKBURN, J.—In the present agreement we find the words "occupy" and "quit and deliver up possession," which, *prima facie*, look like a demise.] The substance, not the words, of the agreement must be looked at. In *Smith v. St. Michael, Cambridge* (3 El. & El. 383; 3 L. T. Rep. N. S. 687), A. let to the Inland Revenue Department, for their offices, five rooms of a house in his occupation, it being stipulated that the rent was to be 90*l.* per annum, this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals; also providing a trustworthy person to reside on the premises to keep clean, light fires, and attend to the same, A. himself occupying the shop as distributor of stamps for the district. In their judgment the court say: "We think we must look not so much to the words as to the substance of the agreement, and taking the whole together we think it must be construed, not as a demise of the five rooms, but as an agreement by which the appellant came into the possession of those rooms and keeping a servant there himself; and certainly the exclusive enjoyment of the rooms was to be given in the same way as the guest at an inn, or a lodger in a house has a separate apartment, or the master of a ship has a separate cabin, in which case the possession remains in the innkeeper, the lodging-house keeper, and the shipowner. We think that the appellant was the occupier of the whole of the rated property." The case is much stronger here, where the railway company reserves to itself power to make what bye-laws it pleases for the regulation of the stables. Suppose they chose to make a bye-law that the servants of the company should go in daily and clean out the stables, could they not do so? In *Reg. St. Mary Abbot's, Kensington* (12 A. & El. 824), the company had power to sell in perpetuity or for a term, the exclusive right of burial in the cemetery, subject to their rules and regulations, and to payment of burial fees to them; but they were bound to keep the building, external walls, and every part of the cemetery in repair. Though they had in fact sold in perpetuity the exclusive right of burial in the vaults, catacombs, &c., made by them, had ceased to exercise any act of ownership over them after the sale, and had delivered the keys to the purchasers, it was nevertheless held that the Cemetery Company were liable to be rated to the relief of the poor as occupiers of the whole cemetery. "No doubt," said Williams, J., "the company are in the occupation of the whole cemetery. They have the regulation and repair of it, and the general superintendence over it. They have the control of the external entrance. . . . It is a fallacy to treat the conveyance here as a sale of the land. The company have no power to sell any but the surplus land not used for the cemetery. By the grant they only part with the

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exclusive right of sepulture." [BLACKBURN, J.—We followed that case in the recent case of *Reg. v. The Abney Park Cemetery Company* (L. Rep. 8 Q. B. 515; 29 L. T. Rep. N. S. 174.) ARCHIBALD, J.—And as to the making of bye-laws, section 124 of the Companies Clauses Act (8 & 9 Vict. c. 16) enacts that "it shall be lawful for the company from time to time to make such bye-laws as they think fit, for the purpose of regulating the conduct of the officers and servants of the company, and for providing for the due management of the affairs of the company in all respects whatever, and from time to time to alter or repeal any such bye-laws and make others, provided such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect," &c.] As has been stated already, the defendants will not dispute that replevin will lie under the circumstances.

Littler, Q. C. was heard in reply as to the stables.—The power of the railway company as to the making of bye-laws does not disprove the fact of a demise; for a landlord in creating a tenancy, might reserve to himself similar powers, and no bye-law made by the company could derogate from their grant under the agreement. As to the cases cited, in each of them there was only some one expression seemingly inconsistent with a non-letting, whilst here are several such.

BLACKBURN, J.—In this case I do not think it necessary that we should take time to consider our judgment. I am of opinion that, on the case as stated, we must find that the rate imposed on the London and North-Western Railway Company was right, because they were the occupiers of the whole of the premises which are the matter in dispute. The general rule of law is that the occupier of any property is the person who has the sole and exclusive possession of it, and that he is the person who is to be rated in respect of it. But when the owner of property demises it to any other person, giving him the exclusive possession and occupation, so as to make him the tenant of it, it is the tenant who should be rated and not the landlord. In this particular case, however, I think that what was done did not amount to a demise of any portion of this property, but merely to a giving a licence to have the easement and use of it, analogous to the case of a lodger. The more important part of the things referred to, consists of lines of rails and portions of property adjoining, which are part of the company's premises, and it appears that the railway company have been in the habit of letting them out to coalowners and stone merchants for the purpose of storing their coals and stone on particular spots there. There is no ground for saying that these spots are irrevocably appropriated to those particular persons. In fact it appears that when one spot is not occupied by a particular person, and his coals or goods are not there, the company's servants move the boundaries and allow somebody else to occupy the spot. There is no pretence, therefore, for saying that there is here anything more than an easement, and on that part of the case the plaintiffs must fail. But it is said to be enough to vitiate the whole rate if any portion of the premises is shown not to be in the occupation of the persons rated, and, consequently, that the fact of the stables not being in the occupation of the railway company is enough to vitiate the entire rate. If that is the law, practically it

becomes important because it will become necessary, wherever there is any dispute as to any portion, to make separate rates for every portion, which will be very inconvenient. But until the Legislature or a Superior Court thinks otherwise, we must take it that that will be so. But then comes the question, which is the one we have to consider, whether or no the stable in question are shown to be in the occupation of the Clay Cross Company, so that the Clay Cross Company are to be rated? That depends entirely on this: if the London and North-Western Railway Company, who are the owners and occupiers of the station, have a place there, inside which, and as a portion of which, station there was this stable; if they have entered into an agreement with the Clay Cross Company that the Clay Cross Company shall enter into and be exclusively possessed of this stable and shall so continue until after the expiration of one month's notice; and if the Clay Cross Company have acted on that agreement, and under it have entered into and taken possession of the stable, then the Clay Cross Company are the occupiers. But if the intention of the parties appearing on the agreement was this, that the Clay Cross Company should have the sole right of putting their horses in the stable, the railway company, nevertheless, retaining control of the stable, as part of their station, then the railway company would be rateable as the occupiers. Now, when we come to consider the words of the agreement, we find them, "We, the Clay Cross Company, in consideration of the London and North-Western Railway Company permitting us to occupy and use a stable"—the word "occupy" looks rather like the occupation of a tenant, the word "use" looking more like an easement—"for the accommodation of four horses, at or near the Clapham station of the said company, do hereby undertake and agree that we will pay the said railway company the clear monthly rent or sum of 12. 5s., the first payment to be made on the 1st March next." The word "rent" used here would not necessarily make the Clay Cross Company other than a kind of lodger. Then the agreement goes on: "and we undertake and agree, so long as we shall occupy or use the said stable, to observe, perform, and be bound by the bye-laws, rules, and regulations which shall for the time being be issued or prescribed by the said railway company for the government and use of their railway stations, premises, and conveniences." It is on that clause of the agreement that I found my judgment that the Clay Cross Company were but lodgers in this stable. The agreement goes on: "And we further undertake and agree to quit and deliver up possession of the said stable at the expiration of one month after a notice in writing." That would no doubt tend to show that the Clay Cross Company were the tenants and occupiers, and should, therefore, be rated; but the former clause as to observance of the bye-laws, &c., which the railway company might make from time to time, leads me to a contrary conclusion. Before that agreement was entered into, it is quite clear that this stable, which was inside the walls of the company's premises, and could only be got at by going through the gates of the company, was a portion of the premises of the station. It was important to the railway company that they should not grant a lease of this stable to anyone, and so create a

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tenancy of it, but that they should grant only a license to use it, retaining themselves the control and management of it; like the case of a theatre, where the owner of the theatre gives for a term the sole use of a stall or a box, but the sole occupation is nevertheless retained by the owner of the theatre. When we consider that it was very desirable and important for the railway company to retain the control and management of this stable; and when we find that they stipulate in the agreement that the Clay Cross company "shall be subject to the bye-laws, rules, and regulations made for the government and use of the railway stations, premises, and conveniences," it amounts to a declaration that the stable, though used by the Clay Cross company, should nevertheless remain part of the railway station, and subject to their control, and consequently the railway company are the occupiers and the proper persons to be rated. Taking that view of the case I think that our judgment should be generally for the defendants.

QUAIN, J.—I am of the same opinion, though I have come to this conclusion after some hesitation. I think, however, that the whole substance of the arrangement made between the parties leads to that conclusion. Before that arrangement was come to, it is clear that these stables were part of the railway premises at that particular place at Clapham Junction. They are within the curtilage which, as a whole, was in the possession and occupation of the railway company. They can only be approached by the roads over which the railway company undoubtedly have exclusive control; they are entered by gates at the end of these approaches, which, I think we may fairly infer, are under the control of the railway company. Therefore the railway company seems to me to be in possession and occupation of the whole of these premises, very much like the case of the cemeteries, which were held to be in the exclusive occupation of the cemetery companies. When we look at the agreement itself, we find, no doubt, some ambiguous expressions which may be construed either way; but when we look at the convenience of the thing, and the situation of the premises, and the general control evidently exercised and intended to be exercised over these stables by the railway company under their bye-laws, I come to the conclusion that on the whole the stables are not in the occupation of the Clay-cross Company, in the strict sense of the word occupation, but in that of the railway company, who are therefore the proper persons to be rated. Looking at the words themselves of the agreement, it is singular that it does not grant permission to use and occupy any particular stable at all upon the premises, and I am very much inclined to think that all that was intended to be given to the Clay Cross Company was stable room for four horses, the words being, "the company permitting us to use a stable"—not stable No. 4 or No. 5, or any particular stable—"for the accommodation of four horses at or near the Clapham Station." I do not think that this construction of the agreement is contradicted by the other part of it as to, delivering up possession at the expiration of a month's notice in writing. No particular stable is mentioned, and it appears that there are several on the premises, all the coal owners seeming to have similar accommodation; and as I read the agree-

ment all that it really means is that until it has been terminated by a month's notice in writing the railway company shall provide for the use and accommodation of the coalowners, stable accommodation for four horses. On the whole I have come to the conclusion which I have already stated, though with some hesitation, chiefly caused by the finding in the case that the railway company "have not in point of fact exercised any control over or used any of the stables during the currency of these agreements." That statement is no doubt a very strong one, and is calculated to convey the idea of an exclusive occupation by the railway company; but, taking the whole of the circumstances into consideration, looking at the character of the premises and the way in which they were used, and looking at the manifest convenience there is that the company should have entire control over their premises, I consider it safer and more convenient, where the terms of the agreement are ambiguous, to construe them as amounting to a licence to use and not to a demise of the stables.

ARCHIBALD, J.—As to the first point, whether the validity of the rate can be disputed in this form of action, I think, when the cases are carefully considered, it appears that where there is one entire rate, and part of the property rated is not in the occupation of the persons rated, that does justify the raising of the question in this form by action of replevin, the question, that is, whether the matter has been *coram non judice*. As to all the premises except the stables, I agree with all that has been said by my brother Blackburn, and I do not think it necessary to add anything to what he said. The important question is as to the stables whether the railway company are liable to be rated in respect of them or not. That depends upon the intention of the parties appearing on this agreement, which gives the use and occupation of the stables. Looking at the various provisions, I have come to the conclusion that all that was given, or that was intended to be given, was a mere easement. Before this agreement the stables were part of the premises of the railway station, and situated within the curtilage; and when we find that the persons to whom the use of the stables is allowed are to be bound by the bye-laws, rules, and regulations which shall from time to time be issued or prescribed by the railway company, I draw from that the inference that the stables were not intended by this agreement to be placed beyond the control of the company, but that they were to remain part of the property occupied by the company. As the railway company might make bye-laws in the fullest manner under the Companies' Clauses Act, to regulate their affairs, before this agreement was entered into, from their inserting this clause as to bye-laws in their agreement I draw the inference that it was not their intention to part with their control over these stables, and that they still remain liable to be rated as the exclusive occupiers of the premises. I agree, therefore, with the other members of the court that there should be judgment for the defendants.

Judgment for the defendants.

Attorney for plaintiffs, R. F. Roberts.

Attorney for defendants, J. C. F. Warrington Rogers.

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THE LOCAL BOARD OF HEALTH OF ABERDARE (apps.) v. HAMMETT (resp.).

[Q. B.]

Wednesday, Jan. 20, 1875.

THE LOCAL BOARD OF HEALTH OF ABERDARE (apps.)
v. HAMMETT (resp.)*Voting paper — Fabricating — Mens rea — Local Government Act 1858 (21 & 22 Vict. c. 98), sect. 13, sub-sect. 5.*

Respondent called at the house of a voter to canvass in favour of one of the candidates at an election for members of a local board of health. The voter was absent, but his wife, being authorised by her husband to act for him in the matter, placed her mark on the voting paper, to which respondent added his signature as attesting witness. Respondent also, bona fide believing in the authority of the wife to act for her husband, and in the propriety of what he was doing, affixed in the margin the husband's initials to the name of the candidate for whom he was canvassing.

Held, that respondent was not, under the circumstances, guilty of "fabricating in whole or in part" a voting paper, within sect. 13, sub-sect. 5, of the Local Government Act 1858 (21 & 22 Vict. c. 98).

CASE stated under 20 & 21 Vict. c. 43, for the opinion of the court upon a question of law.

At a petty sessions held at Aberdare, in the county of Glamorgan, on the 21st Oct. 1873, an information of the Local Board of Health of Aberdare was heard against one John Hammett, under the 21 & 22 Vict. c. 98, s. 13, sub-sect. 5, "for that he, the said John Hammett, did fabricate a certain voting paper."

From the evidence it appeared that an election took place in August last for a member to serve on the board of health.

That there were two candidates, a Dr. Price and Mr. Howell Williams.

That Edward Richards was a voter duly qualified to vote at that election.

That Henry Davies was duly appointed by the said board of health to deliver the voting papers on the 22nd Aug. to those persons entitled to vote at the said election, and to collect them on the day of election, the 26th Aug. following.

That on the 22nd Aug. a voting paper was left by the said collector at the house of the said Edward Richards, of which fact the said Edward Richards was aware.

That on the following day, the 23rd Aug., the respondent, John Hammett, with Howel Williams, one of the candidates, called at the house of the said Edward Richards to canvass him for his vote on behalf of Mr. Howel Williams.

That Edward Richards was not at home, but his wife was, and upon being asked for her husband's vote in favour of Williams she consented to give it, and made her mark at the bottom of the voting paper, the said respondent at the same time witnessing the mark of the said wife and affixing the initials of the said Edward Richards to the name of the said Howel Williams in the margin.

That the said Edward Richards was aware that his wife had so signed the paper, as he swore upon the hearing of the information, "I leave such matters to her, and I did so this time, as I have done many times before, because I think she is wise and capable enough to do it."

That the respondent affixed his signature as witness to the mark of the wife, describing it as the mark of the voter, and the initials of Edward Richards in the margin, bona fide believing that

she was entitled to sign on behalf of her husband, and that he, in doing as he did, was in no way acting contrary to the Act, and left the voting paper open for the husband's inspection.

That on the day of the election, the 26th Aug., the collector called at the house of the said Edward Richards for the voting paper, but was told it had been mislaid, and no voting paper was either tendered or sent in on behalf of Edward Richards.

That on the 27th Aug., the day for counting up the votes, and when under the before-mentioned circumstances no additional voting papers could have been either tendered or received, a relation of one of the candidates induced the said Edward Richards to go down with the voting paper, which had been found, to the office of the board of health, where it was produced before the chairman who was casting up the votes, and at the instigation of Mr. Thomas, who was appointed to assist the chairman in the conduct of the election, the words in red ink were written across the voting paper, and signed by the said Edward Richards, and witnessed by the said Mr. Thomas. Those words were: "I, Edward Richards, hereby certify that this paper was filled up and my vote recorded for Howell Williams without my knowledge or sanction. (Signed) Edward Richards."

That in recording the votes given at the said election, the voting paper of Edward Richards was not received or admitted by the chairman, as the same remained uncollected "through no fault of the chairman or the person appointed to receive the same." (11 & 12 Vict. c. 63, s. 26.)

That at the hearing of the said information the said Edward Richards swore that, although the words were read to him, and signed by him, the words were not his, and did not convey his real meaning.

The justices were of opinion that at the time the respondent so signed and attested the said voting paper, he bona fide believed that the wife had the authority of her husband (the said Edward Richards) to sign his name (which in point of fact she had), and that the respondent had no criminal or unlawful intention in witnessing her signature, and therefore dismissed the summons.

The following question is submitted for the consideration of this honourable court: Whether, under the circumstances above stated, the justices were bound to find the said John Hammett guilty of fabricating the said voting paper.

Given under our hands the 24th Feb. 1874.

(Signed)

A. DE RUTZEN.

D. E. WILLIAMS.

Pritchard, for the appellants.—Sect. 13, sub-sect. 5, of the Local Government Act 1858 (21 & 22 Vict. c. 98), enacts that, "If any person fabricates, in whole or in part, alters, defaces, destroys, abstracts or purloins any voting paper, or personates any person entitled to vote in pursuance of the Public Health Act 1848, or this Act, or falsely assumes to act in the name or on the behalf of any person so entitled to vote, or interrupts the distribution of any voting papers, or distributes the same under a false pretence of being lawfully authorised so to do, he shall for every such offence be liable, on conviction before two justices, to be imprisoned in the common gaol or house of correction for any period not exceeding three months, with or without hard labour." It is submitted that, on the undisputed facts of the case, the respondent

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was guilty of "fabricating, in whole or in part," a voting paper, within the meaning of this enactment, when he attested the mark of the wife as the signature of the husband, and put the husband's initials in the margin. [LUSH, J.—Is not the word "fabricate" used in a bad sense, meaning forgery? and to constitute a criminal offence must there not be a *mens rea*, which is distinctly negatived here?] It is submitted that that is not necessary here. In *Reg. v. Hartshorn and others* (6 Cox Crim. Cas. 395), the defendants had gone to the houses of voters who were marksmen, to assist in filling up the voting papers, and having obtained the express or implied consent of voters, or members of their families, filled up the papers with the proper names and marks of the voters, and put their own names as attesting witnesses, without obtaining the actual signatures or marks of the parties themselves. Crompton, J., said: "This does not amount to forgery, although it is undoubtedly an irregular proceeding. . . . It is possible that the irregularity committed may be indictable, as it is clear the statute intended that the voter should affix his mark *propria manu*, but the attestation in the mode adopted in this case is not forgery. There is no false statement implied, and the offence of the crime of forgery is making a false entry or signature, knowing it to be without authority, and with intent to defraud. As I have already stated, I am not at all sure that some proceeding might not have been framed to meet this case, but it is certainly not forgery." After this decision came the Act of 1858 (sect. 13, sub-sect. 5), meeting, it is submitted, this very case, and making a new offence. [LUSH, J.—Giving rather a summary remedy. MELLOR, J.—By the word "fabricate," the Legislature must have intended an act done *malâ fide*.] Where the doing of a thing is forbidden by statute, it is not necessary to show a guilty mind in order to prove the offence. In *Foulger v. Steadman* (26 L. T. Rep. N. S. 395; L. Rep. 8 Q. B. 65), a railway company having allowed cabs to stand on a thoroughfare belonging to the company, on payment of a weekly sum by the drivers, a particular cab driver, not being one of those who paid, stood his cab in the thoroughfare, and refused to leave when requested on behalf of the company so to do, and this court held that he was a wilful trespasser, within 3 & 4 Vict. c. 97, s. 16. "We think," said Blackburn, J., "that if a man does intentionally and purposely stay on the railway premises after being requested to leave, he commits a wilful trespass, within sect. 16 of 3 & 4 Vict. c. 97, although he fancies that he is entitled to remain upon the premises because other drivers are allowed to put their cabs upon the stand, pursuant to certain terms. If there had been a *bond fide* claim of a right, which upon the evidence adduced could exist at law, the alderman would have been bound to hold his hand; but here the defence only amounted to this, that the respondent believed he had a right to stand his cab upon ground which was the premises of the company, without their leave. This does not prevent the respondent from being a wilful trespasser."

B. L. Williams, for the respondent, was not called upon.

MELLOR, J.—I am clearly of opinion that the magistrates were right in the view they took of this case. It is sought to make a man a criminal for doing an act without sufficient authority, whilst it is found that he believed he had authority to do

what he did. The magistrates, in fact, find that he had no guilty intention of any kind. The wife of the voter had actual authority to sign the voting paper for him, and thought that she was acting according to law in what she did. It is said, however, that in attesting the wife's signature and putting the voter's initials in the margin, the defendant "did fabricate a voting paper," within the meaning of the Act. But when we come to consider what the Legislature intended to constitute an offence under the Act, it is clear that what was in their contemplation was the case of a man doing what he knows is not right. The magistrates have found the contrary of that here, and their finding on the fact is binding on us. If the facts of the case are stated correctly, the respondent was guilty of no offence within the meaning of this Act of Parliament, for I think he did not fabricate, in whole or in part, a voting paper within the meaning of the Act. The section of the Act is this: "If any person fabricates, in whole or in part, alters, defaces, destroys, abstracts, or purloins any voting paper, or personates any person entitled to vote in pursuance of the Public Health Act 1848, or this Act, or falsely assumes to act in the name or on the behalf of any person so entitled to vote, &c., he shall for every such offence be liable, on conviction before two justices, to be imprisoned, &c." All the words used there import a criminal intention, a *mens rea*, and without a *mens rea* you cannot make out that there is an offence under the statute. The magistrates were therefore quite right in their decision.

LUSH, J.—I am of the same opinion. We are not called on to determine whether this was such a vote as ought under the circumstances to have been received, but whether the respondent was guilty of fabricating the voting paper; and I am clearly of opinion that fabricating imports the knowingly doing a wrongful act, and that the respondent was not guilty of that act here.

QUAIN, J.—I am of the same opinion. I think that fabricating means something false and fraudulent, and that, unless the facts show that the person knew that he was doing wrong, there is no offence within the Act of Parliament.

Judgment for the respondent.

Attorneys for appellants, *Rickards and Walker*, for *Gery*, *Aberdare*.

Attorneys for respondent, *Purkis and Perry*, for *Phillips*, *Aberdare*.

Saturday, Jan. 23, 1875.

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Metropolitan magistrates—Jurisdiction—Having or conveying suspected property—Arrest in a house—2 & 3 Vict. chapters 47 & 71.

The defendant was seen in a metropolitan street to stealthily produce an empty bag from under his jacket, place it under the legs of the coachman of a brougham, and with his assistance take instead a bag full of oats, which he carried off on his shoulder. The coachman immediately drove rapidly off. A police constable was told of what had occurred, and his attention was called to the defendant and his burden. He followed, but came up only after the defendant had entered his own house, when the constable arrested him.

Held, that the conviction of the defendant by a magistrate under the Metropolitan Police Courts

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Act, 1830, s. 24, for having in his possession these oats which were then and there suspected of being unlawfully obtained, was under the circumstances right.

On an appeal made by the defendant, Edward Fisher, under 2 & 3 Vict. c. 71, s. 50, against a conviction for misdemeanour by one of the magistrates of the police courts of the metropolis, dated the 27th Nov. 1872, which came on to be heard by the General Quarter Sessions of the Peace holden in and for the county of Middlesex on the 25th Jan. 1873, the court affirmed the said conviction subject to the opinion of the Queen's Bench on the following case:

The conviction took place under the Police Act, 2 & 3 Vict. c. 71, s. 24, for having on the 20th day of Nov. 1872, at the parish of St. George, Hanover-square, in the county of Middlesex, in his possession thirty pounds weight of oats, which oats were then and there suspected of being unlawfully obtained, and the said Edward Fisher not giving a satisfactory account how he came by the said oats, the said magistrate, pursuant to the said statute in such case made and provided, deemed the said Edward Fisher guilty of a misdemeanour, and adjudged him for the said offence imprisoned in the House of Correction at Cold Bath Fields in the said county and district, and there kept to hard labour for the space of thirty-two days.

On the morning of the 20th Nov. 1872, a brougham was driven into Churton-street, Pimlico, in the metropolitan police district, and there drew up. The said Edward Fisher went up to it, unbuttoned his jacket, and produced an empty bag, which he placed under the legs of the coachman, who was sitting on the box of the said brougham, and had raised the leather apron in front of him to facilitate the act of Fisher. He then walked to the end of the street, looked up and down, and returned to the said brougham and took from under the said coachman's legs a bag full of oats, weighing 30lb. He took the bag of oats on his shoulder, and went off as quickly as he could. The coachman then drove the brougham away at a very rapid pace.

The attention of Henry Whittingham, a police constable of the Metropolitan Police, was called to the fact by a person who had seen what took place between Fisher and the coachman. At that time Fisher was carrying the bag along a street leading out of Churton-street. The constable was about 150 yards away from him, and having followed him for about 200 yards, and reduced the distance between them to a dozen yards, he saw him enter his (Fisher's) own shop, which was a grocer's shop, with dwelling house, in which Fisher lived. The police constable followed to the door of the said shop of the said Edward Fisher who came forward; the constable asked him whether a man had entered with a parcel? Fisher at once replied, "Yes, I'm the man; that's all right, sir, I received it from a coachman;" and he further said, in answer to the constable, "that he didn't know the coachman's name."

The constable took possession of the bag which Fisher, before the constable entered, had put down in a corner at the back of the said shop. The constable then took Fisher into custody.

Fisher was subsequently brought before the said magistrate, and was charged under the said 24th section with having in his possession the said oats,

which were reasonably suspected of being unlawfully obtained.

The foregoing facts were proved before the magistrate, and Fisher was then called upon to give an account of how he came by the said oats, and he thereupon said, "I received them from a friend of mine; I don't know his name; he says, I have a bit of corn if you like it; he says, you can give me a little tea or coffee for it. I've given him things before for corn, and lent him a little money."

The magistrate deemed this to be an unsatisfactory account and committed Fisher, and ordered him to be imprisoned and kept to hard labour for 32 days.

On the hearing of the appeal at the sessions, the same facts were proved.

It was contended on behalf of Fisher that the magistrate had no jurisdiction to commit him under sect. 24 of 2 & 3 Vict. c. 71, because he was arrested with the oats in his possession in his own house, and was not arrested under 2 & 3 Vict. c. 47, s. 66. It was also contended that as the mode in which the oats came into his possession was known and proved, he could not be convicted under sect. 24, and that such section did not apply to a case like the present, where the oats were actually stolen; and that the magistrate ought not to have summarily convicted Fisher, but have sent him to the sessions to be tried by a jury.

The magistrate and Court of General Quarter Sessions were of opinion that the case was within the provisions of the Act, and confirmed the conviction with costs.

The question for the opinion of this court is, whether the Court of Quarter Sessions was right in law in affirming the said conviction. If the court shall answer this question in the affirmative, the order of the sessions is to be affirmed with costs; if in the negative, such order and conviction are to be quashed.

Tickell argued in support of the conviction.—The section upon which the magistrate acted is 2 & 3 Vict. c. 71, s. 24: "That every person who shall be brought before any of the said magistrates, charged with having in his possession, or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanour." By *Hadley v. Parks* (14 L. T. Rep. N. S. 325; L. Rep. 1 Q. B. 444), the case upon which the defendant's objection was based, it was held that this section was supplemental only to sect. 66 of 2 & 3 Vict. c. 47, "That any person found committing any offence punishable either upon indictment or as a misdemeanour, upon summary conviction, by virtue of this Act, may be taken into custody without a warrant by any constable, or may be apprehended by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or by any person authorised by him, and may be detained until he can be delivered into the custody of a constable to be dealt with according to law; and every such constable may also stop, search, and detain any vessel, boat, cart, or carriage, in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found, and also any person who may be reasonably suspected of having or conveying in any manner any-

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thing stolen or unlawfully obtained; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed with respect to such property, or that the same or any part thereof has been stolen or otherwise unlawfully obtained, is hereby authorised, and, if in his power, is required to apprehend and detain, and as soon as may be to deliver such offender into the custody of a constable, together with such property, to be dealt with according to law." *Hadley v. Parks* also decided that those two sections apply only to possession in the streets, and not to possession in a house; but in that case the defendants were never seen to be in possession of the suspected goods in the street at all, as the defendant here was seen, but in a house only. This defendant was reasonably suspected of conveying goods unlawfully obtained in the very words of both the sections, and therefore the authority does not apply. [Stopped by the Court.]

Poland (with him *Mead*) for the defendant.—A constable has no authority under these two sections to enter a house and arrest a man there on suspicion of unlawful possession; and if he exceeds his authority by doing so, *Hadley v. Parks* decides that the magistrate has no jurisdiction. The 25th section of the 2 & 3 Vict. c. 71, is that which applies to the circumstances of this case, "That if information shall be given on oath to any of the said magistrates that there is reasonable cause for suspecting that anything stolen or unlawfully obtained is concealed or lodged in any dwelling-house or any other place, it shall be lawful for such magistrate, by special warrant under his hand directed to any constable, to cause every such dwelling-house or other place to be entered and searched at any time of the day, or by night if power for that purpose be given by such warrant; and the said magistrate, if it shall appear to him necessary, may empower such constable with such assistance as may be found necessary, such constable having previously made known such his authority, to use force for the effecting of such entry, whether by bursting open doors or otherwise, and if upon search thereupon made any such thing shall be found, then to convey the same before a magistrate, or to guard the same on the spot until the offenders are taken before a magistrate or otherwise dispose thereof in some place of safety, and moreover to take into custody and carry before the said magistrate every person found in such house or place who shall appear to have been privy to the deposit of any such thing, knowing or having reasonable cause to suspect the same to have been stolen or otherwise unlawfully obtained." By the following section the magistrate may then convict of a misdemeanour, but that can only be when the defendant has been arrested in a house upon a special warrant. [BLACKBURN, J.—The defendant's case would be admittedly within sect. 24, if the constable had arrested him outside his door; how can the magistrate's jurisdiction be affected by the constable's trespass?] It has been laid down in *Hadley v. Parks*, that a magistrate has jurisdiction under sect. 24 of the Act, c. 71, only when the person charged is arrested under sect. 66 of the Act, c. 47. Another question is whether a magistrate can convict on this charge when the mode by which the defendant obtained possession of

the goods is known. It then becomes a matter for a jury to decide, and the magistrate could only commit for trial.

BLACKBURN, J.—The defendant's contention seems to me to be quite untenable. He has done what by the very words of the 24th section is made a misdemeanour.

LUSH, J.—I am of the same opinion.

Conviction affirmed.

Attorneys for prosecution, *Allen and Son*.

Attorney for defence, *W. D. Smyth*.

Wednesday, Jan. 27, 1875.

REG. v. VINE.

Beerhouse licence—Disqualification—"Person convicted of felony"—Construction of statute—Retrospective operation—Wine and Beerhouse Act Amendment Act 1870 (33 & 34 Vict. c. 29), s. 14.

Sect. 14 of the Wine and Beerhouse Act Amendment Act 1870 (33 & 34 Vict. c. 29) provides that "every person convicted of felony" shall be disqualified from selling spirits by retail, and makes any licence held by such person void.

Held by Cockburn, C.J., and Mellor and Archibald, J.J. (Lush, J. dissenting), that the section had a retrospective operation, and applied to a person convicted before the passing of the Act, so as to make a licence held by him void.

JAMES VINE was the appellant, and the Justices of the borough of Leeds were the respondents. *Tenant* had obtained a rule calling on the prosecutors to show cause why the order of sessions stated in paragraph 8 of the case set out below should not be quashed for the insufficiency thereof.

The following was the case stated for the opinion of the Court of Queen's Bench.

1. The Fox and Grapes is an old established inn situate in the borough of Leeds, and in 1873 one James Edward Saville Theaker became by transfer the holder of licences under 9 Geo. 4, c. 61, and subsequent statutes amending the same, by which he was empowered to keep the said inn, and therein to sell exciseable liquors by retail to be consumed on the premises.

2. The said licences to the said Theaker were duly renewed at the general annual licensing meeting in 1873.

3. In Jan. 1865 the said Theaker was convicted of felony, and was then sentenced to and suffered three months' imprisonment with hard labour. The fact of such conviction was first known to the authorities of the borough and the owners of the said inn in the month of November 1873.

4. Thereupon the appellant James Vine became tenant of the said inn, and in Feb. 1874 applied to the justices of the said borough for the transfer to him of the licences held up to that time by the said Theaker.

5. The said justices refused the application, on the ground that such licences were void by reason of the conviction for felony of the said Theaker.

6. The said appellant duly appealed to the Court of Quarter Sessions for the West Riding of Yorkshire against such refusal.

7. Upon the hearing of the appeal it was contended on the part of the appellant, and denied on the part of the respondents, that the licences held by the said Theaker were subsisting at the time of the application to the justices by the

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appellant, and that the statute 33 & 34 Vict. c. 29, s. 14 applied to only to persons convicted of felony after that passing of the Act.

8. The Court of Quarter Sessions dismissed the appeal, upon the ground stated by the justices of the borough; but for the purpose of giving full effect to the judgment of the Court of Queen's Bench, in case it should be in favour of the appellant, they directed by, and with the consent of the parties, that the transfer should be granted, but that the licence should be lodged with the clerk of the peace, and the house not be opened unless, and until the Court of Queen's Bench should decide in favour of the appellant.

9. The question for the opinion for this court is, whether the said licences so held by the said Theaker were or were not void by reason of his said conviction for felony.

10. If the court is of the affirmative opinion, the order of the Court of Quarter Sessions is to stand, otherwise such order is to be reversed, and judgment given for the appellant, James Vine.

Maule, Q.C. (Wilberforce with him), for the respondents, showed cause against the rule.—The question depends upon the interpretation of the Wine and Beerhouse Act Amendment Act 1870 (33 & 34 Vict. c. 29), s. 14. That section provides that "every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid; and if any person shall after having been so convicted, as aforesaid, take out or have any licence to sell spirits by retail, the same shall be void to all intents and purposes; and every person who after being so convicted as aforesaid, shall sell any spirits by retail, in any manner whatever, shall incur the penalty for doing so without a licence." The words "every person convicted" in the above section must be taken to mean every person who has been at any time convicted, or who shall be convicted hereafter; and therefore the licences held by Theaker were void in consequence of his conviction. The object which the Legislature had in view in passing this enactment was not the punishment of persons who were guilty of felony, but the protection of the public by taking every precaution to ensure that houses of public entertainment should be kept by none but persons of good character.

The Court called on.

Poland and Tennant for the appellant in support of the rule.—The Act applies only to persons convicted after it was passed; otherwise it would apply to the holder of a licence at the time of the passing of the Act, for it makes a licence held by a convicted person void; and it is unlikely that the Legislature intended it to apply to such a case, for where a man is in the possession of a licence it is to be supposed that the magistrates have inquired into his character. Suppose the holder of a licence at the passing of the Act had been convicted of manslaughter when he was a boy for carelessly throwing a stone which accidentally caused death, and sentenced to one day's imprisonment; it is a startling proposition to say that the section would apply to such a case. The value of property might be much deteriorated and the public put to great inconvenience by such an interpretation of the section for a house licensed for the public convenience might have been shut up for nearly a year. 9 Geo. 4, c. 61, ss. 4 and 14, as to transfers of licences

at special sessions, would not apply, and [See 37 & 38 Vict. c. 49, s. 15 (30th July 1874)] a fresh licence could not have been obtained for the house until the general annual licensing meeting. The rest of the section shows that its operation is intended to be prospective. [COCKBURN, C.J.—In 3 & 4 Vict. c. 61, s. 7 the words used are "Every person who shall hereafter be lawfully convicted of felony." That Act relates to the sale of beer, and similar words are to be found in the Act, relating to refreshment houses (23 Vict. c. 27, s. 2). The intention must have been to apply the same rule to the case of spirits, which can only be done by reading this section prospectively. The words, "who shall hereafter be" were probably omitted for the sake of brevity. The rule of construction is thus stated in Broom's Legal Maxims, p. 34 (5th edit.): "Every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be deemed retrospective in its operation, and opposed to sound principles of jurisprudence;" and at pages 37 & 38 the observations of Parke and Rolfe, BB. in *Moon v. Durdan*, 2 Ex. 22, are cited in support of this view. The judgment of Erle, C.J. in *The Midland Railway Co. v. Pys* (10 C. B., N. S., at page 191), is a strong authority to the same effect. He says there: "Wherever it possible to put upon an Act of Parliament a construction not retrospective, the courts will always adopt that construction."

LUSH, J. not having been in court during the whole of the argument,

Maule, Q.C. was called on to reply.—The intention of the Legislature is to be collected from the language employed. There is nothing to limit the operation of the words used here, and according to its plain grammatical meaning the expression "every person convicted" must include all persons convicted at any time. The words of future operation which occur in 3 & 4 Vict. c. 61, s. 7, are omitted in 33 & 34 Vict. c. 29, s. 14, while in other respects the language of the former section is closely followed in the latter. It seems clear that this alteration was made not for the sake of brevity, but deliberately, for the express purpose of giving a different effect to the section.

COCKBURN, C.J.—I am of opinion that the rule should be discharged. I feel myself bound by the language which the Legislature have used in sect. 14 of the Wine and Beerhouse Act Amendment Act 1870 (33 & 34 Vict. c. 29). The question is whether upon the words of that section, a person who has been convicted of felony before the passing of the Act becomes disqualified from holding a licence for the sale of spirits, and I think he does. If it could be seen that the intention of the Legislature was to aggravate the punishment of persons convicted of felony, I should feel strongly the force of Mr. Poland's argument; but the purpose of this enactment is not to punish the felon, but to protect the public from having houses of public entertainment kept by a class of persons likely to prove injurious to society. It is true it may be that the felony is of such a comparatively venial nature as not to affect the character of the person convicted, as for instance in some cases of manslaughter by negligence; and there seems to be no reason in such a case why a man should not afterwards hold up his head among his fellows,

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and be looked upon as a person of good character. and fit to keep a house of public entertainment. But the Legislature have thought otherwise, and have drawn what Mr. Poland appropriately called a hard and fast line. The intention is that places of this kind shall be kept by persons of good character, and for the protection of the public it matters nothing whether the offence was committed before or after the passing of the Act. We must look and see what mischief the Act was intended to remedy; it would seem to import that the Legislature intended to protect the public against persons who had committed crimes in the past, as well as against those who might do so in the future. The words "every person convicted of felony" are large enough to bear this interpretation; they are equivalent to, and synonymous with, "every convicted felon." Supposing a man who had been convicted of felony prior to the passing of the Act were to apply to the magistrates for a licence, would they be justified in granting it? The answer is that the applicant was convicted of felony; it would be a strong thing to say, "You are a convicted felon, but you were convicted before the passing of the Act, and therefore you are to have a licence." The only question which magistrates can determine in a case arising under this section is whether the person is a convicted felon; if he is, he is disqualified. In the preceding Acts the language is different; it points to the future, and operates only in cases of future convictions. It is suggested that the drawer of this Act was only attempting to remedy the tautology which is too common in Acts of Parliament; but he appears to have carefully omitted the very words which restricted the operation of the former Acts, and so to have made the words of this Act applicable to convictions before its passing. We have been pressed with the hardship which may be entailed upon a man who has obtained a licence in being cut short of his living, because under this section the licence would be null and void; but the Legislature might have made an exception, and we have only to look at the precise language used. I think the right decision in this case is that under 33 & 34 Vict. c. 29, s. 14 the licence was null and void.

MELLOR, J.—I am of the same opinion. I do not wish to exclude the general rules which have been cited as to the mode in which Acts are to be construed, but these rules must be considered with reference to the particular Acts to which they have been applied, and the particular cases in which they have been laid down. The general policy of the Legislature in these Acts, which are all restraints upon the liberty which every person ordinarily possesses to carry on what trade he pleases, is to ensure that public-houses shall be kept by persons of good character; there are provisions with that object in all of them. It is clear that the Legislature were legislating here with the view that, instead of its being necessary to inquire fully into character in these cases, it should be sufficient to show a conviction for felony, after which there should be no further inquiry. The class of convicted felons is disqualified; it is supposed that their characters are tainted; they are supposed to have acquired habits which are mischievous to society. And where a man has been convicted before the passing of the statute his character is as much tainted as where he has been convicted after; the reason applies as strongly in the one case as in the other. It is not a matter

of punishment, but of the protection of the public. According to the natural interpretation, if we had never heard of the contention as to prospective and retrospective construction, any person reading the statute would say that it was intended to include every member of the convicted class. I concur with the opinion of my Lord that the order of sessions ought to stand.

LUSH, J.—I am sorry that I cannot concur with the other members of the court, and I feel some diffidence in expressing an opinion contrary to theirs, but I cannot bring my mind round to adopt their view. I fail to collect from 33 & 34 Vict. c. 29, s. 14 any intention that the Act should have a retrospective effect, and that the moment it received the Royal Assent every person who had at any time been convicted of felony should at once forfeit his licence, lose his means of living, and become liable to penalties for selling spirits, which up to that moment he had been entitled to sell. This is a penal Act and causes a forfeiture, and it is an established canon of construction that statutes working disabilities are to be read liberally unless the intent is clear. The words are "Every person convicted of felony," and this may be read to mean every person who *shall be* convicted, or every person who *has been* convicted; the meaning is ambiguous, and there is nothing in the after part of the section to throw any light upon it. The subsequent words afford no assistance, and the words of the first clause are equally capable of either interpretation; this is the very case in which the canon of construction comes in. That would have been my view even if this Act had stood alone; but we have two other Acts 3 & 4 Vict. c. 61, relating to the sale of beer, and 23 Vict. c. 27, relating to wine and refreshment houses, in both of which the word "shall" occurs in the corresponding clause. It is reasonable to suppose that the Legislature, having made conviction a disqualification, first as to the sale of beer, and afterwards as to the sale of wine, thought that the same class of persons already disqualified in these cases, should not be allowed to sell spirits; this seems probable if we read 33 & 34 Vict. c. 29, s. 14 by the light of the other Acts. It has been argued that the person who drew the Act struck out the words "who shall be" and "hereafter" purposely, but the intent is a matter of speculation; it may be that the enactment was intended to be condensed, and the words were struck out because they were thought superfluous. If the intent had been to contrast this provision with those in the former statutes, it would have been expressed by the use of the words "shall have been." Even looking at the clause standing alone, I find no words otherwise than future.

ARCHIBALD, J.—I am of the same opinion with my Lord and my brother Mellor. I agree that if this were simply a penal statute we should give it a liberal interpretation, unless the language were clear; but it was passed with a view to public and social order, and not in aggravation of the penalties of felony. If the words had been "every convicted felon," that would have led me to the conclusion that they were retrospective as well as prospective; and the words which are used are in effect the same. As to the inference to be drawn from the previous legislation I come to a different conclusion from my brother Lush; the language of the former Acts was clearly prospective, and I think that the

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alteration was made with the object of making this clause retrospective. I should come to the conclusion that the Legislature was under the impression that the former legislation was not sufficiently strong, and that this was the very reason for the alteration in the words of the clause.

Rule discharged; judgment for the respondents.

Attorneys for appellant, *Massey, Taylor, and Hales*, for J. G. Turner, Leeds.

Attorneys for respondents, *Simson and Co.*

Saturday, Jan. 30, 1875.

(Before COCKBURN, C.J., and BLACKBURN and MELLOR, J.J.)

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Criminal practice—Change of place of trial—View.

Where it appears to be necessary for the purpose of a criminal trial that the jury should have a view of premises situated in a different county from that in which the offence was committed, this is sufficient reason for ordering the trial to take place in such county.

In this case a rule had been obtained on behalf of the defendant, calling on the prosecutor to show cause why the trial should not take place at the Warwick instead of at the Worcester Assizes, on a suggestion that a fair and satisfactory trial could not be had in the county of Worcester.

The defendant was charged with perjury, alleged to have been committed in an affidavit sworn in answer to certain interrogatories in an action in which he was defendant and the prosecutor was plaintiff.

The action was brought for trespass in building a wall, which the prosecutor alleged was built partly on his property. The premises were situated in Warwickshire, and the defendant resided in that county, near the borders of Worcestershire; but, in consequence of there being no commissioner to administer oaths where the defendant lived, the affidavit in answer to the interrogatories was sworn at Shipton-on-Stour, within the borders of the county of Worcester.

The statements on which perjury was assigned related to the position of the new wall built by the defendant, with regard to the foundations of an old wall and a "miskin," or mauve pit, on the premises of the prosecutor. The cause had been referred to arbitration, and the arbitrator had considered it necessary that he should have a view of the premises.

The grand jury of Worcestershire had found a true bill for perjury against the defendant, and the indictment had been removed into the Queen's Bench by *certiorari*, and was to be tried on the Civil side at the assizes. The rule had been obtained for the purpose of enabling the jury to have a view of the premises.

Huddleston, Q.C. (*Nash* with him) showed cause.—In order to entitle the defendant to have the place of trial changed, it must be shown that a fair and impartial trial cannot be had in the county in which the offence is alleged to have been committed; it is not sufficient to show that it is more convenient that the trial should take place in another county. There is an Irish case, *Reg. v. Cavendish* (2 Cox

Crim. Cas. 175), where the Court of Queen's Bench refused to order a suggestion to be entered on the roll to change the place of trial in an information for libel, on the ground of inconvenience and difficulty in securing the attendance of the defendant's witnesses. Crampton, J., there said: "A suggestion to change the place of trial in a criminal case is only entered on the roll on the ground that a fair trial cannot be had at the place originally selected." *Clerk v. The Queen* (5 L. T. Rep. N. S. 66; 9 H. of L. Cas. 184) is also an authority for this proposition. [BLACKBURN, J., referred to the form of the entry of the suggestion in *Reg. v. Hunt* (3 B. & A. p. 448).] If the court holds that a fair trial cannot be had without a view, there is no doubt a difficulty in opposing the rule, but the only ground on which it is supported is the necessity for a view, and the prosecutor's affidavit states that the foundations of the old wall have been removed since the place was viewed by the arbitrator. [BLACKBURN, J.—Might not the view be material with regard to the question whether the defendant's statement was a mistake, or wilfully false?] There is an anonymous case (6 Jur. 131), to the effect that, if the venue is changed, it ought to be changed to some place on the same circuit. [BLACKBURN, J.—Where a view is required it must be changed to the county where the premises are situated, if changed at all.] It is shown on the affidavits that considerable prejudice exists in Warwickshire.

Mellor (*Lockwood* with him), in support of the rule.—It has been conceded that the power to change the place of trial exists, and the only question is, does the court think a view necessary? The prosecutor could have laid the venue in Warwickshire (under 7 Geo. 4, c. 64, s. 12); for the place where the affidavit was sworn is within the distance of 500 yards from the boundary of the two counties. [He was stopped by the court.]

COCKBURN, C.J.—It is entirely owing to the accidental circumstance that there was no commissioner to administer oaths at the place where the defendant lived, which obliged him to go to Shipton to find one, that the venue in this case is, technically speaking, in Worcestershire. It may turn out that the view is unnecessary, but that is a question which we cannot try here on affidavits. If the *locus in quo* had been situated in Worcestershire, or if the affidavit had been sworn in Warwickshire, the jury could have had a view; it is much more convenient that they should have one, and the rule must be absolute.

BLACKBURN, J.—I am of the same opinion. I cannot doubt that the existence of the necessity for a view is as material as the fact of the jury being likely to prove partial.

MELLOR, J.—I am of the same opinion.

Rule absolute.

Huddleston, Q.C.—I am instructed to ask for costs. The defendant has come here to ask for a favour.

Per CURIAM.—The costs of the motion are to be costs in the cause.

Attorneys for the prosecution, *Chorley and Crawford.*

Attorneys for the defendant, *Hoare, Taylor, and Cooke.*

[NOTE.—The defendant has since been tried before Amphlett, B., at the Warwickshire Spring Assizes, and acquitted.]

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COURT OF COMMON PLEAS.Reported by **ETHELINGTON SMITH** and **J. M. LELY Esqs.**
Barristers-at-Law.

Jan. 18 and 19, 1875.

CHEETHAM v. THE MAYOR, &C., OF MANCHESTER.*Exercise of statutory powers by a corporation—Dangerous structures—Certificate of surveyor conclusive—Act of the corporation—Ratification—Building.*

By a local Act, the corporation of a city by the council were thereby empowered to carry the Act, and the several powers thereof into execution. Another section said that if any summons, demand, or notice, required authentication by the corporation, the signature of the town clerk thereto, should be a sufficient authentication. Among other things it was also enacted that "If the surveyor of the city should certify in writing that there is imminent danger from any building, the corporation shall and may, without any presentment, notice, or other formality, cause the same to be taken down." The plaintiff was the occupier of two houses, between which communications had been made, and which were in effect one set of business premises, and were so occupied by him, though they were numbered as in different streets, and were separately rated.

Held: First, That the surveyor's certificate was conclusive as to the state of the building described in it at the time it was given, and that the corporation were not only protected in acting, but were bound to act upon it, and that the facts upon which such certificate was based could not afterwards be examined into. Secondly, That a written direction of the town clerk, purporting to be given in the name of the corporation, though without consulting them, to the surveyor upon receipt of his certificate, directing him to take the building down, was the act of the corporation; and the employment and payment of workmen by the corporation to do this was an absolute ratification, if such were needed, of the act of their agent. Thirdly, That a notice given to the plaintiff of the dangerous condition of his houses, describing them as a "building," and by the number and name of one street only, was a sufficient description for identification, and to justify the corporation in dealing with all the premises under the powers of their Act.

This was an action brought by the plaintiff to recover damages for injury alleged to have been caused to certain houses, shops, fixtures, furniture, and stock-in-trade, by acts done by the defendants in the alleged execution of powers given to them by two Acts of Parliament, viz., 7 & 8 Vict. c. 40 (The Manchester Police Act 1844) and 30 & 31 Vict. c. 36 (The Manchester Corporation Waterworks and Improvement Act, 1867). The case came on for trial before the late Mr. Justice Willes and a special jury at Manchester, on 3rd Aug. 1872, when by consent the jury found a verdict for the plaintiff, subject to the decision of the court on a special case. The following are the portions of those paragraphs of the case necessary for the comprehension of the arguments and judgments:

1. The plaintiff is a wholesale stationer, and was possessed of three houses and shops situate together in a block, being respectively No. 95, No. 97, and No. 99, Market-street. He occupied No. 95 for the purposes of his business.

2. The defendants are the Mayor, &c., of the City of Manchester, and they possess certain powers for the government and regulation of the city given to them by the two Acts aforesaid.

The case then sets out sects. 1, 2, 13, 58, 59, and 280 of the 1844 Act, and sects. 4, 5, 38, 39, 49, and 51 of the 1867 Act.

Sect. 38 is as follows:

In addition to the powers conferred by sect. 59 of the Manchester Police Act, 1844, the corporation may, either before or after a presentment under that section, cause any building which they may consider dangerous to be watched or guarded by the police or otherwise; and if the surveyor of the city, or, in his absence, any other duly qualified surveyor shall certify, in writing, that there is imminent danger from any building, the corporation shall, and may, without any presentment, notice, or other formality, cause the same to be taken down, either wholly or in part, or to be repaired or secured in such manner as the corporation shall think requisite.

Sect. 39. All charges incurred by the corporation under the Manchester Police Act 1844, or under the preceding section, shall and may, in addition to the remedies provided by that Act, be recoverable as a penalty under the same Act, or by action in any court of competent jurisdiction.

Sect. 51.—Any order or resolution of the corporation or of the council of the city, and any notice, &c., given in exercise of the powers of this Act, shall be sufficiently authenticated by the name of the town clerk being affixed thereto in print, lithograph, or writing.

3. At the times hereinafter mentioned J. G. Lynde was the surveyor, and Sir Joseph Heron the town clerk, of the City of Manchester.

4. On the 13th July J. G. Lynde certified to the defendants that there was imminent danger from Nos. 97 and 99.

5. Thereupon the town clerk delivered a direction signed by him to the city surveyor, directing him to cause the building mentioned in his certificate to be secured, &c.

6. On or about the same day, Lynde gave notice to the plaintiff that he had certified as above, and proposed that the plaintiff should employ his own men in taking down the front wall. The plaintiff refused.

7. After receiving the direction, J. G. Lynde caused the said building to be taken down in part, and secured as he thought requisite. He selected, at the request of the plaintiff, one Maud to perform the work, and Maud was employed thereon by the defendants, under the directions of Lynde.

8. On the 11th Aug. Maud's bill was paid by the plaintiff, by the direction of the defendants.

9. Afterwards the building fell. I find that the fall of the building was not due to any negligence on the part of the defendants, or of any person in their employment.

10. After the fall of the said building, J. G. Lynde on the 29th Aug. certified to the defendants that there was imminent danger from the aforesaid house, No. 95, Market-street, in a similar certificate. The building was described as follows: "All that building situate in, and being No. 95, Market-street, and belonging, or reputed to belong to Mr. James Cheetham."

11. Thereupon on the same day the town clerk delivered a direction signed by him to the said city surveyor, similar to the direction in paragraph 5.

12. Afterwards, on the same day, J. G. Lynde delivered to the plaintiff a notice, of which the following is a copy:—

City Surveyor's Office,
29th Aug. 1870.

Mr. James Cheetham.

Sir,—I have to inform you that I have this day certi-

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fed that there is imminent danger from the building described in the schedule hereto, and that the same will be forthwith taken down, either wholly or in part, or be repaired or secured in such a manner as I may think requisite, at your expense.—I am, Sir, yours respectfully,
J. G. LYNDE,
City Surveyor.

The schedule above referred to.
Shop No. 95, Market-street.

13. After receiving the direction last mentioned J. G. Lynde caused such part as he thought necessary to be taken down. He selected a builder of experience to perform this work, who was employed thereon by the defendants under his directions.

14. In Feb. 1871 the defendants recovered the charges incurred by them in taking down in part the said building, No. 95, from the plaintiff.

15. Evidence was produced by the plaintiff and by the defendants, but I declined to insert in the case any findings on the state of the buildings at the times of making of the aforesaid certificates.

16. The directions to the city surveyor were not made at any meeting of the council, or of any committee appointed by the council, nor is there any resolution delegating power to the town clerk to make such directions.

17. The house and shop described by the plaintiff in his declaration and particulars of demand as No. 95, Market-street, was a corner house, situate at the junction of Market-street with Palace-street. The plaintiff included under the above description two houses of different original structure; one an original, No. 95, Market-street, the other a house No. 2, Palace-street, which at some time before had been built against the back wall of the original No. 95, with the front to Palace-street, which two houses had been converted by the plaintiff into one set of business premises.

The front door of the house in Palace-street had on it the No. 2, meaning thereby No. 2, Palace-street, and the plaintiff was rated in respect thereof as a separate tenement from No. 95, Market-street.

The case then describes various internal communications made between the two houses on every floor, and the walling up and cutting away of two staircases.

On the 29th Aug. 1870 before certifying, J. G. Lynde inspected the whole of the above set of business premises. His attention was not called to there being any distinction between No. 95 and No. 2.

18. The court is to be at liberty to draw inferences as a jury from the evidence set out in the case.

The questions for the court are, first, whether the certificates of the 13th July 1870, and of the 29th Aug. 1870, were a sufficient justification to the defendants for the execution in regard to the buildings mentioned therein respectively of the powers given to them by the aforesaid Acts of Parliament. If the court shall be of opinion that this question is to be answered in the affirmative, then the court is asked the following second question; but if the court shall be of opinion that this question is to be answered in the negative, then it is agreed that the case is to come back to me to find whether at the times of the making of the said certificates there was imminent danger from the buildings mentioned in them respectively; but if the court shall be of this opinion, the court is asked to assume, for the purpose of this case, that

at the times of the making of the said certificates there was such imminent danger as therein alleged, with a view of obtaining in both events the decision of the court upon the following second question. Secondly, whether the acts done by the defendants in respect of the buildings mentioned in the aforesaid certificates, or either of them, were a lawful execution in respect thereof of the powers given to them by the aforesaid Acts of Parliament. If the court shall be of opinion that this question is to be answered in the affirmative, then the following question is submitted to the court. Thirdly, whether the certificate of the 29th Aug. 1870, was sufficient to cover the aforesaid No. 2, Palace-street, so as to afford a justification to the defendants for the execution in respect thereof of the powers given to them by the aforesaid Acts of Parliament.

The *Solicitor-General* (*Baylis* with him) for the plaintiff.—If the certificate of the surveyor be absolutely conclusive and indisputable, and no evidence may be given that he was mistaken as to the facts on which he based his judgment, then his powers are enormous; for it is to be observed that by the Act, not only the city surveyor, but in his absence any qualified surveyor may say that a building is in imminent danger, pull it down at a moment's notice, and charge the expense on the owner. There is no guarantee of a qualification. [Lord COLERIDGE, C.J.—Suppose the surveyor to be absent, is a house to be allowed to fall down, and endanger the public?] No, but the owner ought to have some power of objecting. It would have been so easy had it been so intended to have said in the Act that the certificate shall be conclusive. [KEATING, J.—The Act would be a dead letter if every question could be reopened.] Surely after the public safety is secured an owner should be entitled to satisfy a court or a jury that there were not sufficient grounds for the action of the surveyor. There are cases showing that though the language in Acts of Parliament be absolute, yet it is to be read subject to the qualification that parties shall not be deprived of their rights:

St. George, Hanover-square v. Sparrow, 10 L. T. Rep. N. S. 504; 16 C. B., N. S., 209;

Simpson v. Smith, 24 L. T. Rep. N. S. 109; L. Rep. 6 C. P. 87.

[Lord COLERIDGE, C.J.—There was a case in which the Queen's Bench refused to follow the decision of this court.] That was *Bauman v. The Vestry of St. Pancras* (L. Rep. 2 Q. B. 528). It is commented on in *Simpson v. Smith* (*ubi sup.*), and this court adheres to its original view. See also *Wandsworth Board of Works v. Hall* (L. Rep. 4 C. P. 85), and *Cooper v. The Wandsworth Board of Works* (8 L. T. Rep. N. S. 278; 14 C. B., N. S., 180), and *Bonaker v. Evans* (16 Q. B. 162.) [Lord COLERIDGE, C.J.—That last was a case of sequestration without notice. Here in the statute are the words "without notice." The cases cited only lay down that when nothing is said the ordinary preliminaries shall be observed.] The second point is that on receipt of the certificate the corporation has, by sect. 38, to form an opinion; while the 16th paragraph shows that here the town clerk did everything, and the corporation nothing. [Lord COLERIDGE, C.J.—What do you say to the ratification?] Ratification cannot apply to an Act which the corporation were under a statutory obligation to do; the 4th clause says that the

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corporation must do acts by their council. [DENMAN, J.—Was there any ratification before demolition?] The corporation employed men in the demolition. On the third question I contend that No. 95 and No. 2 were distinct buildings; they had separate walls, each was a complete structure in itself, they had separate entrances, and they were separately rated. What the plaintiff may have done in his occupation of them cannot make two buildings one, built at different times, and on different levels. It will not make the certificate good that Lynde says he intended to condemn the two.

B. G. Williams, Q.C. and E. Sutton, contra, were requested to argue on the second and third points only.—All that the corporation is required to do by the 38th section of the 1867 Act, is to cause the building to be pulled down or to be repaired or secured. These last words show that the action of the corporation must be through its skilled servants. A consideration of sect. 21, 41 and 42, makes it clear that it would be absurd for the council to meet and decide as to alterations of pipes, &c., nor does the 4th section confine them to acting by deliberation and resolution only. Then as to ratification, there was here prior authority; for all the men employed were employed by the corporation, it is so found in the case; but if ratification be wanted, then it is here, and it relates back for all purposes. To guard against any need of the meeting of council or committee, the acts authorised are to be done "without any presentment notice, or other formality." On the third question, Nos. 95 and 2 were a building, according to the definition of the term in the Act. They are found to have been one set of business premises, and were two houses thrown into one.

The *Solicitor-General* in reply.—The practical difficulty suggested would be met by the council passing a resolution to authorise the town clerk to act in such cases on the certificate of the surveyor. Two houses are not made one building, because occupied by one man.

Jan. 19.—Lord COLERIDGE, C. J.—This is a case turning almost entirely on the construction of two Acts of Parliament relating to the city of Manchester, empowering the corporation to pull down dangerous buildings and to recover the expenses of so pulling them down from the owners. As far as the facts are concerned, they are simple enough. Mr. Cheetham was the owner of several houses in Market-street, Manchester, numbered 97, 99, and 95, and, adjoining the latter, of No. 2, Palace-street. These two last-mentioned houses had internal communications, and had been converted by him into one set of business premises. All these houses became dangerous, and a notice to that effect, with reference to Nos. 97 and 99, was given; upon which certain repairs were done by the corporation, and properly done as found in the case, notwithstanding which, shortly after, 97 and 99 fell down. Then Nos. 95, and 2, Palace-street were found to be dangerous, and were so reported. The town clerk, purporting to act on behalf of the corporation, gave notice to Mr. Cheetham, and workmen were employed who acted under the town clerk's orders, he purporting to act, as I have said, for the corporation. Certain repairs were done, part of the houses were pulled down, and the expenses were charged by the corporation to the plaintiff, to recover which as having been incurred without authority, he brought the

present action. The case was tried some time ago, and in a special case, which was stated, three points were raised, involving the following questions: First, whether the certificates given by the surveyor to the defendants were conclusive, and so an absolute justification to them for the execution of the powers given under the Acts; secondly, whether the corporation did act in accordance with the provisions of the statutes through their town clerk; thirdly, whether the notice given as to No. 95, Market-street and No. 2, Palace-street, describing them as a building, was a sufficient notice. There are two Acts of Parliament; first, the 7 & 8 Vict. c. 40 (The Manchester Police Act, 1844), which contains a variety of provisions for the regulation of the city, and, among others, a sort of code as to structures of all kinds, and the powers which the corporation is to have over dangerous structures. Sect. 58 of this first Act says: "It shall be lawful for any two justices to order and direct any house, or building, or wall therein, which upon view of the same by the said justices may appear to be in a ruinous or dangerous state, to be properly fenced and guarded from the street by a proper and sufficient hoard or fence by and at the expense of the mayor, aldermen, and burgesses, until the said premises, shall be regularly and lawfully proceeded against by presentment of the grand jury at the sessions, &c., and the amount of the said expenses shall and may be recovered in like manner as penalties are recoverable by this Act." Then sect. 59 deals with the procedure after such presentment, and says that if the owner fails within twenty days after notice by the surveyor to act, "then the council shall cause such house or building, or wall, or so much thereof as shall be in such ruinous or dangerous condition, to be taken down, repaired, or secured, in such manner as shall be thought requisite, which powers are enlarged by the subsequent Act in sects. 60 and 61. It is to be observed that even there the provisions are of a very stringent kind. If there were no presentment, four householders might complain to the council, which would act upon that as notice, and the house might be pulled down after twenty days, and the expenses charged on the owner or occupier. I presume, however, that the powers were found not to be sufficient, for in 30 & 31 Vict. c. 96, the powers are considerably enlarged. Sects. 38 & 39 are: [His Lordship then read the sections set out above]. The expressions here can hardly be strengthened, the condition precedent to the action of the corporation is the city surveyor, or any duly qualified surveyor, certifying in writing that there is imminent danger from any building; and then the corporation not only may, but shall, order it to be taken down or secured. Then, there are the two other sections bearing on the case; sect. 4 is "The corporation by the council are hereby empowered to carry this Act and the several powers thereof into execution;" and sect. 5, "Any summons, demand, or notice, or other such document under this Act, may be in writing or print, or partly in writing or print, and if the same require authentication by the corporation, the signature of the town clerk thereto shall be a sufficient authentication." That being the law, let us see what was done here. The premises, Nos. 97 and 99, became dangerous, and on the 13th July the city surveyor, Lynde, certified the fact to the corporation in a certificate, of which the following is a copy:

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To the Corporation of the City of Manchester.

I, James Gascoigne Lynde, of the city of Manchester, civil engineer, surveyor of the said city, hereby certify, in pursuance of the Manchester Corporation Waterworks and Improvement Act, 1867, and of all other powers enabling me in this behalf, that there is imminent danger from the buildings described in the schedule hereto.

The schedule above referred to.

All that building situate in and being Nos. 97 and 99, Market-street.

Dated this 13th day July 1870.

J. G. LYND, City Surveyor.

Upon that the town clerk issued his direction to the city surveyor, in these terms:—

The Corporation of the City of Manchester hereby direct you to cause the building mentioned in your certificate of this date, to be taken down, either wholly or in part, or to be repaired or secured, in such manner as you shall think requisite.

Dated this 13th July 1870.

Jos. HEBON, Town Clerk.

Certain works were thereupon done, and done without any negligence, and afterwards the houses tumbled down. Then, on the 29th Aug. the surveyor certified that there was danger from No. 95, in a certificate similarly worded, and the house was described as "all that building situate in, and being No. 95, Market-street, and belonging or reputed to belong to Mr. James Cheetham." On the same day the town clerk gave a direction to the surveyor as to No. 95, similar to the former one as to Nos. 97 and 99. On the same day also Lynde delivered this notice to Mr. Cheetham:

City Surveyor's Office,
Town Hall, Manchester,
29th Aug. 1870.

Mr. James Cheetham.

Sir,—I have to inform you that I have this day certified that there is imminent danger from the building described in the schedule hereto, and that the same will be forthwith taken down, either wholly or in part, or be repaired or secured in such a manner as I may think requisite, at your expense.—I am, Sir, yours respectfully,

J. G. LYND, City Surveyor.

The schedule above referred to.

Shop No. 95, Market-street.

Nothing, it may be observed, is said about No. 2, Palace-street. Thereupon certain work was done, and the 13th paragraph of the case finds that W. J. Cookson, a builder of experience, was employed thereon by the defendants, under Lynde's directions. Afterwards, in Feb. 1871, the defendants recovered the expenses of taking down part of the building from the plaintiff. I think that those are all the material facts in the case. Now, the first point of the Solicitor-General was that the certificate was not conclusive of the imminence of the danger; and although the corporation might act under it, without being liable in trespass, yet they must be liable to make compensation to the owner, if upon investigation it should be proved that the danger was not imminent, and that they acted without authority. I am of opinion that the certificate is conclusive, and is made so by the Act of Parliament. The words of the statute are not merely permissive, but are imperative; and therefore under that statute, without any presentment, notice, or other formality, the corporation must act upon the receipt of the certificate. Cases were cited raising the question whether the certificate of an architect under somewhat similar sections of the Metropolitan Building Act is conclusive, and to show that the facts upon which a certificate is based will be examined into afterwards. Sitting as a judge in the Court of Common Pleas, I should, if it were necessary to decide the point upon an Act exactly

similar, be bound by the decisions in two cases cited, in which it was decided that an architect's certificate can be reviewed. But the Court of Queen's Bench has held otherwise, and one member of this court yielded to authority, and agreed with the majority not on his own judgment and opinion. So elsewhere than in this court the point is not settled. But it is not necessary in my opinion to consider those cases, as the words are not the same here as in the Acts with reference to the Metropolitan Board of Works. I therefore hold that the certificate is intended to be enough, and that upon its production the corporation are bound to act. Then in the next place the Solicitor-General argued, still if it be so, yet it is the corporation that must act, and here they have not acted. The words in the Act are "the corporation," and they must decide what is to be done. Now it is true that it is found that there was no meeting of the council about this matter; but then the directions given by the town clerk purported to be given in the name of the corporation, and the persons who did the work were, as it is found in both cases, employed and paid by the corporation. I should thus be of opinion, on two grounds, that the Act of Parliament has been complied with. First, I should say that it is found that as a matter of fact the corporation have acted; they have employed men to do the work which their surveyor has said was requisite; and then I should say that by what they did afterwards they absolutely ratified what their agent had done. They knew what he was doing, saw it done, and employed men to do it, and recovered the expenses of doing it from the person who was the owner of the houses, according to the provisions of the Act of Parliament. I am not aware that the distinction made by the Solicitor-General has ever been sustained in argument, and, without any case as an authority, I may say I think it would be very difficult to sustain it. He says that subsequent ratification would not make the acts of the workmen their acts; that ratification was to ensure against them, but not for them. But if there is any satisfaction here at all, it is difficult to see how it could be of that qualified kind, and therefore the second point also fails. The third point was somewhat technical, but it is none the less worthy of consideration, because the corporation must act strictly in execution of such wide powers. The Solicitor-General said that the notice, or rather the certificate, was bad. That as to Nos. 97 and 99, was admitted to be all right, but that as to No. 95 had this defect alleged. It described the building as No. 95, Market-street, and there stopped; while the evidence was that No. 2, Palace-street adjoined that house, and had been also dealt with under the notice. The objection, therefore, is, that No. 2, Palace-street was omitted, and also that the notice having misdescribed the whole subject, is bad, not only as to No. 2, but altogether. Upon the evidence there had been two houses, separately occupied and separately rated. Mr. Cheetham, however, threw them into one, made communications between them, and took away one staircase, so that the top of No. 95 was only accessible through No. 2. Clearly Mr. Cheetham understood what was meant by the notice, and in my opinion the notice would do, for nobody would be misled by it. This was a building, and it was quite sufficiently described as such for identification and for the purposes of the Act.

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Therefore all the three points fail which have been raised by the Solicitor-General; and the plaintiff is not, in my judgment, entitled to recover from the corporation for what they have done. The Acts have been said to be stringent, but I think that they are very salutary. The individual must give way to the community, and general convenience must override particular hardship. I am, therefore, of opinion that the defendants are entitled to our judgment.

KEATING, J.—I am of the same opinion. After the accurate and careful statement of the facts by my Lord, I shall not advert again to them. On the first point I entirely agree. The Act of Parliament would not have effect given to it if the certificate were not conclusive. I do think that it is a very stringent provision, vesting in a surveyor an absolute power of saying that a man's house shall be taken down at his expense; but the Legislature has thought it necessary, and the Act could not be carried out except in this way. As to the cases referred to by the Solicitor-General, as I was a party to *St. George's, Hanover-square v. Sparrow* (*ubi sup.*), I will only say that the provisions of the present Acts are wholly different from those in the Act on which that case was decided. There a judicial proceeding interposed before the house was pulled down, and that prevented the certificate being conclusive, at least in the absence of any words that it was to be so. The point on which originally I did entertain some doubt, was whether a ratification could make any proceedings regular *ab initio*; but on consideration I think it can. The document which required authority was the direction of the town clerk setting the work in motion, and it ought to have been issued after some decision of the corporation, but that is the only Act requiring authority. The most, therefore, that can be said is that the act of the town clerk required ratification by the corporation. On the third point I will not weaken the explanation of my lord on the identity of Nos. 95 and 2, and I agree entirely in what he has said. On these grounds, therefore, I think judgment must be for the defendants.

DENMAN, J.—I also think that judgment ought to be for the defendants. I desire to say that my judgment is founded on a consideration of the provisions of the statute 30 & 31 Vict. c. 96, some light being thrown upon it by the previous statute. I myself think that the cases cited do not at all apply, because they are upon statutes with totally different objects and powers. The first point was, was the certificate conclusive; and from the reasons given by my lord, and looking at sect. 38, I think it was, for otherwise it would be impossible to work the Act at all. It would be impossible for a corporation working through a council to carry out any of the provisions of the Act. If that were not the law, it would always be open to any man whose building was pulled down to have the opinion of a jury on the matter, but it is in the highest degree improbable that the Legislature should have intended to allow the subject to be reopened. Then, secondly, it is urged that the corporation ought themselves to form a judgment, and ought not in the first instance to act on the certificate of the surveyor, but should exercise an independent judgment. I, however, think that the clause cannot be so construed; such a construction would also make it inoperative; the corporation must act through some one,

and if in fact an act is done through the surveyor and the town clerk, and the corporation do not repudiate it, then it is the act of the corporation. So again, in my opinion, the argument of the Solicitor-General fails on the construction of the Act of Parliament alone. On the third point he says the promises are not sufficiently pointed out in the certificate of the surveyor. But here we are bound to use the power reserved to us to draw inferences of fact, and on paragraph 17 of the case, I hold as a fact the description is sufficient; paragraph 17 says in the schedule "Shop No. 95, Market-street." It is not a misdescription that there is at the back another place, in which part of the business is carried on. The original construction and the present use of the premises are described, and before the plaintiff came into possession, two communications had been made between the houses; then the plaintiff made some further alterations, uniting them more completely, and I must add that Lynde's attention was not called to any distinction. I hold, therefore, as a conclusion of law and fact, that No. 95, Market-street did describe sufficiently the whole premises, and there was thus ample statement in the certificate that the surveyor was going to deal with the whole. This point, therefore, also fails the plaintiff, and judgment must be for the defendants.

Judgment for the defendants.

Attorneys for plaintiff, Gregory, Rowcliffe, and Bwale.

Attorney for defendants, R. Freer Austin.

Tuesday, Jan. 26, 1875.

BOSTON ELECTION PETITION; MALCOLM (pet.) v. INGRAM (resp.)

Joint candidature—Bribery by agent of one candidate before coalition—Ignorance of other candidate—Whether other candidate responsible.

A coalescing candidate is not responsible in law for the corrupt practices of his co-candidate before coalition.

P. and I. were joint candidates in the Liberal interest, and were jointly returned in Feb. 1874. P.'s agent had distributed coals in Dec. 1873, in consequence of which P. was afterwards unseated on petition. I had agreed, in 1872, to be put in nomination along with any other respectable candidate, and in 1873 with P., but he was personally unacquainted with P., and the election was caused by an unexpected dissolution of Parliament, which took place during I.'s absence from England. I was neither directly nor indirectly a party to the distribution of coals, and was ignorant of such distribution until after the election.

Held, upon a special case stated by Grove J., that I. was not responsible in law for the acts of P. or his agent so as to be guilty of corrupt practices by an agent.

The North Norfolk case (1 O'M. & H. 240) and the Norwich (2) case (2 O'M. & H. 39; 23 L. T. Rep., N.S., 70) distinguished.

THIS was a special case stated by Grove, J., under the Parliamentary Elections Act 1868. The case affected the respondent Ingram only, the respondent Parry having been unseated at the trial of the petition, and the petitioner having been seated in his place upon the hearing of a former

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special case: (See *Malcolm v. Ingram*, 31 L. T. Rep. N. S. 331.)

On the 16th Dec. 1873, a public meeting of liberal electors was held in Boston, for the purpose of establishing a Liberal Association or Club, the object of such association being as stated to keep together the Liberal party. Mr. Parry attended, but Mr. Ingram did not, having on that day left England for Algeria. But he had previously been informed of the intention of the promoters to form such an association, and knew and approved generally of the purposes for which it was formed. He did not attend any meeting of the association, nor was he a member of it until after his election. Mr. Ingram assented to have his name associated with that of Mr. Parry for nomination at an ensuing election, but at the time of such assent he did not expect an immediate dissolution of Parliament. About the end of Dec. 1873, and after Mr. Ingram had left England, Mr. Parry determined (*mero motu*) to give away about 230l. in coal, among the poor, in Boston. [Upon the strength of this distribution of coals through Mr. Dyer, Mr. Parry's political agent (as to the details of which see 31 L. T. Rep. N. S. 331), the learned judge was of opinion "that Mr. Parry had through his agents, though not personally, been guilty of corrupt practices," and "therefore held that he was not duly elected."]

The question for the decision of the court was whether Mr. Ingram became, in law, affected by or responsible for the acts of Mr. Parry, or Mr. Parry's agents, by such consent to allow his name to be associated with Mr. Parry's for nomination as Liberal candidates, so as to make him guilty of corrupt practices by an agent or agents. If the court should be of opinion that Mr. Ingram was not so liable, the petition was to be dismissed as against him with costs; but if the court should be of opinion that he was so liable, his election was adjudged to be void, with costs against Mr. Ingram.

Thesiger Q.C. (with him *Giffard* Q.C., and *Oave*) for the petitioner.—It may be hard, no doubt, to hold Mr. Ingram liable in law for acts of bribery of which he was quite ignorant, but to hold otherwise would be to strike at the root of all legislation against bribery, and would lead to undoubted breaches of the law. Suppose, for instance, a Conservative were to go down to a place represented by two Liberals, and having ensured his own candidature by bribery, were immediately to send for another Conservative candidate, who should win the seat upon the strength of that bribery. Could it be maintained that the second candidate could hold his seat? Again, suppose before any candidate was before the electors, a person interested in politics were by open bribery to secure the seat for candidates of his own politics, who were afterwards returned. Would not such candidates be legally responsible for that bribery, whether they knew of it or not? [Lord COLERIDGE, C.J.—How far back need the acts of bribery have been committed?] It would be sufficient if they could be connected with the same election. That joint candidates are responsible for each other's acts is clearly laid down by Blackburn J., in the *North Norfolk Case* (1 O'M. & H. 240). "It happens in this case," he says, "that the respondents have stood jointly. They have chosen to, what we commonly call, coalesce. They united in a canvass, and, in fact, have made each an agent for the other, and they have chosen

to stand or fall together; consequently, if any corrupt act is shown to be done by an agent appointed by one member, it will affect both. Such are the consequences of a coalition. If, therefore, a corrupt act is brought home to one, both are unable to hold their seats." The law of bribery is not framed with the object of punishing the briber, but of securing purity of election. "The law of agency, which would vitiate an election," said Martin, B., in the *Norwich Case* (1 O'M. & H. 10), "is utterly different from that which would subject a candidate to a penalty or an indictment, and the question of his right to sit in Parliament has to be settled upon an entirely different principle. The relation is more on the principle of master and servant than of principal and agent." He also cited the *Norwich* (2) case (2 O'M. & H. 39; 23 L. T. Rep. N. S. 701), in which Keating, J., had fully approved the ruling of Blackburn, J., in the *North Norfolk case*, (*ubi sup.*), as to the legal effect of a coalition.

Lord COLERIDGE, C.J.—In this case, which has been argued by Mr. Thesiger with great ability and fairness, it is quite unnecessary to call upon counsel for the respondent. The consequences which Mr. Thesiger himself described as following from his argument would seem to show that the argument is itself unsound. The material facts are these: The respondent agreed, in 1872, when no election was in prospect and no candidate named, to offer himself as a candidate "in case a vacancy should occur." The way in which this is found is material. It is also found that the respondent assented "to have his name associated with that of Mr. Parry, but at the time of such assent he did not expect any immediate dissolution." The respondent then left England, not having been mixed up personally in political affairs. After he had so left England, Mr. Dyer, the political agent of Mr. Parry, was guilty of those acts which, in the judgment of my brother Grove, were acts of bribery, disentitling Mr. Parry from retaining the seat in Parliament which he afterwards gained. But the respondent had not known anything of Dyer, and Dyer's acts of bribery were committed on behalf of Mr. Parry only. Afterwards, the dissolution and the general election took place. The respondent returned to England, and associated himself with Mr. Parry as a co-candidate. From the time of that association he became responsible for the acts of Mr. Parry or his agents, and whatever would have affected Mr. Parry would also have affected the respondent, however innocent. It has been rightly said by Mr. Thesiger that what the law looks at as its object is not the punishment of guilty candidates, but the purity of election, and therefore a candidate, however innocent, is responsible for the acts of his co-candidate. But Mr. Thesiger would carry this still further, and would make a candidate responsible for the acts of his co-candidate, done, it may be, years before the election by a man over whom he had no moral or legal control, and of whose conduct he was completely ignorant. Admitting, as I do, in the fullest manner, that the law of principal and agent in election matters has an object, scope, and effect quite different from that which it has in other matters, I cannot accept this proposition. The strongest cases of constructive notice would be nothing to it. If there were authorities, which we are bound to respect, pointing in the other

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direction to that which I have indicated, I would defer to them, but it happens that all the authorities to which we have been referred are quite consistent with our present judgment. In the *North Norfolk case* (*ubi sup.*) the coalition was before the bribery, not after it. Mr. Thesiger has put a *reductio ad absurdum* in certain supposed cases of seats won entirely through bribery. But I must say that I do not see any absurd consequence. In all those supposed cases, as well as in the present, the agent when bribing is not an agent, and, when an agent, does not bribe. Mr. Ingram was responsible only for the acts of Mr. Parry or his agents done during the actual joint candidature, and the case against him, both upon principle and authority, wholly fails.

KEATING, J.—I am of the same opinion. The act which invalidated Mr. Parry's election was that in Dec. 1873, while Mr. Ingram was out of England, he authorised a distribution of coals. The question for us to decide now, is whether Mr. Ingram is responsible in law for that act. Now it is clearly established by the *North Norfolk case* (*ubi sup.*), and the *Norwich (2) case* (*ubi sup.*), that where there is a coalition between two candidates during the election, where, so to speak, the candidates embark in the same boat, each of those candidates is responsible as principal for the acts of the other, and for the acts of the agents of the other. But it is now sought to extend this doctrine so as to make an after coalescing candidate liable before he gets into the same boat with another candidate—before there was any joint candidature at all. I am clearly of opinion that the doctrine cannot be so extended. When a man agrees to become a candidate along with another he does not by simply so doing place himself in such a position that the doctrine becomes at once applicable to him, so as to have a retrospective operation. If Mr. Thesiger could have shown that Mr. Ingram had entered into a coalition with Mr. Parry, with a knowledge of the acts of Mr. Parry and adopting them, a further question would have arisen which it is not necessary here to decide. But here there was no such knowledge, much less adoption, of the acts of bribery at the time they were committed. I therefore concur in the judgment of the Lord Chief Justice.

GROVE, J.—I am of the same opinion. When the petition was tried, after the case as against Mr. Parry was disposed of, it appeared to me that the case against Mr. Ingram was worthy of consideration by the full court. I thought so on the ground that similar cases might frequently occur, and that it was therefore desirable to have it decided once for all whether or not the coalescing candidate is responsible. But I am now bound to own that I ought to have decided the case myself upon the spot, inasmuch as it now appears not to be of the importance which I then attributed to it. I am satisfied that any one case of this kind can be no more than an argument, and can never be an authority, in any other, so very slight are the circumstances which may distinguish cases from each other. Another reason for my reserving the point was, that it was argued before me upon one side only. In such a case I should always hesitate to decide, being sensible of the probability that quite as sound arguments might be forthcoming from the other side. I then entertained a doubt respecting Mr. Ingram's case which I do not entertain now. On the contrary, I am now quite clearly

of opinion that the case against Mr. Ingram fails. The result, no doubt, might be different in another case if a coalescing candidate knew of the bribery before coalition, or shut his eyes to such bribery, or entered into a coalition recklessly. And even the publicity of this case might make some difference, as it might be held that the knowledge of its facts ought to make candidates more cautious in forming coalitions.

DENMAN, J.—If we were now to hold that Mr. Ingram ought to be unseated on the ground of being implicated in this distribution of coals, we should be holding contrary to facts, and contrary to justice. The doctrine of the *North Norfolk* and *Norwich cases* (*ubi sup.*) can never be extended in the manner contended for by Mr. Thesiger.

Agents for petitioner, *Collyer-Bristowe, Withers, and Russell*; for respondent, *Bogerson and Ford*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 23, 1875.

Before Lord COLERIDGE, C.J., MELLOR, GROVE, and QUAIN, JJ., and AMPHLETT, B.)

REG. v. HENRY THOMAS.

Practice—Indictment—Feloniously uttering counterfeit coin after previous conviction—Guilty of subsequent offence but not of the previous conviction—24 & 25 Vict. c. 99, ss. 12, 37.

The prisoner was indicted under 24 & 25 Vict. c. 99, s. 12, for the felony of unlawfully uttering counterfeit coin, after a previous conviction for unlawfully uttering counterfeit coin; and in the first instance he was arraigned pursuant to sect. 37 upon the part of the indictment which related to the subsequent offence, and found guilty; and then upon the previous conviction, and found not guilty.

Held, that he was not guilty of the compound offence which constitutes the felony, and could not be convicted of the subsequent misdemeanor upon this indictment.

CASE stated for the opinion of this Court by the Common Serjeant of the City of London.

At a session of the Central Criminal Court, on Monday, the 11th Jan. 1875, Henry Thomas was tried before me, on the following indictment, for uttering counterfeit coin after having been previously convicted of a like offence.

Central Criminal Court, to wit.—The jurors for our lady the Queen, upon their oath, present that Henry Thomas, on the 18th Dec. 1874, in the county of Middlesex, and within the jurisdiction of the said court, one piece of false and counterfeit coin resembling and apparently intended to resemble and pass for a piece of the Queen's current silver coin called a florin, unlawfully, unjustly, and deceitfully did utter and put off to one Eliza Cunningham, he the said Henry Thomas then knowing the same to be false and counterfeit, against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say that heretofore and before the committing of the offence hereinbefore mentioned, to wit, at the General Session of the delivery of the Queen's Gaol of Newgate, holden for the jurisdiction of the Central Criminal Court, at Justice Hall, in the Old Bailey, in the suburbs of the City of London, on Monday, the 11th Dec. 1871, the said

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Henry Thomas was in due form of law convicted on a certain indictment against him for unlawfully and knowingly uttering to Ann Biggs a counterfeit florin, at the same time having one other counterfeit florin in his possession, against the form of the statute in such case then made and provided. And that the said Henry Thomas was thereupon ordered to be imprisoned and kept to hard labour for two years, and to be subject to police supervision for five years. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Henry Thomas, on the day and year first aforesaid, feloniously and unlawfully did utter the said piece of false and counterfeit coin to the said Eliza Cunningham in manner and form aforesaid, and against the form of the statute in such case made and provided.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Henry Thomas afterwards, to wit on the 18th Dec. 1874, in the county of Middlesex and within the jurisdiction of the said court, one piece of false and counterfeit coin, resembling and apparently intended to resemble and pass for a piece of the Queen's current silver coin called a florin, unlawfully, unjustly, deceitfully, and feloniously did utter and put off to the said Eliza Cunningham, he the said Henry Thomas then knowing the same to be false and counterfeit, against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say that heretofore and before the committing of the offence in this count mentioned, to wit, at the General Session of the delivery of the Queen's Gaol of Newgate, holden for the Central Criminal Court at Justice Hall in the Old Bailey, in the suburbs of the City of London, on Monday, the 11th Dec. 1871, the said Henry Thomas was in due form of law convicted on a certain indictment against him for unlawfully and knowingly uttering to Ann Biggs a counterfeit florin, at the same time having one other counterfeit florin in his possession, against the form of the statute then made and provided. And that the said Henry Thomas was thereupon ordered to be imprisoned and kept to hard labour for two years, and to be subject to police supervision for five years.

The 12th section of 24 & 25 Vict. c. 99, declares that where a person utters counterfeit coin, and has been previously convicted of a like offence, he shall be guilty of felony; and the 37th section of the same statute declares, that in the indictment for such felony, it shall be sufficient, after charging such subsequent offence, to state the substance and effect only of the indictment and conviction for the previous offence, and directs that the offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and that the jury shall be charged in the first instance to inquire concerning such subsequent offence only.

It will be seen that the indictment first charges (in the first count) that the prisoner *unlawfully* uttered the coin; next that he had been before convicted; and then states the legal conclusion that he therefore *feloniously* uttered the coin. The second count charges the uttering to be felonious throughout it.

Upon the trial of the said Henry Thomas before me, he was found guilty by the jury of the subsequent offence, that is to say, of the unlawful uttering of the counterfeit florin to Eliza Cunningham,

but the previous conviction alleged against him was clearly negatived, and the jury acquitted him of having been so previously convicted. He was, therefore, found guilty of a misdemeanor upon a count of an indictment, which count charged him in fact with a felony consisting of two elements, namely, a misdemeanor and a prior conviction.

Not being aware of any instance in which, without the aid of a statute, an offender can be convicted of a misdemeanor on a count for felony, I had to consider whether in this particular case the averments in the first count were divisible, and whether the prisoner could be convicted of the misdemeanor of uttering counterfeit coin of which the jury had found him guilty.

I ruled that under this particular statute, the averments in the first count were divisible, and that though the whole count taken together charged a felony, yet that as the felony was only a felony by reason of the alleged previous conviction, the failure in proof of that previous conviction left the offence a misdemeanor, of which the jury had found him guilty, and directed his conviction of a misdemeanor to be recorded, and committed the prisoner to gaol, and respite judgment until the Court for Consideration of Crown Cases Reserved shall decide whether he has been properly convicted.

It will be observed, that there is this difference in the two counts of this indictment, that the first count charges a substantive misdemeanor of uttering the counterfeit florin to E. Cunningham, and then proceeds to charge the circumstance of aggravation which, if proved, would convert the misdemeanor into a felony; but in the second count the uttering of the counterfeit florin to E. Cunningham is throughout alleged to be felonious.

I have reserved for the Court for Consideration of Crown Cases Reserved, the question whether the said Henry Thomas has been legally convicted of uttering the counterfeit florin to E. Cunningham.

(Signed) THOMAS CHAMBERS.

No counsel appeared to argue for the prisoner.
Poland, for the prosecution.—The 24 & 25 Vict. c. 99, s. 12, upon which this indictment is framed, enacts that whosoever having been convicted of any such misdemeanor or crime and offence as in any of the last three preceding sections mentioned (of which unlawfully uttering counterfeit gold or silver coin is one), shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall be guilty of felony. And the short question is, whether the prisoner can be convicted upon this indictment for felony, of the misdemeanor of unlawfully uttering counterfeit coin, without the aid of a statutory enactment to that effect. The doctrine of merger no longer exists in the criminal law. The first part of the indictment charges a subsequent offence of misdemeanor under sect. 9; and on this part of the indictment the prisoner was found guilty; but the indictment proceeds to charge him with a previous conviction for uttering counterfeit coin to another person, and of this charge of previous conviction he was acquitted. According to the 37th section, the prisoner was arraigned in the first instance on the first part of the indictment only. So that there was a distinct charge of misdemeanor upon which he was arraigned and found guilty. [MELLOR, J.—That is a

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mode of proceeding directed to prevent any prejudice to the prisoner from the form of the indictment. The substance of this indictment is felony, and if the prisoner is not found guilty of that, can you convict him of the misdemeanor? In the case of a charge of feloniously cutting, stabbing, and wounding, by the 14 & 15 Vict. c. 19, s. 5, the jury may acquit of the felony and find the prisoner guilty of the misdemeanor of cutting, stabbing, and wounding. But the grand jury cannot do that, it is only the petit jury who can do it. Does not the indictment charge one offence of felony compounded of two ingredients? QUAIN, J.—The 14 & 15 Vict. c. 100, s. 12, provides for the converse of this case, "that where a prisoner is indicted for a misdemeanor, he shall not be acquitted if the facts amount in law to a felony." The 37th section treats the first finding as one of unlawfully uttering counterfeit coin. Supposing the prisoner to be afterwards indicted for the misdemeanor, can he plead *autrefois acquit*? The conclusion of the court: "And the jurors aforesaid do say that the said Henry Thomas, on the day and year first aforesaid, feloniously and unlawfully did utter." &c., may be rejected as surplusage: (*Reg. v. Hodgkins*, 21 L. T. Rep. N.S. 564; L. Rep. 1 C. C. R. 212; 11 Cox C. C. 365.) [Lord COLERIDGE, C.J.—There the indictment was for a misdemeanor. That is no authority that you can reject the words, "feloniously did utter," in this indictment.] It has been held that where you have counts for felony and misdemeanor in the same indictment, a conviction thereon for either felony or misdemeanor may be sustained after verdict. This objection is a matter of consequence, for if the prisoner may be convicted of the misdemeanor of uttering on the first part of the indictment, and this court should uphold the objection, the prisoner might plead *autrefois acquit* to a subsequent indictment for the misdemeanor. There is no instance, so far as I know, where a person charged upon an indictment for felony can be found guilty of a misdemeanor, except by the aid of some statute.

Lord COLERIDGE, C.J.—I am of opinion that the conviction should be reversed. By the law of England the crimes of felony and misdemeanor are different, and have been always treated in different ways; and upon an indictment for one a person cannot be convicted of the other crime, except under the provisions of a statute. Here we have to deal with a peculiar case, in which a statute provides that a person who unlawfully utters counterfeit coin, and who has been previously convicted of a like offence, shall be guilty of felony; and to prevent prejudice, everything relating to the previous conviction is to be kept back from the jury until it is necessary to produce it, and their opinion is to be taken upon the subsequent offence in the first instance. Nevertheless, the charge is one of felony, and, unless both incidents concur, proof of the subsequent offence and of the previous conviction, the compound offence of felony is not made out. The result appears to be clear, that unless the person charged is convicted on both the findings, which constitute the compound offence, he is not guilty of the compound offence. The prisoner was indicted and tried for a felony, but was not convicted of the felony, and it follows that, except there is some statutory provision, which there is not, he could not be found guilty of the misdemeanor of unlawfully uttering upon this indictment. The conviction, cannot be sustained.

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MELLOR, J.—I am of the same opinion. Mr. Poland admits that he can find no case in support of his argument; and in all the instances I am aware of, where, upon an indictment for felony you can convict of the misdemeanor of attempting to commit the offence, it is done by virtue of some statute which enables a jury to do so.

GROVE, J.—I am of the same opinion. On first reading sect. 37, my opinion was the other way; but on looking at the section more carefully, and particularly the last clause, I am satisfied that the finding of the jury on the arraignment in the first instance for the subsequent offence, is only a preliminary part of the inquiry as to the compound offence. If so, it follows, that upon the indictment for felony the accused cannot be found guilty of the misdemeanor of unlawfully uttering, except by virtue of some statutory provisions.

QUAIN, J., and AMPHLETT, B., concurred.

Saturday, Jan. 23, 1875.

(Before Lord COLERIDGE, C.J., MELLOR, GROVE, and QUAIN, JJ., and AMPHLETT, B.)

REG. v. GRAHAM.

Embezzlement—Servant of the Crown—Policeman employed to receive contributions under Reformatory and Industrial Schools Acts (24 & 25 Vict. c. 96, s. 70; 29 & 30 Vict. cc. 117, 118).

A., an inspector of prisons, duly authorised to receive the contributions of parents towards the maintenance of their children committed to reformatory and industrial schools under 29 & 30 Vict. cc. 117, 118, and instructed to pay the amount received into the Bank of England, to the credit of the Paymaster-General, employed the prisoner, a member of the police force of the borough of L., as his agent in taking proceedings against the parents of such children for the recovery of such contributions on A.'s behalf, and for generally carrying out the provisions of the Reformatory and Industrial Schools Act. Under this employment the prisoner received and misappropriated moneys, the contributions of parents, ordered by magistrates to be paid for the maintenance of their children in the schools:

Held, that the prisoner was, while so employed, in the public service of her Majesty, so as to render him amenable to indictment for embezzlement under 24 & 25 Vict. c. 96, s. 70.

CASE reserved for the opinion of this court by Mellor, J.

The prisoner, John Graham, was indicted at the last Liverpool Winter Commission, as follows:

The indictment states that prisoner, on the 11th April 1871, being then employed in the public service of the Queen, and being a constable and a person employed in the police force of the borough of Liverpool, and entrusted by virtue of such employment with the receipt and custody of money the property of the Queen, did by virtue of his said employment, and whilst he was so employed, receive and have in his possession, and was entrusted with certain money, the property of the Queen, to wit to the amount of 1l. 6s., for and on account of the public service of the Queen, and then fraudulently and feloniously did apply the said money to his own use and benefit, and fraudulently and feloniously did steal the said last-mentioned money, being the property of the

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Queen, from the Queen, against the form of the statute, &c.

Second count.—That prisoner, afterwards and within six calendar months of his committing the offence in the first count mentioned, to wit on the 17th June in the year aforesaid, being then employed, &c., and being a constable, &c., and entrusted, &c. (as in the first count), did by virtue of such employment and whilst he was so employed, receive and have in his possession, and was entrusted with certain money, the property of the Queen, and then fraudulently and feloniously did apply the said last-mentioned money to his own use and benefit, and did fraudulently and feloniously steal the same, being the property of the Queen, from the Queen, against the form of the statute, &c.

Third count.—That prisoner afterwards, and within six calendar months of his committing the offence in the first count mentioned, to wit on the 15th July in the year aforesaid, being then employed, &c., and being a constable, &c., and entrusted, &c. (as in the first count), did by virtue of his said employment, and whilst he was so employed, receive and have in his possession and was entrusted with certain money, the property of the Queen, to wit the amount of 13s., as and on account of the public service of the Queen, and then fraudulently and feloniously did apply the said last-mentioned money to his own use and benefit, and did fraudulently and feloniously steal the same, being the property of the Queen, from the Queen, against the form of the statute, &c.

The indictment was framed under sect. 70 of the Larceny Act (24 & 25 Vict. c. 96). The prisoner was found guilty of embezzlement under that section, but I postponed the judgment until the decision of the Court of Appeal upon the following case should be had, and in the meantime admitted the prisoner to bail.

Before the 10th Aug. 1866, the Rev. Sydney Turner, who had been appointed inspector of prisons on the 24th Jan. 1857, was on the 1st April 1862 authorised by the Secretary of State to receive, on behalf of the Secretary of State, the contributions of parents towards the maintenance of their children committed as well to reformatory schools as to industrial schools, and was instructed to pay the amount collected into the Bank of England, to the account of the Paymaster-General, at the end of each quarter.

On the 25th May 1866, the prisoner, who was a member of the police force of the borough of Liverpool, employed and paid by the Watch Committee, was recommended by them to Mr. Turner, and was by him engaged as his agent, with the sanction of the Treasury, at the salary ultimately raised to 30s. per week, and was called off to that duty by the Watch Committee, who continued to pay him a small salary in addition to that paid with the sanction of the Treasury, and on the 10th Aug. 1866, Mr. Turner, upon the passing of the statute 29 & 30 Vict. cc. 117, 118, requested him, by writing, "to act until further notice, as my agent, in taking proceedings against the parents of children committed to the reformatory and industrial schools, for the recovery of contributions towards their maintenance; for collecting and recovering such contributions on my behalf, and for generally carrying out the provisions of the Reformatory and Industrial Schools Acts, in pursuance of the instructions which you may from time to time

receive from this office." The prisoner continued to act under this appointment until the 25th March 1870, when he received a new appointment from Mr. Turner as follows:

Office of Inspector of Reformatory and Industrial Schools, 15, Parliament-street,

25th March, 1870.

Sir,—In virtue of the powers given to me by the statutes 29 & 30 Vict. cc. 117, 118, I hereby authorise and request you to act as my agent in Liverpool and its vicinity: For taking proceedings against the parents of children committed to the reformatory and industrial schools for the recovery of contributions towards their maintenance; for collecting and recovering such contributions on my behalf, and for generally carrying out the provisions of the Reformatory and Industrial Schools Acts, in pursuance of the instructions which you may from time to time receive from this office.

It was part of the prisoner's duty to receive the contributions ordered by the magistrates to be paid for the maintenance of the children in the schools, and he was duly provided with proper books and forms, and it was his duty to account to Mr. Turner quarterly for the amount so received.

He was charged and convicted by the jury of embezzling three several sums of money in the year 1871, viz., 1l. 6s., 2l. 4s., and 13s. No point arises upon the evidence relating to the fact of embezzlement, but it was contended on behalf of the prisoner that he did not come within the language of sect. 70 of the Larceny Act (24 & 25 Vict. c. 96), as a person employed in the public service of her Majesty, but was rather the personal agent and assistant of Mr. Turner, appointed by and responsible only to him.

That there is no express power in the Reformatory and Industrial Schools Acts to appoint such an officer as the prisoner to perform the duties which Mr. Turner had appointed him to perform. I overruled the objection, and the case went to the jury and the prisoner was convicted.

The question for the opinion of the court is, whether there was sufficient evidence that the prisoner was a person employed in the public service of her Majesty, so as to bring him within the 70th section of the Larceny Act (24 & 25 Vict. c. 96).

(Signed) JNO. MELLOR.

No counsel was instructed to argue for the prisoner.

McConnell, for the prosecution, was not called upon.

Lord COLERIDGE, C.J.—I am of opinion that the conviction was right. The prisoner, a police constable of the borough of Liverpool, was employed by the Inspector of Prisons, who was authorised to receive the contributions of parents towards the maintenance of their children committed to reformatory and industrial schools, as his agent, to take proceedings for the recovery of such contributions, under two Acts of Parliament, the 29 & 30 Vict. c. 117, s. 25, and c. 118, s. 40 each of which contains a similar enactment as follows (*mutatis mutandis*): "The parent or step-parent, or other person legally liable to maintain any youthful offender detained in a certified reformatory school, shall, if of sufficient ability, contribute to his support and maintenance therein a sum not exceeding 5s. per week. On the complaint of the Inspector of Reformatory Schools, or of any agent of the inspector, or of any constable under the directions of the inspector (with which directions the constable is hereby required to comply), at any time during the deten-

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tion of a child in a certified industrial school, two justices or a magistrate having jurisdiction at the place where the parent, step-parent, or other person liable as aforesaid resides, may, on summons to the parent, step-parent, or other person liable as aforesaid, examine into his or her ability, and may, if they or he think fit, make an order or decree on him or her for the payment to the Inspector of Reformatory Schools, or to an agent of the inspector, of such weekly sum, not exceeding 5s. per week, as to them or him seems reasonable, during the whole or any part of the period for which the offender is liable to be detained in the school. . . . Every such payment shall go in relief of the charges on her Majesty's Treasury, and shall be accounted for as the Commissioners of her Majesty's Treasury direct. The Secretary of State may, in his discretion, remit all or any part of any payment so ordered." The question is, whether the prisoner was "employed in the public service of her Majesty" within the 24 & 25 Vict. c. 96, s. 80, and that he was so I think there cannot be any doubt. He was employed under a statute by a person who acted as inspector of prisons, and who was duly authorised by the Secretary of State to receive these moneys, as his agent, to take proceedings for their recovery, and the above enactment recognises such an agent; he was, therefore, as much in the employment of the public service of the Queen as the inspector himself. These moneys, when received, are the property of the Treasury under that Act. He received these moneys and misappropriated them. There were, therefore, all the incidents of embezzlement, and he was in the employment of the Crown. The conviction, therefore, was right, within the 24 & 25 Vict. c. 96, s. 70.

MELLOR, J.—I am of the same opinion. Giving a reasonable construction to the statute, I think the prisoner was in the public service of her Majesty. He was appointed by the Inspector of Prisons, who was appointed to receive these contributions, with the consent of the Treasury. I entertained little doubt about the point myself, but was told that the receiver was of a different opinion. I therefore reserved the case.

The rest of the COURT concurred.

Conviction affirmed.

Saturday, Jan. 23, 1875.

(Before LORD COLERIDGE, C.J., MELLOR, GROVE, and QUAIN, JJ., and AMPHLETT, B.)

REG. v. JAMES HALL.

Embezzlement—Clerk or servant—Debt collector—24 & 25 Vict. c. 96, s. 68.

Prisoner, who carried on business as an accountant and debt collector (there was no evidence to show what was the nature of that business), was employed by the prosecutors to collect certain debts specified in a list given to him. The time and mode of collecting the debts were in his discretion, and he was authorised to sue for them, if necessary, but at his own charge. In no case was he to receive from the prosecutors more than five per cent. on the amount collected by him and paid over to the prosecutors.

The jury having found on these facts that the prisoner was employed in the capacity of clerk, and convicted him of embezzlement of certain sums received by him and not paid over to the prosecutors:

Held, by the court, that the finding was wrong, and that he was not employed as a clerk, and that the conviction could not be sustained.

CASE stated for the opinion of this Court by the Recorder of the Borough of Cambridge.

James Hall was tried before me at the sessions holden for the borough of Cambridge, on the 7th Jan. 1875, for embezzlement.

The indictment charged that he was employed in the capacity of clerk to James Milligan and another, the prosecutors.

The prisoner carried on business at Cambridge as an accountant and debt collector. No evidence was given to show what the business of an accountant or of a debt collector was, nor whether the prisoner carried on the business by himself alone or was assisted in it by any clerks or subordinates.

The prisoner was employed by the prosecutors to collect certain debts due to their firm, and a list containing the names and addresses of the respective debtors, and the amount due from each which he was to collect, was given to him by the prosecutors.

The prosecutors had on a previous occasion employed a person carrying on the business of an accountant and debt collector to collect debts for them; and on this occasion they employed the prisoner, because he was an accountant and debt collector, and in the way of his business as such.

He was not bound to collect the debts within any given time, nor to devote any definite portion of time to the business of collecting, nor any particular day to collecting any particular debt. He was to pay over the amount of each debt collected to the prosecutors as soon as he received it, and he was to receive as a remuneration 5 per cent. on the amount so paid over. He was authorised by the prosecutors to employ an attorney, but at his own sole charge, to obtain payment of those debts payment of which he himself was unsuccessful in obtaining. In no case were the prosecutors to pay him more than the above mentioned 5 per cent. on the amount paid over to them.

The money which the prisoner was charged with embezzling had been paid (under pressure of a writ at the suit of the prosecutors issued by an attorney employed by the prisoner) by the debtor to the attorney, and by him to the prisoner.

On behalf of the prisoner it was contended that these facts were not sufficient to prove the allegation in the indictment, that the prisoner was "employed in the capacity of clerk to the prosecutors."

I entertained doubt whether they were sufficient, but declined to stop the case, and I directed the jury that there was evidence upon which they might, if they thought proper, find that the allegation was proved.

The jury found the prisoner guilty, and I discharged him on recognizance of bail to appear at the next quarter sessions for the borough and receive judgment.

I respectfully request the opinion of the Court for Crown Cases Reserved, whether there was evidence proper to be left to the jury that the prisoner was employed in the "capacity of a clerk" to the prosecutors.

If the opinion of the Court should be in the affirmative, the verdict of guilty is to stand; if in the negative, a verdict of not guilty is to be recorded.

(Signed) J. R. BULWER,
Recorder of Cambridge.

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Poland (*Horace Browne* with him), for the prisoner, was stopped by the court.

Cockerell, for the prosecution.—The jury having found, upon the evidence submitted to them, that the prisoner was employed in the capacity of clerk to the prosecutors, the conviction should be upheld. In *Reg. v. Negus* (42 L. J. 62, M. C.; 12 Cox C. C. 492), *Bovill, C.J.*, said that it was a much more convenient course that the circumstances should be left to the jury for them to determine whether the prisoner was employed in the capacity of a clerk or servant, than that the court should be asked the question as matter of law. [*Lord COLERIDGE, C.J.*—We are in substance asked to say whether there was any evidence from which they could properly draw that inference.] This case differs from that of *Reg. v. Negus*, inasmuch as there the prisoner was employed on a roving commission to get orders at his own convenience; in this case a list of specific debts was given to the prisoner to collect. In *Reg. v. Bowers* (35 L. J. 206, M. C.; 10 Cox C. C. 250), where the prisoner was engaged as agent or traveller for sale of coals, at a weekly salary and a commission per ton on sales, and he agreed to collect the moneys on his sales and to pay them over within a week from receipt thereof, *Erle, C.J.*, said, the prisoner was a clerk or servant upon this agreement, but the prisoner after a time having set up a retail business of his own, and the prosecutor having recognised that, and agreed to supply him coals, and "in future to pay the prisoner a commission only and no salary," it was held that under this new arrangement the prisoner ceased to be a clerk or servant within the meaning of the statute. There the court alluded to the fact that the prisoner had set up an independent business of his own. [*MELLOB, J.*—Here the prisoner was employed in his general capacity of a debt collector; the mode and time of collection were under his own control.] The case was for the jury, and they have found that he was employed as a clerk to collect specific debts and pay them over to the prosecutors.

Lord COLERIDGE, C.J.—I am of opinion that the conviction should be reversed. The question is, whether the prisoner was a clerk to the prosecutors within the 24 & 25 Vict. c. 96, s. 68. The money appropriated to his own use by the prisoner was the produce of legal proceedings instituted by the prisoner at his own cost, under the authority of the prosecutors. There are no incidents in this case which bring the prisoner within a reasonable or fair definition of the terms clerk or servant, as used in the statute. The prisoner may be liable to be sued in a civil action, but he is not liable upon this indictment. If any authorities were wanting to justify our decision, *Reg. v. Bowers*, and *Reg. v. Negus*, are in point.

MELLOB, J.—I am of the same opinion. This is a case in which the prisoner carried on an independent business as an accountant and debt collector. He was employed by the prosecutors to collect certain debts at a commission of 5 per cent. on the amount recovered, and he had authority to sue, if necessary, to recover the debts, but he was not to charge the expense of so doing to his employers, and he was not to be paid more than the amount of his commission. He did sue for some of the debts and recovered them, and failed to pay over the sums so recovered to the prosecutors. The not paying over these moneys was a breach of contract, but did not render him liable to this in-

dictment, for he was not employed by the prosecutors in the capacity of clerk or servant to collect the moneys.

GROVE and QUAIN, JJ., and AMPHLETT, B., concurred.

Conviction reversed.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES P. ASPINALL, Esq. Barrister-at-Law.

Jan. 19, 20, 21, and 22, and Feb. 25, 1875.

(Present: The Right Hons. Lord HATHERLEY, Lord PENZANCE, Lord SELBORNE, the LORD CHIEF BARON, (Kelly), Sir MONTAGUE SMITH, and Sir ROBERT COLLIER.)

PHILLPOTTS v. BOYD AND OTHERS.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Ecclesiastical law—Visitation power of bishop—Jurisdiction over fabric of cathedral—Stat. 3 & 4 Edw., 6 c. 10—Images—Reredos.

According to general ecclesiastical law all deans and chapters are subject to the visitation of the bishop as ordinary, and the Church Discipline Act (3 & 4 Vict. c. 86), leaves untouched all power which the bishop might previously have exercised in his visitations except that of proceeding against individuals by way of punishment; and, therefore, in the absence of any direct authority to the contrary, he has power as such visitor, to make orders on some definite legal ground, but not otherwise, with reference to any part of the structure or fabric of the cathedral church.

The Act 3 & 4 Edw. 6, c. 10 "for the abolishing and putting away divers, books, and images," remains unrepealed, but must be taken to apply only to images, &c. which have been abused, or are likely to be abused, by giving occasion to superstitious and idolatrous practices, not to such as are merely decorative.

In a case in which the dean and chapter of a cathedral church, had, without the licence or consent of the bishop, erected at the east end of the choir a "reredos" or sculptured stone screen, containing figures of sacred subjects in high relief:

Held, (reversing the judgment of the court below) that if such erection were illegal the bishop as visitor had power to order its removal; but, (affirming the judgment of the court below) that the images in question, being set up for the purpose of decoration only, and not being liable to superstitious abuse, were not illegal.

Seemle, that a faculty is not necessary for an alteration in the fabric of a cathedral church.

THIS was an appeal from a decree or sentence of the official principal of the Arches Court, delivered on the 6th Aug. 1874, in a cause of appeal brought by the present respondents against the present appellant. The litigation originally began in the following manner:

On the 20th Dec. 1873, the respondents, who were the Dean and Canons, or Prebendaries Residentiary, of the Cathedral Church of St. Peter in Exeter, were served with a citation from the Lord Bishop of Exeter, which citation recited that the appellant who was a non-residentiary prebendary of the cathedral, Archdeacon of Cornwall, and Chancellor of the Diocese, had presented a petition praying the bishop to exercise his power, as visitor of the cathedral, to visit the dean and chapter of the

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cathedral, and to inquire into the recent erection of a reredos in the choir of the cathedral, with certain images thereon, not being on any tomb or in any painted window, such erection being alleged to have been made without the bishop's consent, and the images so placed being alleged to be in themselves contrary to the laws ecclesiastical, and further praying the bishop to order the removal of the images, and the substitution of the Ten Commandments in their stead. The citation then proceeded to require the respondents to appear in person before the bishop, in the chapter house of the cathedral, on the 7th Jan. 1874, and to answer certain articles of inquiry annexed to the citation, and contained an intimation that both the petitioner (the present appellant) and the respondents would be heard by counsel or in person.

On the 7th Jan. 1874, the respondents appeared in the chapter house in person and by counsel; the appellant also appeared with counsel; and the bishop held his visitation, being assisted by Mr. Justice Keating as his assessor. The respondents appeared under protest, taking objection to the bishop's jurisdiction, and by consent of parties and with the approval of the bishop and his assessor, it was arranged that the question of jurisdiction should be first argued, and that if the bishop should be advised that he had jurisdiction, the question of the lawfulness of the reredos should be then at once argued, without previous appeal, or other application, in regard to the question of jurisdiction, reserving the subsequent exercise of their rights to the respondents.

The question of jurisdiction was accordingly argued; and next day, the 8th Jan., the learned assessor advised the bishop that he had jurisdiction.

Answers to the articles were then put in by the respondents, the question of the lawfulness of the reredos was argued on that day and the following, the learned assessor took time to consider, and the visitation was adjourned.

On the 15th April 1874, the bishop delivered the opinion or judgment of his learned assessor, whereby he decided—First, that the bishop had jurisdiction; secondly, that the reredos ought not to have been erected without a faculty; and, thirdly, that the images upon it were in themselves unlawful. He further decided that the Ten Commandments ought to be erected over the Holy Table, but that it must be taken to be the intention of the respondents so to place them as to be in compliance with the law.

On the same day the bishop delivered his judgment, whereby, as visitor and ordinary, he declared and adjudged that the removal of a former screen and the setting up of the reredos without a faculty were illegal, and that the images on the reredos were illegal, and he ordered and adjudged that the reredos and images be removed, and certain erections substituted therefor, and that the Ten Commandments be set up at the east end of the choir.

The respondents appealed from this judgment, both in so far as it purported to be an exercise of jurisdiction, and in so far as it declared the reredos and the sculptures thereon to be unlawful, and made the subsequent order thereupon, to the Arches Court of Canterbury.

The present appellant appeared in the Arches Court at first under protest, alleging that no appeal lay to the Arches Court. Pleadings on protest were gone into, and the learned Judge of the

Arches Court gave judgment overruling this protest, and deciding that the appeal was rightly brought to the Arches Court.

The present appellant submitted to this decision and appeared absolutely, and no question was raised in the present appeal as to the original appeal having been rightly made to the Arches Court.

The appeal itself was then argued before the Arches Court, on the 23rd, 24th, and 25th July 1874. The learned Judge of the Arches Court took time to deliberate, and, on the 6th Aug., gave judgment in favour of the appellants (the present respondents), and by his decree or sentence reversed the judgment of the bishop, in so far as the bishop assumed jurisdiction, as visitor and ordinary, to order the removal of the reredos with the images thereon, and in so far as he had ordered the removal of the reredos and images as being unlawful, and had ordered the substituted erection named in his judgment, and the learned Judge of the Arches Court dismissed the appellants (the present respondents) from all further observance of justice, but made no order as to costs.

It was from this decree or sentence that the present appeal was brought.

W. F. Phillpotts and *B. Shaw*, appeared for the appellant.

Dr. Deane, Q.C. and *W. G. F. Phillimore*, for the respondents.

The arguments urged, and the authorities relied on will be found in the judgment; and in addition to those there mentioned the following were cited in the course of the argument,

Johnson v. Ley, Skin. 589;
Oliver v. History of Exeter Cathedral;
Sieveking v. Kingsford, 36 L. J. 1, Eccl.;
Sherfield's Case, 3 Stat. Tri. 519;
White v. Bowron, L. Rep. 4 A. & E. 207.

Feb. 25.—Their Lordships' judgment was delivered by

LORD HATHERLEY.—This is an appeal from a decree of the Court of Arches, reversing an order made by the Lord Bishop of Exeter, as visitor of the Cathedral Church of St. Peter in Exeter, for the removal of a sculptured reredos recently erected at the east end of the choir of the cathedral by the dean and chapter, on the ground that the sculpture, so erected, contains or consists of images, not permitted within churches by the law of the Church of England. The judgment of the court below makes it necessary, in the first place, to decide whether the bishop, as ordinary, had a visitatorial power over the Cathedral Church of Exeter, with reference to the sculpture of which the appellant complained, and whether, in the exercise of that power, it was competent for him, if he found that sculpture to have been unlawfully erected, to make an order for its removal. The respondents have contended throughout these proceedings, that the bishop had no such power, and the learned Judge of the Court of Arches has so determined. It is not, and indeed it could not be, disputed that, according to the general ecclesiastical law, "all deans and chapters are subject to the visitation of the bishop, *jure ordinario*, and of the archbishop of the province, *jure metropolitico*." (2 Burn's Eccl. Law, Phillimore's Edit. 1842, p. 93.) It is equally certain that as to some matters, at all events, the bishop, visiting his dean and chapter as ordinary, would have power to make orders

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binding upon the dean and chapter, subject to an appeal to the higher ecclesiastical tribunals. By the case of *Dr. Goodman*, reported in Dyer, p. 273 (the same law is recognised by Lord Holt in *Phillips v. Bury*, 2 T. R. 353), it appears that, before the Church Discipline Act (3 & 4 Vict. c. 86), this power would have enabled a bishop, as visitor, to pronounce, in case of necessity, a sentence of deprivation against an offending member of the chapter. Since that statute it has been determined, in the *Dean of York's case* (2 Q. B. 1), that, in order to inflict any personal punishment for an ecclesiastical offence upon an individual member of a chapter, the bishop must proceed against him as against any other clerk in holy orders, under the Church Discipline Act, and not as visitor. But the statute leaves untouched all other power which the bishop might previously have exercised in his visitation except this single power of proceeding against individuals by way of punishment.

Two arguments have been urged before their Lordships in this case against the bishop's jurisdiction. The first is that, although the bishop may have power to visit the dean and chapter as ordinary, and also power, in some cases, to make orders binding on the dean and chapter (subject to appeal), yet he cannot do so with reference to any part of the structure or fabric of the cathedral church. For such a limitation of the bishop's visitatorial power no authority has been cited: and, considering the nature and importance of the duties which the dean and chapter have to perform with respect to the fabric of their church, the burden of proof rests, in their Lordships' opinion, on those who, admitting the general visitatorial power, contend that it is thus limited. It appears, not only from the precedents in the history of the Cathedral Church of Exeter, to which their Lordships will have occasion to refer, but from the form of the articles of inquiry at the visitation of the Cathedral Church of York by Archbishop Harcourt, *jure ordinario*, in 1841 (which the learned editor of Burn's Ecclesiastical Law, edition 1842, vol. 2, p. 93, c., states to have been "framed in careful compliance with former precedents"), that the practice, in visitations of this kind, has been for the ordinary to include among the matters cognizable by him in this form of proceeding, the repairs, and generally the state and condition of the fabric, of the cathedral church. The reason of the thing, and all the authority which has been produced is opposed to this first argument, which their Lordships, therefore, reject as untenable. The other argument (and it is that which seems to have chiefly prevailed with the learned Dean of the Arches) is, that the Dean of Exeter has a peculiar jurisdiction, exclusive of the bishop, within the "close" of the cathedral church, which (it is contended) includes the area and fabric of the cathedral itself. Reliance, for this purpose, was placed upon an instrument of "composition," dated in 1616, and purporting to be made between the then Bishop of Exeter, the Dean and Chapter, the Dean, the several Archdeacons of the Diocese, and the Custos and College of Vicars Choral of the Cathedral Church. Their Lordships were referred to what purports to be a copy of this document, printed in a note at pp. 232-236, of the 3rd vol., of Dr Phillimore's Reports. It is hardly necessary to say that such a printed statement in a book of reports could not be treated by their Lordships as

in itself evidence, either of the existence or the due execution of such a document. The fact of its execution seems to have been challenged in the reported case. Their Lordships, however, understood the argument in the court below, and upon appeal, as having proceeded upon the footing of the execution and authority of such a document, and they therefore proceed to consider its value and effect. It was not alleged that the successors of the then Bishop of Exeter could, by the mere force of an agreement or composition of this nature, made in 1616, be ousted from any ordinary jurisdiction which they would otherwise have possessed; but the contention was, that this document is evidence of the previous legal existence of a peculiar jurisdiction of the dean within the "close" of Exeter, exclusive of the ordinary jurisdiction of the bishop. Some of the remarks made by Sir John Nicholl, in his judgment in *Parham v. Templar* (3 Phill. 252), seem for this purpose to be important. This document, he says, "states that the agreement or composition is made upon a view of ancient usage, and upon searching and consulting proper authorities. But it does not state how far any such search was made, nor recite any particulars to prove this ancient usage. In short, whether it may not be altogether irregular and an usurpation, the instrument itself does not afford any means of ascertaining. The search was probably made, not by the archdeacons or the bishop, or any of the principals, but by their agents or officers—possibly some practitioners in these courts not very well read either in the canon or the civil law of the country." Upon these grounds, and on the further ground of the metropolitan not being a party to the instrument, the learned judge, in that case, refused to accept it as evidence that an appeal from those peculiars of the dean and chapter (such as Ashburton), which were exclusive of the bishop's ordinary jurisdiction, would lie to the bishop in the first instance, and not to the metropolitan. Yet it seems to have been an inseparable part of the composition, considered as (what it purports to be) a general scheme for defining the manner and form in which the execution of the ecclesiastical jurisdiction of the several parties to it should for the future "be bounded, limited, and for ever thereafter used and exercised by the said parties and their successors;" and for the "clearing" of those "questions" which it recites to have been "then, and theretofore, moved between the same parties, touching the execution of ecclesiastical jurisdiction within the Diocese of Exeter;" "and for the settling and establishing a peace and certainty therein for ever thereafter between the said parties and their successors." The court does not appear to have proceeded in the case of *Parham v. Templar*, upon the sole evidence of this document, so far as it recognized Ashburton as being a peculiar of the dean and chapter, in which their jurisdiction was exclusive of the ordinary jurisdiction of the bishop; and, in that case, no question whatever arose as to any jurisdiction either of the dean or of the bishop within the cathedral close or the cathedral itself. Supposing, however, that this composition could properly be accepted as evidence of some exclusive peculiar jurisdiction of the dean within the cathedral close, its terms must be accurately weighed to ascertain the true nature and character of that jurisdiction. The material parts of the composition are these:

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1. That "Matthew Sutcliff, Dean of the Cathedral Church, and his successors, and his and their officer and officers, shall for ever hereafter, solely and without any concurrence, prove in common form all testaments" (except those of knights, beneficed men, and such as were *de robâ Episcopi*) "within the parish of Braunton, in the county of Devon, and the close of the Cathedral Church of St. Peter, in Exeter; and also, solely and without any concurrence, hear, and determine, within the said parish of Braunton and close aforesaid, all causes, as well *ad instantiam partis*, as *ex officio*."

2. That "within the residue of the diocese, the bishop or his chancellor, solely and without concurrence, shall have power to dispense in all causes, to grant all manner of licences, sequestrations, and relaxations, and (generally) to do whatsoever is not formally declared to belong to the said archdeacons, dean and chapter, dean, and custos and college, or to some of them, as aforesaid."

3. "Lastly, that the said bishop, his chancellor, or officers for the time being, shall and may, for ever hereafter, once in every three years complete, visit all the said diocese, except the peculiars of the said dean and chapter, dean, and custos and college of vicars, and their successors."

Unless, therefore, the visitatorial authority of the bishop, as ordinary, over the dean and chapter themselves, was, according to the true construction of this instrument, to be exercised by the dean, as part of his peculiar jurisdiction within the close of the cathedral church, it is not taken away from, but is (by the very terms of this instrument) reserved to the bishop. "Peculiars," as Ayliffe states (in a passage cited by Sir John Nicholl, at p. 245 of the judgment in *Parham v. Temple*), "are called exempt jurisdiction; not because they are under no ordinary, but because they are not under the ordinary of the diocese, but have one of their own." The ordinary of the Cathedral Close of Exeter, so far as it is described as a peculiar by this composition, was the dean. But the only matters in respect of which the dean was, according to the terms of the composition, to exercise ordinary jurisdiction within the close, were the grant of probates, not of all persons, but of persons not falling within certain specified classes, and "the hearing and determination of causes," whether *ad instantiam partis* or *ex officio*. The composition does not provide that the dean shall visit himself; still less does it provide that the cathedral church shall be exempt from all ordinary visitation, and subject only to the metropolitan jurisdiction of the archbishop. It is further manifest, that if by the terms of this composition, the bishop, as ordinary, had been excluded from visiting the dean and chapter or the cathedral, it would have been a total, and not merely a partial, exclusion. Any visitation of the cathedral by the bishop, as ordinary, for any purpose whatever, would (in that view) have been quite as much *ultra vires*, as a visitation for the purpose of setting right whatever might be found wrong as to the fabric of the church.

Passing from the letter of the composition itself to the evidence which is before us of the usage and practice, as to visitation, of the Cathedral Church of Exeter since the date of that instrument, their Lordships find that this evidence is altogether adverse to the contention of the respondents. There is no instance given of the exercise of any jurisdiction by the dean, except one case of brawling within the cathedral, which arose in the year

1827, and which was manifestly a "cause" either *ad instantiam partis* or *ex officio*. Such a cause would no doubt have been cognizable by the dean under the express terms of the composition if the cathedral ought to be deemed part of the close, and it would have been equally cognizable, under the same instrument, by any archdeacon of the diocese, if the brawling had happened within one of that archdeacon's peculiars. But there is no trace of its ever having been supposed or contended, before the arguments in the present case, that the Bishop of Exeter had not, over the dean and chapter, and within the cathedral of the diocese, as large and full visitatorial jurisdiction, as ordinary, as any other diocesan bishop has in his cathedral church. That jurisdiction has been, in practice, exercised on more than one occasion, without objection on protest, and its existence was expressly admitted, in the course of a recent public inquiry, by the dean and chapter.

In 1660 Bishop Seth Ward held a primary visitation of this cathedral; and in the articles then exhibited by him, inquiries were made (among other things) into the condition of the fabric generally, and of the roof, windows, seats, towers, and bells. No question appears to have been raised as to his authority so to inquire.

In 1678 Bishop Lamplugh held another primary visitation of the cathedral. Articles were exhibited on that occasion substantially similar to those of Bishop Ward (though not in exactly the same form); and, in addition to these, the second article inquired "whether any passages or doors had been made in the time of the late rebellion, leading into the cathedral by breaking down the wall thereof, and continued to be so?" The dean and chapter put in their answers to these articles. As to the second article they said "that there was only one door, towards the north-east, that was made in the late times, which had not been walled up (as another door then made had been), because it was a great convenience to several dignitaries of the church and other persons of quality, and was neither indecent itself nor prejudicial to anybody." It appears, however, that by some objector, connected (as is to be presumed) with the cathedral, a presentment was made against the door, which the dean and chapter thus desired to keep open, as having been improperly and illegally made through a private chapel at the north-east end of the church, "to the dishonour of the church," and to the prejudice of a particular family which had right of burial there. The bishop, as visitor, adopted this latter view; and he thereupon ordered "that the said door be forthwith shut up, and hereafter not opened; and that, before Candlemas next ensuing, the aforesaid door be taken away, and the wall made up, and the passage restored to the right owner; and that the great gate next the street be by that time taken down and walled up." At a further visitation on the 21st April 1680, it was finally certified to the visitor by the dean that this order had been fully obeyed, and that the door in question had been walled up, as directed.

In 1852, the Dean and Chapter of Exeter, in answer to questions addressed to them by the Royal Commissioners for inquiring into the Cathedral Churches and Capitular Bodies in England, stated that the Bishop of Exeter was their visitor; and that the powers of the visitor were "those vested in him by the general law, not modified by any special custom." For the dean, they did not

then claim any peculiar jurisdiction, further than by stating that he had "archidiaconal authority within the close;" which, however, was no longer exercised by him. In Bishop Voysey's Statute of 1544 (to which they then referred, as the document in which the duties of the several dignitaries and officers would be found most fully stated), the same statement is found, that the dean had "jurisdictionem archidiaconalem in omnibus enumeratis infra clausum Exoniensis Ecclesiæ," no other jurisdiction of the dean being there mentioned. Their Lordships are, under these circumstances, unable to agree with the opinion expressed by the learned Dean of Arches against the jurisdiction of the bishop in the present case. The right of the bishop to visit, as ordinary, in respect of the fabric being established, the question arises whether the order made by him for the removal of the reredos can be sustained. It was first suggested in argument that the respondents were in the same position as if they were applying for a faculty to authorise its erection, inasmuch as the erection without a faculty was illegal. Their Lordships cannot accede to this argument of the appellant's counsel. It was pressed upon them in order to lay the foundation for an exercise of discretion on the part of the bishop even in a case where there might be no breach of the law. No authority has been cited, and no instance has been produced, in which a grant of any such faculty has been applied for, either in the case of Exeter Cathedral or of any other cathedral, although it is notorious that important alterations in the fabric of most cathedrals have continually been effected. The argument, which was urged at the bar, that although a faculty may not strictly be necessary, the express or implied consent of the bishop ought to be obtained for every alteration in the fabric of a cathedral, was equally unsupported by authority; and their Lordships cannot, under these circumstances, conclude either that the bishop, as visitor, has a discretion to order any alteration in the fabric of the cathedral church, except on some definite legal ground: or that such a discretion, if not possessed by the bishop, could be exercised by the Court of Arches, or by Her Majesty in council, when adjudicating on an appeal from the bishop's judgment as visitor.

The case before us on the present appeal must therefore be determined with reference to the question whether the structure itself is contrary to the ecclesiastical law. For determining this question their Lordships have proceeded to examine the authorities and documents cited before them in proof of the alleged illegality of the respondent's proceedings. At the commencement of the Reformation attention was directed to the numerous representations in churches, either by sculpture or painting, or both, of those who were venerated either as divine persons or as saints of the church, and to the outward acts of worship or honour paid to these representations or images. In the first year of Edward VI. (1547) injunctions were issued to the clergy and laity by the king, with the advice of the protector and the council, purporting to be in continuation of like injunctions issued by Henry VIII. which, amongst other things denounced, as tending to idolatry and superstition, "the offering of money, candles, or tapers to relics or images, or kissing or licking of the same." And the clergy were directed to take down and destroy "such

images as they know to have been so abused with pilgrimages or offerings of anything made thereunto, or shall be hereafter censured unto," and to suffer thenceforth "no torches or candles, tapers nor images of wax to be set before any image or picture," but only two lights upon the high altar . . . admonishing their parishioners that images serve for no other purpose but to be a remembrance whereby men may be admonished of the holy lives and conversations of those that the said images do represent; which images, if they do abuse for any other intent, they commit idolatry in the same.

By the 28th of these injunctions the clergy are ordered "to take away, utterly extinct, and destroy all shrines, tables, candlesticks, trindles, or rolls of wax, pictures, paintings, and all other monuments of feigned miracles, pilgrimages, idolatry, and superstition, so that there remain no memory of the same in walls, glass windows, or elsewhere within their churches or houses." The execution of these injunctions was intrusted to the ordinary, and articles were framed to be inquired of in the King's visitation, one of which inquired, "Whether there do remain not taken down in your churches, chapels, or elsewhere, any misused images with pilgrimages, and whether do remain, not defaced and destroyed, any shrines, coverings of shrines, or any other monument of idolatry, superstition, and hypocrisy." A question has been raised as to the authority under which these injunctions were issued; whether, under the statute 31 Hen. 8, c. 8, giving to the king's proclamations the force of law, or by virtue of the Act of Supremacy. The learned judge in the court below seems to treat the injunction as a proclamation under the statute, which statute was soon afterwards repealed; but whether it was so or not appears to their Lordships to be an inquiry not material to the present issue, for the reasons to be afterwards mentioned.

The next document relied upon by the appellant is a Latin letter headed "*Mandatum ad amovendas et delendas imagines*" of Archbishop Cranmer to the Bishop of London, dated the 24th Feb. 1547-8, which recites (in English) letters missive (purporting to have been received by the archbishop), signed by certain Lords of the council.

The archbishop then directs the bishop to proceed accordingly, and articles appear to have been framed to be inquired of in the visitation of the diocese of London; one of which is framed in the very words of the 28th of the King's Injunctions, so far as regards images. Whatever may have been the legal effect of this mandate, it may be assumed that it was sent under the circumstances stated, and in consequence of the letter set forth as having been sent to the archbishop from the Lords of the council. It appears plain to their Lordships that the injunctions were directed (3rd and 28th) to the removal or destruction of such images only "as had at any time been abused" by superstitious observances; but the letter refers to the difficulty of distinguishing them from others, and to the pretext made for retaining some that had been "manifestly abused" by reason of their alleged exemption from abuse. Accordingly, it is directed that, in order to make sure of attaining the original purpose, all the remaining images should be then removed.

This order, or letter, then, of the King's council, explained as it is in its objects and intentions on

the face of the document itself, appears to their Lordships to amount to no more than an administrative act or step taken at the time, for the time, and dictated by the necessities peculiar to the time. It did not contain, nor profess to contain, the enunciation of any general law of a permanent character with respect to images. It, no doubt, proceeded on the implied assertion that the worship or abuse of images was contrary to the true doctrine of the church, then at the commencement of its reformation. But it did not involve all images in a general condemnation, even by implication, for it distinguished between those which had been abused and those which had not, so far as condemnation went, and ordered the removal of all, whether abused or not, for the sake of peace, and for the purpose of insuring obedience to the former orders. Far from denouncing dead images as things unlawful, this document speaks of them "as things not necessary." The Act of the 3 & 4 Edw. 6, intitled "an Act for the abolishing and putting away divers books, and images," enacts, by the 1st section, that all books (enumerating many) heretofore used for service of the church, written or printed in the English or Latin tongues, other than such as are or shall be set forth by the King's Majesty, shall be by authority of this present Act clearly and utterly abolished, extinguished, and forbidden for ever to be used or kept in this realm or elsewhere within any of the King's dominions. The 2nd section enacts that, if any person that then had, or thereafter should have, in his custody any such books or images of stone, timber, alabaster, or earth, graven, carved, or painted which heretofore have been taken out of any church or chapel, or yet stand in an church or chapel, and do not before the last day of June next ensuing deface and destroy, or cause to be defaced and destroyed, the same images and every of them, "and do not deliver up the books there mentioned in the manner and for the purpose of their destruction therein mentioned, he shall, for every book willingly retained in his hands, incur such penalties as in the Act mentioned." The careless wording of the Act, which omits all penalty with reference to images, induces a suspicion that the introduction of images into the Act was an afterthought; but, be this as it may, this Act would imply the necessity of all persons defacing or destroying or delivering up all images which had already been, or might afterwards be, removed out of churches, and probably, also, the obligation of removing those then remaining in churches, whether abused or not, except in cases falling within the exception of the 6th section of the Act, which provides that the Act shall not extend "to any image or picture or any tomb in any church or chapel or churchyard only for a monument of any king, prince, or nobleman, or other dead person, which hath not been commonly reputed and taken for a saint, but that such pictures and images may continue in the like manner and form as if the Act had never been had or made." The exception itself shows the generality in all other respects of the enactment as embracing all images; though it is remarkable that the excepted cases are referred to as occurring in any church or churchyard, whilst the rest of the statute appears to be confined to images contained in or removed from the inside of churches or chapels. This statute was repealed by 1 Mary, c. 2, s. 2, but that statute was in its turn repealed by 1 Jac. 1 c. 25, s. 48, and the statute of Edward was thereby

revived. The Act of James 1 is itself repealed by the 26 & 27 Vict. c. 125. But an express section of that Act provides that, where any Act thereby repealed had the operation of reviving any former Act, such reviver shall not be affected. The Act of Edward 6, therefore, remains unrepealed.

It is in this state of circumstances that their Lordships deem it unnecessary to consider by what authority the royal injunctions and the archbishop's mandate may have been originally issued. Their Lordships concur in the opinion expressed by this tribunal in *Westerton v. Liddel* (Moore's Spec. Rep., London, 1857), and cited by the learned judge of the court below, viz., that the Act "related to the destruction of images already ordered to be removed, but which either had not been removed, or, having been so, were still retained for private devotion and worship." It may be regarded as a recognition by the Legislature of the validity of these orders (though not expressly referred to), and of the obligation of obedience to them, but it does not go further; and, as with the mandate above referred to, so with this statute, it appears to their Lordships that the efficacy of the Act of Edward was spent upon the definite purpose to which it was directed, and that the Legislature did not thereby make, or intend to make, provision in respect of the subsequent use or abuse of any other images. Up to this time then, viz., up to and including the statute of Edward VI, the case as to "images" stands thus:—The King's injunctions in the first year of his reign condemned several superstitious practices with reference to images, such as pilgrimages to particular images, offerings made to them of any kind, kissing or licking, or censing the same, and directed all shrines, pictures, paintings, and other monuments of feigned miracles, pilgrimages, idolatry, and superstitions, to be destroyed by the incumbent, so that there remain "no memory of the same in walls, glass windows, or elsewhere within the churches or houses of their parishioners." The Metropolitan then communicated to the Bishop of London a letter received by him from the privy council, with reference apparently to what had been done under the injunctions, and the difficulty of distinguishing images which had been abused from those which had not, which letter directs a total removal and destruction of all images. This is followed by the statute, and so matters appear to have rested till the reign of Mary, when the Act of Edward was repealed, and the images, or some of them, were probably restored.

It is remarkable that nothing was done by Elizabeth with reference to the revival of the Act of Edward, but in the first year of her reign (1559) injunctions were issued by her, the 23rd of which directed that the clergy should take away, utterly extinct, and destroy all shrines, . . . pictures, paintings, and all other monuments of feigned miracles, pilgrimages, idolatry, and superstition, so that there remain no memory of the same in glass windows, or elsewhere within their churches and houses; and articles, on the visitation of the Queen, were issued, founded on these injunctions, the 45th of which inquired whether the clergy knew any that kept in their houses any undefaced images, tables, pictures, paintings, or other monuments of feigned and false miracles, . . . and do adore them, and specially such as have been set up in churches, chapels, and oratories.

In the next year the Queen put forth the following

proclamation: "Elizabeth.—The Queen's Majest' understanding that by means of sundry people partly ignorant, partly malicious or covetous, there hath been of late years spoiled and broken certain ancient monuments, some of metal, some of stone, which were erected up as well in churches as in other public places within this realm, only to show a memory to posterity of the persons there buried, or that had been benefactors to the buildings or dotations of the same churches or public places, and not to nourish any kind of superstition, by which means not only the churches and places remain at this present day spoiled, broken, and ruined, to the offence of all noble and gentle hearts, and the extinguishing of the honourable and good memory of sundry virtuous and noble persons deceased, but also the true understanding of divers persons in this realm (who have descended of the blood of the same persons deceased) is thereby so darkened, as the true course of their inheritance may be hereafter interrupted, contrary to justice; besides many other offences that hereof do ensue to the slander of such as either gave or had charge in times past, only to deface monuments of idolatry and false feigned images in churches and abbeys; and therefore, although it be very hard to recover things broken and spoiled, yet both to provide that no such barbarous disorder be hereafter used, and to repair as much of the said monuments as conveniently may be Her Majesty chargeth and commandeth all manner of persons hereafter to forbear the breaking or defacing of any parcel of any monument, or tomb, or grave, or other inscription and memory of any person deceased, being in any manner of place; or to break any image of kings, princes, or noble estates of this realm, or of any other that have been in times past erected and set up for the only memory of them to their posterity, in common churches, and not for any religious honour, or to break down and deface any image in glass windows in any church without consent of the ordinary, upon pain that whosoever shall herein be found to offend, to be committed to the next gaol. . . ."

The words "false," and "feigned images," which frequently occur in these documents, may either refer to images to which particular efficacy was falsely attributed, or (a meaning borne out by some passages in the Homilies) to images falsely alleged to be true likenesses of either the Saviour or any saints, of whom no true likeness existed. But whatever meaning be assigned to these words, the language of both the injunctions and the proclamation, is plainly addressed, not to all "pictures, paintings, or monuments, &c.," but to a limited class of them, and this a class tainted with falsehood or superstition. As the reformation proceeded, and the articles of religion came to receive statutory authority, the doctrine of the church on this subject was plainly set forth.

The 22nd Article of Religion declares that "the Romish doctrine concerning purgatory, pardons, worshipping, adoration, as well of images as of reliques, and also invocation of saints, is a fond thing vainly invented, and grounded upon no warranty of scripture, but rather repugnant to the Word of God." In other words, it condemns only the abuse of images. But great stress has been laid in the argument of this case upon the Homilies against the perils of idolatry, which are recognised in the 35th Article of Religion (amongst other homilies) as containing

"a godly and wholesome doctrine, and necessary for the times, and therefore are judged to be read in churches by the ministers diligently and distinctly, that they may be understood of the people."

The 46th and 49th canons give special directions as to the reading of the Homilies, and the 80th canon orders the book of Homilies to be provided in each parish. This recommendation, however, of the Homilies cannot be pressed further than as containing an approbation of "doctrines" therein contained, and even that of a qualified character, as being specially necessary for the times when the articles were framed and published. Now the Homily against the peril of idolatry (contained in several parts) sets forth in very glowing colours the vanity and folly of paying adoration or worship to images or paintings, but it recognises the original intention of such images or paintings to have been the better instructing of the ignorant, as set forth in the letter of Gregory to Serenus (cited by the learned judge in the court below). The Homily observes, "you may withal note that seeing there is no ground for worshipping of images in Gregory's writing, but a plain condemnation thereof, that such as do worship images do unjustly allege Gregory for them." The Homily, however, proceeds to affirm that the worshipping of images is a necessary consequence of their being allowed to exist, and therefore concludes strongly for their entire abolition, irrespective of actual abuse. Now it is plain that the "doctrine" maintained by the Homily is that of the 22nd Article, and condemns paying "honour and reverence to images as being an act of idolatry, and contrary to the second Commandment." In the judgment of its author the existence of any image, whether originally intended for instruction or not, is dangerous, as tending to idolatry. This cannot be called doctrine. It is an opinion as to the consequences which might at that time follow the use of representations of sacred objects, and probably the opinion might then be well founded; whilst it is, on the contrary, notorious that numerous sculptures and pictures representing the Saviour and Apostles and other holy men exist, and have existed for more than two centuries in and outside of our churches, to which no worship has been paid. The old associations were broken off, and the old "monuments of superstition" had either been removed, or become innocuous, before the reign of Elizabeth was closed.

In the 9th of Elizabeth, on a visitation by Archbishop Parker, articles were exhibited, the 6th of which inquired whether any taught "that any man is borne with which do extol any superstitious religion or religious pilgrimages, lighting of candles, kissing, kneeling, or ducking to images." And at another visitation in the 12th of Elizabeth, by the same metropolitan, articles were exhibited, by the 6th of which inquiry is made "whether images and all other monuments of idolatry and superstition be destroyed and abolished, and whether your churches and chancels be well adorned and conveniently kept without waste, destruction, or abuse of anything. Whether the rood loft be pulled down according to the order prescribed, and if the partition between the chancel and the church be kept." These articles appear to observe the distinction noticed in the Queen's proclamation already referred to between the representations which had been abused and those which had not. It is not improbable that there had existed some

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conspicuous representation of a crucifix in the rood-lofts which had been abused, and therefore was directed to be removed.

In Cardwell's "Annals" (vol. 1, No. lxxvii) are articles intended to have been exhibited at Archbishop Grindal's visitation in the 18th Elizabeth, the 4th of which inquires "whether rood-lofts be taken down to the cross-beam," and the 6th inquires whether (amongst other things), "all images and other relics and monuments of superstition and idolatry be utterly defaced, broken, and destroyed, and if not, where and in whose custody they remain." It appears to be doubtful whether these articles were ever exhibited. From this time, and notwithstanding the revival in the time of James I of the Act of 3 & 4 Edw. 6, there appears to have been neither further legislation nor inquiry with reference to pictorial or sculptured representations of sacred subjects in churches.

What, then, is the character of the sculpture on the reredos in the case before their Lordships? For what purpose has it been set up? To what end is it used? and is it in danger of being abused? It is a sculptured work in high relief—in which are three compartments. That in the centre represents the ascension of our Lord, in which the figure of our ascending Lord is separated by a sort of border from the figures of the Apostles, who are gazing upward. The right compartment represents the transfiguration, and the left the descent of the Holy Ghost on the day of Pentecost. The representations appear to be similar to those with which every one is familiar in regard to the sacred subjects in question. All the figures are delineated as forming part of the connected representation of the historical subject. The ascension necessarily represents our Lord as separated from the Apostles, who are gazing at Him on His ascent. As finials to the architectural form of the reredos, there is on each side a separate figure of an angel. It is plain to their Lordships that the whole erection has been set up for the purpose of decoration only. It is not suggested that any superstitious reverence has been or is likely to be paid to any figures forming part of the reredos, and their Lordships are unable to discover anything which distinguishes this representation from the numerous sculptured and painted representations of portions of the sacred history to be found in many of our cathedrals and parish churches; and which have been proved, by long experience, to be capable of remaining there without giving occasion to any idolatrous or superstitious practices. Their Lordships are of opinion that such a decorative work would be lawful in any other part of the church; and, if so, they are not aware of any contravention of the laws ecclesiastical by reason of its erection in the particular place which it now occupies. Their Lordships have not adverted to the case of *Cook and others v. Tallent*, (in the Arches Court, A.D. 1684) mentioned by the learned judge in the court below, because they have been furnished by the registrar with a full note of that case, which appears to have proceeded on consent.

Their Lordships desire it to be clearly understood that nothing decided in this case affects the question of superstitious regard being paid, contrary to the 22nd Article of Religion, to any representations or images that are, or may at any time be set up in churches. The law will at all times be sufficiently strong to correct and control

any such abuse; but their Lordships are of opinion that the sculpture in question is not liable to be impugned in that respect. Their Lordships will therefore recommend Her Majesty to reverse the decree pronounced by the Dean of the Arches, so far as it reversed the decree of the Lord Bishop of Exeter in pronouncing for his jurisdiction as visitor and ordinary of the Cathedral Church of St. Peter, in Exeter; but to affirm the decree of the Dean of the Arches in all other respects; and their Lordships, regard being had to the argument in the court below and before them, in opposition to the jurisdiction of the Lord Bishop, do not decree the payment of any costs of this appeal by any party. Indeed, they understood it to be stated at the bar, by the counsel for the respondents, that they did not ask for costs.

Proctors for the appellant, *Moore and Currey*.
Proctor for the respondents, *Skipwith*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Wednesday, Jan. 20, 1875.

HALL (app.) v. NIXON (resp.).

Local board—Bye-law—New buildings—Notice of intention to build—Deposit of plans—Penalty—Local Government Act 1858 (21 & 22 Vict. c. 98, s. 34).

A local board of health made a bye-law under sect. 34 of the Local Government Act 1858, by which every person intending to erect any new building was required to give fourteen days' notice to the local board of such intention, by writing, delivered to the surveyor of the local board or left at his office, and at the same time to deliver to such surveyor or leave at his office detail plans and sections, drawn in ink on drawing paper, &c., showing the thickness of the walls, the dimensions of the rooms, &c., every plan submitted to be lodged at the borough surveyor's office on the Tuesday previous to the fortnightly meeting of the town improvement and public health committee; the local board, within fourteen days after receiving the notice, to signify whether the plans and sections were approved or disapproved, and, if the latter, for what reasons; any person erecting any new building without giving such notice and delivering such plans and sections as aforesaid, or without having the same approved by the local board, or in any wise contrary to the plans and sections which had been approved, to be liable for each offence to a penalty of 40s. Another bye-law empowered the local board to remove, alter, and pull down any work contrary to the bye-laws:

Held, that, notwithstanding the power given by the last-mentioned bye-law, the former bye-law was reasonable and not beyond the power of the local board to make.

Hattersley v. Burr (4 H. & C. 523), and Young v. Edwards (33 L. J. 227, M. C.), commented on and questioned.

At a petty session holden at the borough of South Shields, in the county of Durham, in and for the said borough, on the 28th Jan. 1874, before Henry Nelson and J. B. Dale, Esqs., two of her Majesty's justices of the peace in and for the said borough, a certain information was preferred by one Matthew Hall (hereinafter called the appellant), the surveyor

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appointed by and on behalf of the mayor, aldermen, and burgesses of the said borough, being the local board of health, against Thomas James Nixon (hereinafter called the respondent), under the 6th bye-law made by virtue of the statute 21 & 22 Vict. c. 98, s. 34, by the said local board of health for the corporate district of South Shields aforesaid, charging that the respondent, on the 13th Jan. 1874, at and in the said borough, did unlawfully erect a certain building, to wit, a dwelling-house, in Challoner Grove in the said borough, without first giving fourteen days' notice in writing to the surveyor of the local board of health for the said borough, and leaving with him the plans and sections of such building, and having the same approved of by the said local board of health, contrary to the building bye-laws of the said borough; and the appellant and respondent being respectively present then and there, the said charge was duly heard by the justices in due form of law. It was proved in evidence on the part of the appellant that on the 13th day of the same month of January, the surveyor visited the new buildings now in course of erection in Challoner Grove by respondent, and found him building two houses for which he had not previously submitted detail plans and sections, as required by the 6th bye-law of the board; that on the same day he had caused a notice to be given to the said respondent forbidding him to build further until he had furnished plans, and had them approved by the board; the respondent thereupon submitted plans to the said board, and at their next meeting the plans for some cause were rejected, and a prosecution ordered against the respondent for a breach of the 6th bye-law.

It was contended, on the hearing of the said information, on the part of the appellant, that it was immaterial for the respondent to show that he was complying in all respects with the bye-laws as to the construction of the buildings, sufficiency of space about the buildings, or the drainage; the defendant had committed an offence by not having given fourteen days' notice, and submitted detail plans and sections, and had them approved by the board, as required by the 6th bye-law, before building; and the local board pressed the court to punish him for the breach of it.

It was admitted on cross-examination that a plan, called an estate plan, had been passed by the local board about two years ago for the building of twenty houses, to compose when completed the street called Challoner-grove, which plan complied with the requirements of the bye-law as an estate plan. This plan was submitted by the owner of the ground, and not by the respondent. It showed the level and width of the street, and the yard space behind the houses when built, also the house drainage, their size, depth, and inclination. The owners of the ground had from time to time sold off sites, and the defendant was a purchaser of several of them.

It was admitted on the part of the respondent that, in respect of the two houses recently commenced, no plans had been delivered to the local board, but that of itself, it was contended, was not an offence punishable by justices in a summary manner; that the respondent was building according to the plan passed by the board as an estate plan, which gives the line of street and yard area

behind; and that in all other respects he was complying with the building bye-laws of the board, which provide for the construction of houses, and that in respect of the two houses just recently commenced he was building them upon plans passed by the board for the two houses there immediately adjoining, the two just commenced being intended to be exactly the same and conformable in every way to the bye-laws. It was further contended, on the part of the respondent, that, if the defendant was building anything contrary to the building bye-laws, he was not punishable in a summary manner by justices, but that the local board might, under their 36th bye-law, order the buildings, or any of them, to be removed or altered, and in case of default the board might proceed to pull down such buildings to the extent to which the same might be an infraction of the bye-laws.

The section of the Act provides that every local board may make bye-laws with respect to the following matters (that is to say):

1. With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof.
2. With respect to the structure of walls of new buildings for securing stability and the prevention of fires.
3. With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings.
4. With respect to the drainage of buildings to water-closets, privies, ashpits, and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation.

And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws; provided always that no such bye-law shall affect any building erected before the date of the constitution of the district.

The sixth bye-law is as follows:

Every person who shall intend to erect any new building shall give fourteen days' notice to the local board of such intention by writing delivered to the surveyor to the local board, or left at his office, and shall at the same time deliver to such surveyor, or leave at his office, detail plans and sections drawn in ink on drawing paper, tracing cloth, or mounted tracing paper, on a scale of one-eighth or one quarter of an inch to every foot of every floor of such intended new dwelling, showing the thickness of the walls, the dimensions of the rooms, the situation of the fireplaces, stoves, chimneys, and flues, and generally the position, form, and dimensions of the several parts of such building, and of the water closet, privy, gully, and drain, ash pit, coal house, and all other buildings and appurtenances connected therewith; and such plans and sections shall be accompanied by a description of the materials of the building, the mode in which it is proposed to be constructed, and the number of the site on estate plan it is intended to occupy.

1. Walls of proposed building to be coloured

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red, walls of adjoining buildings (if any) Indian ink or some dark colour, timbers yellow, all rooms and parts covered with a roof to have a light wash of burnt sienna or a light yellow colour, yard and foot pavement to have a light wash of blue.

The plan and section to be neatly inked in with Indian ink.

2. Every plan submitted for the approval of the corporation must be lodged at the borough surveyor's office, on the Tuesday previous to the fortnightly meeting of the town improvement and public health committee.

A block plan in all cases where no estate plan shall have been deposited and approved shall, if so required by the local board, be lodged at the borough surveyor's office as aforesaid, drawn in ink on drawing paper or mounted on cloth to a scale of one inch to every 44 feet, showing the position of the buildings and appurtenances of the properties immediately adjoining to the extent of six feet at least on all sides, the width or level of all streets abutting thereon, the level of the lowest floor of the intended building and of the yard or ground belonging thereto. The plan shall show also the proposed lines of house drainage and their size, depth and inclination. Provided always, that the local board shall within fourteen days after receiving such notice, detail plans, and sections signify to the persons giving or sending the same whether they approve or disapprove thereof, and if they shall disapprove thereof shall at the same time give the reasons why they disapprove of such plan.

Any person who shall erect any new building without giving such notice, and delivering such plans and sections as aforesaid, or without having the said plans and sections approved of by the local board, or in anywise contrary to plans and sections which have been approved of by the local board, shall be liable for each offence to a penalty of 40s. (a).

(a) The 35th, 36th, and 37th, and bye-laws were as follows:—

35. *Continuing Penalties.*—In case any offence under any of the foregoing bye laws shall continue, the person wilfully offending shall be liable to a further penalty of 40s. for each day during which such offence shall continue after written notice of the offence has been given by the local board to, or left for the offender, at his usual or last known place of abode.

36. *Power to remove, alter, and pull down any work contrary to bye-laws.*—Where any work has been begun or done in contravention of the foregoing bye-laws, or any of them, it shall be lawful for the local board to give notice to the builder or other person who has done, or is doing such work, and the person for whom the same has been or is being done, of the particulars in which the said bye-laws have not been complied with. The said notice shall be served in the manner prescribed for the service by a local board of the notice referred to in the Local Government Act 1858, sect. 75. And it shall call upon the parties respectively to whom it is directed, to appear at a time and place therein named (which time shall not be less than seven clear days from the service thereof), and then and there to show cause why the said work should not be removed, altered, or pulled down. If, after hearing the said parties, or such of them as shall appear in pursuance of the said notice, the local board shall be of opinion that no sufficient cause has been shown to the contrary, it shall be lawful for the said local board to make an order in writing, under the hand of their clerk, requiring the parties to whom the said notice is directed, and each of them, to remove, alter, or pull down the said work, as the case may, in the opinion of the local board, require, and within such time as to the said local board shall seem reasonable. Such order shall be served on the said parties respectively in

We carefully considered the latter portion of the section of the statute referred to, and not only the 6th bye-law, but the succeeding ones, and we were of opinion that as an estate plan had already been passed and approved of by the board, showing the whole of the houses to be built in Challoner Grove, there had been compliance with the bye-law so far as the statute empowered the board to make one, and that the respondent had committed no offence in law by not delivering detail plans and sections: and we decided that the local board had no power to make a bye-law constituting the respondent's conduct in this case an offence, and that the bye-law went beyond the powers given to the board by the Local Government Act 1858.

The question for the opinion of the Court of Queen's Bench is, whether the construction we put upon the statute as applicable to this case be correct, and whether the 6th bye-law alleged to be made in pursuance of it is reasonable, and be within the powers of the board as conferred by the statute.

If the court should be of a contrary opinion, then our decision is to be reversed; if, however, the court should be of an affirmative opinion, then our decision is to be confirmed.

This case stated and signed pursuant to 20 & 21 Vict. c. 43, the 23rd Feb. 1874.

HENRY NELSON.

JOHN BRODRICK DALE.

C. Russell, Q.C. (with him *Dixon*), for the appellants, contended that the bye-law in question was one which the local board of health had authority to make; and as the respondent had clearly infringed it, the justices should have convicted. The authority to make bye-laws is given by the Local Government Act 1858 (21 & 22 Vict. c. 98). Sect. 34 provides that "every local board may make bye-laws with respect to the following matters (that is to say), first, with respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof; secondly, with respect to the structure of walls of new buildings for securing stability, and the prevention of fires; thirdly, with respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings; fourthly, with respect to the drainage of buildings to water closets, privies, ashpits, and cesspools, in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation; and they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or

the same manner as the said notice, and if the surveyor of the said local board shall certify to them that at the expiration of the time named therein, the said order had not been complied with, the local board may, if they think fit, cause such work to be removed, altered, or pulled down, as directed in the said order.

37. *Power to reduce Penalties.*—All justices of courts who shall act in enforcing the payment of any penalty or forfeiture imposed or made payable by the foregoing bye-laws or any of them, shall have the power to mitigate any penalty or forfeiture so imposed or made payable as aforesaid, to such sum as they in their discretion shall think fit.

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pull down any work begun or done in contravention of such bye-laws; provided always that no such bye-law shall affect any building erected before the date of the constitution of the district." By sect. 4, this Act is to be construed together with and to be deemed to form part of the Public Health Act 1848, and bye-laws framed under this Act are to be enforced and dealt with in all other respects as bye-laws under the said Public Health Act. Now by sect. 115 of the Public Health Act 1848 (11 & 12 Vict. c. 63), the local board "may, by any such bye-laws, impose upon offenders against the same, such reasonable penalties as they shall think fit, not exceeding the sum of 5*l.* for each offence, and in the case of a continuing offence, a further penalty not exceeding the sum of 40*s.* for each day after written notice of the offence from the said local board. . . . Provided always that all such bye-laws imposing any penalty shall be so framed as to allow of the recovery of any sum less than the full amount of the penalty; provided also, that no such bye-laws shall be repugnant to the laws of England, or to the provisions of this Act," &c. And by sect. 129, "any penalty imposed by or under the authority of this Act or any bye-law made under this Act, the recovery whereof is not otherwise expressly provided for, may, upon proof on oath of the offence in respect of which the penalty is alleged to have been incurred, be recovered before two said justices, together with such costs of the proceedings as they may think proper; and if the sums adjudged be not paid by the party against whom the adjudication is made, the same may be levied by distress and sale of the goods and chattels by warrant under the hands and seals of the justices making the adjudication; and such justices, or either of them, may order that any offender convicted as last aforesaid be detained and kept in safe custody until return can be conveniently made to the last-mentioned warrant, unless he give sufficient security by way of recognisance or otherwise for his appearance on the day appointed by the return, such day not being more than eight days from the time of taking the security; and if before issuing such warrant, or upon the return thereof, it appear to the satisfaction of the last mentioned justices that no sufficient distress can be had within their jurisdiction, they may, by warrant under their hands and seals, cause the offender to be committed to gaol, there to remain, without bail, for any term not exceeding three months, unless such penalty and costs be sooner paid."

Herschell, Q.C. (with him *C. Crompton*) for the respondent, was here called upon. It is submitted that under sect. 34 of the Local Government Act 1858, the local board had no power to make a bye-law imposing a penalty in money for non-compliance with any of the bye-laws. [*LUSH*, J.—Is not the power to make such a bye-law included in the power to impose a reasonable penalty for non-compliance with the bye-laws?] It is submitted that it is not. At any rate, no such power can be implied where a specific and different remedy is given by the Act. Sect. 34 enables the local board to make provisions by their bye-laws for "removing, altering, or pulling down any work begun or done in contravention of such bye-laws"; and the local board have here made such provision by their 36th bye-law. It could not have been intended to place every person intending to build at the mercy of the particular view which the board's

surveyor might happen to take. [*LUSH*, J.—I find the law on the subject of enforcing bye-laws by penalty thus stated in 2 *Kyd on Corporations*, p. 156: "To secure obedience to a bye-law, it is necessary that a penalty of some kind should be annexed to the breach of it; the only penalty admitted by the law of England is a pecuniary one, though either that may be recovered by action, or the payment of it enforced by distress of the offender's goods," referring to 5 *Coke* 63 b, 64 a. The only question is whether the superadded power of pulling down the building impliedly excludes the other mode of enforcing observance of the bye-laws.] It is submitted that it does. Further, it is submitted that the local board had no power to make a bye-law forbidding the commencing building without notice. In *Hattersley v. Burr* (4 H. & C. 523), it was held that a local board of health had no power under the 34th section of the Local Government Act 1858, to make a bye-law that before beginning to dig or lay the foundation of any new building a written notice thereof of one month at the least shall be left with the clerk at one of the monthly meetings of the board, accompanied with plans and sections, and that whoever shall neglect or refuse to give such notice shall be liable to a penalty not exceeding 5*l.* It was laid down by the Court of Exchequer that if a person gives a local board notice of his intention to build, and leaves with them plans and sections, he may at once commence the building, subject to the right of its being altered or pulled down if not in conformity with the bye-laws of the board. *Pollock*, C.B., said: "The 34th section of the Local Government Act 1858, has imposed a restriction on the common law right of people to build as they please; and it is important that the enactment should not be vexatiously carried out. If a person sends his plans to the board, he has a right to begin building whenever he pleases; he has given them notice of his intention to build, and it is their duty to take care that the building is not in contravention of their bye-laws." *Channell*, B., added: "The argument for the respondents must go to this extent, that a man is liable to a penalty of 5*l.* for building on his own land before the month's notice has expired, although the building is in every respect in conformity with the bye-laws." As pointed out by *Martin*, B.: "The board have power to inspect the building, and if it is in contravention of the bye-laws they may order it to be altered or pulled down." [*LUSH*, J.—Yet the Act of Parliament gives them power to make bye-laws containing provisions "as they think necessary as to the giving of notices as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings." Was not this power given for the purpose of enabling the board to inspect the buildings beforehand? *QUAIN*, J.—According to your contention what is the sanction for that part of the enactment as to the deposit of plans and sections?] The person who does not deposit plans of the buildings he is about to erect runs the risk of having them pulled down afterwards if they contravene the bye-laws; by depositing the plans with the board beforehand he avoids this risk, which is a quite sufficient sanction. In *Young v. Edwards* (13 L. J. 227, M. C.) a bye-law made by a local board of health, imposing continuing penalties on any person who should construct any works, or do or omit to do any act,

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or to comply with any requirement of the board, or should make any alteration or deviation in any plan approved by the board, whether in new or existing buildings, contrary to the provisions therein contained, or should do any act contrary to the bye-laws made under the authority of 21 & 22 Vict. c. 98, s. 34, or should omit, neglect, or fail to perform any of the works, matters, or things required by such bye-laws, and empowering the board to remove, alter, pull down, or otherwise deal with such work, as the case may require, was held invalid, as exceeding the authority given by the Local Government Act. The judgment *per curiam* was, "the bye-law is bad, being in excess of the authority given by the Act." Again, in *Brown v. Local Board of Health of Holyhead* (1 H. & C. 601) a bye-law providing that if any owner or person should construct or cause to be constructed any works, or do any act, or omit to do any act or comply with any requirements of the local board, or should make any alterations in any works after they have been completed, whether in new or existing buildings, contrary to the provisions therein contained, the local board might cause such works to be removed, altered, or pulled down, was held invalid, as exceeding the powers conferred by the Act. "We are all of opinion," said Pollock, C.B., "that this bye-law is invalid. The local board had no right to make a bye-law investing themselves with power beyond that conferred on them by the Act." These authorities are, it is submitted, decisive of the present case.

C. Russell, Q.C., in reply.—In *Young v. Edwards* (*ubi sup.*) the appellant had in fact deposited plans and notices which were unreasonably rejected; in the present case the reasons of their disapproval must be given by the local board. In *Hattersley v. Burr* (*ubi sup.*), also, the appellant had in fact given notice to the surveyor, and the bye-law in that case was very peculiar. Then as to the argument that the liability to have buildings contravening the bye-laws pulled down being a sufficient sanction, it is enough to reply that it does not meet all the cases that might occur under the 34th section, *e.g.*, the case of a deposit of plans by a person "intending to construct buildings."

MELLOR, J.—I am of opinion that the appellant in this case is entitled to succeed. I think the justices erroneously came to the conclusion that the bye-law was not well founded on the words of the statute authorising the local board to make bye-laws. The words of the statute are very wide and comprehensive as to drains and streets. The enactment (sect. 34) on which the present case mainly turns is this: "Every local board may make bye-laws with respect to the following matters (that is to say), first, with respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof; secondly, with respect to the structure of walls of new buildings for securing stability, and the prevention of fires; thirdly, with respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings; fourthly, with respect to the drainage of buildings, &c.; and they may further provide for the observance of the same by enacting therein such provisions as they think necessary, as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local

board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws." A consideration of those provisions seems to show that the course pursued in the present case was a perfectly reasonable mode of exercising the powers conferred by that section. Indeed, I can conceive no more reasonable mode of carrying out the object of the statute than by making provision by bye-laws for the deposit of plans, and the giving of notices by persons about to build; and I must confess I am unable to see the grounds on which the two cases last referred to were decided. It is curious that one of these cases, which was decided two years before the other, was not referred to in it. They were cases which could not be carried into error, and therefore we are not bound to follow them, if we find that the reasoning on which they proceeded is not satisfactory to our own minds, and if we cannot see on what reasoning they proceeded, we must form the best opinion we can for ourselves. It may be that the grounds mentioned by Mr. Russell for distinguishing them are sufficient, though I think they are hardly so. It may be that the reason for the Lord Chief Baron's judgment was that the bye-law was in itself unreasonable, and not that the power to make such bye-laws was not given by the Act. But whether they can be distinguished or not, I think these bye-laws are clearly within the powers conferred by the Act. I do not think that Mr. Herschell was right in his contention that because there is a bye-law giving the local authorities power to pull down buildings which are not erected in accordance with the plans, the other remedy, by penalty, for enforcing compliance, cannot exist. I do not think the power of pulling down buildings affects the validity of the bye-law imposing a penalty for non-compliance with its provisions. I think, therefore, that this bye-law is valid, and that the justices should have convicted the appellant.

LUSH, J.—I own that I should have had no difficulty whatever in arriving at the same conclusion, were it not for the two cases cited by Mr. Herschell. It seems to me that, reading the Local Government Act 1858, in connection with the Public Health Act 1848 (11 & 12 Vict. c. 63), there is no difficulty whatever in this case. According to sect. 53 of the prior Act (11 & 12 Vict. c. 63) "fourteen days at the least before beginning to dig or lay out the foundation of or for any new house, or to rebuild any house pulled down to the extent aforesaid, the person intending so to build or rebuild shall give to the local board of health written notice thereof, together with the level or intended level of the cellars or lowest floor, and the situation and construction of the privies and cesspools to be built, constructed, or used in connection with such house; and it shall not be lawful to begin to build or rebuild any such house, &c., until the particulars so required to be stated have been approved by the said local board; and in default of such notice, or if any such house, privy, or cesspool be built, rebuilt, or constructed as aforesaid without such approval, or in any respect contrary to the provisions of this Act, the offender shall be liable to a penalty not exceeding 50*l.*; and the said local board may, if they shall think fit, cause such house, privy, or cesspool to be altered, pulled down, or otherwise dealt with as the case may require, and the expenses in-

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curring by them in so doing shall be repaid by the offender, &c.; provided always, that if the said local board fail to signify their approval or disapproval of the said particulars for the space of fourteen days after receiving such notice, it shall be lawful to proceed according to such notice if the same be otherwise in accordance with the provisions of this Act." The Act itself there imposed a penalty not exceeding 50*l.*, for not giving the fourteen days' notice. Then the 72nd section of the same Act provided, "that one month at the least before any street is newly laid out as aforesaid, written notice shall be given to the local board of health, showing the intended level and width thereof; and the level and width of every such street shall be fixed by the said local board; and it shall not be lawful to lay out, make, or build upon any such street otherwise than in accordance with the level and width so fixed, unless upon approval by the said local board, of the level or width specified in such notice, the general board of health shall otherwise direct. And whosoever shall lay out, make, or build upon any such street otherwise than in accordance with the level and width fixed by the said local board, or approved by the said general board, shall be liable for every such offence to a penalty not exceeding 20*l.* for every day during which he shall permit or suffer such street to be so improperly laid out, made, or built upon, &c." Now the Local Government Act of 1858 (21 & 22 Vict. c. 98), amending the former Act, repealed those two sections, and by its 34th section gave power instead to every local board to make bye-laws with respect to the following matters. [His Lordship here read the section above set forth.] So that instead of prescribing by Act of Parliament, as formerly, within how many days the notice should be given, and what the penalty should be in case of non-compliance, the Legislature leaves it to the discretion of each local board to make such bye-laws as to it shall seem just for carrying out the objects of the Act. I should have thought, therefore, that the local board could not be said to have made an unreasonable bye-law in providing that every person intending to erect any new building shall give fourteen days' notice of his intention to do so, and shall at the same time deliver plans and sections, it being entirely in the discretion of the local board to make bye-laws for that purpose. Now, further, express power is given by the 34th section to insert in the bye-laws such provisions as they think necessary "as to the giving of notices, as to the deposit of plans and sections by persons intending to construct new buildings." The former Act requires that fourteen days' notice should be given in such a case. Now power is given to such local board to determine the number of days; and there is also given what is implied at common law, a power to impose a penalty for non-compliance with the bye-laws. The Legislature certainly intended that the local board should have the power of enforcing the deposit of plans by persons intending to build, and the only way of enforcing that is by a pecuniary penalty. In the 2nd vol. of *Kydd on Corporations*, p. 156, to which I have already referred, it is said: "To secure obedience to a bye-law it is necessary that a penalty of some kind should be annexed to the breach of it, for otherwise the bye-law will be nugatory; the only penalty admitted by the law of England is a pecuniary one, though

either that may be recovered by action or the payment of it enforced by distress of the offender's goods. That obedience to a bye-law cannot be enforced by imprisonment of the offender, or by the forfeiture of his goods, there are a multitude of authorities; and the reason assigned is, that these are both against *Magna Charta*. If these modes be adopted, an action of false imprisonment in the one case, and trespass for the taking of the goods in the other, may be maintained by the party who has been imprisoned or whose goods have been seized. Neither can a bye-law be enforced by avoiding any bond or covenant made in contravention of it. . . . The penalty must be in a sum certain, and not left to the arbitrary assessment of the makers of the law, according to circumstances, even though the utmost extent of the sum be limited." The power to make bye-laws as, therefore, incident to it the power to enforce compliance with them by a pecuniary penalty. Local boards could not pull down buildings without legislative authority; that would be contrary to *Magna Charta*. This Act of Parliament, therefore, gives them such power where the buildings contravene the bye-laws. The bye-law in the present case does nothing more than say that within fourteen days, the very number of days prescribed by the first Act, persons intending to build shall give notice of their intention, and deposit the plans of the buildings intended to be erected, and that the plans shall show the thickness of the walls, the dimensions of the rooms, the situation of the fireplaces, stoves, chimneys, and flues, and generally the position, form and dimensions of the several parts of such buildings, &c. That appears to me entirely to conform to what the Act prescribes. The respondent in the present case began his buildings without depositing any plans; he came, therefore within the Act. But then we are met by the cases cited. I agree with my brother Mellor, that if the present case could be taken into error we should feel bound to follow those cases, and leave the present parties to go into error; but the case not being one which can be taken into error, we must see whether the cases cited are cases which we can approve of or not. In *Young v. Edwards (ubi sup.)*, the question submitted to the court was, "whether the 26th bye-law was bad, either wholly or in part, and consequently whether the justices were justified in inflicting any penalty by virtue of such bye-law." That question should not have been submitted to the court in that form, because a bye-law may be good in part and bad in part. In 2 *Kydd on Corporations*, 155, the law is thus laid down: "A bye-law may be good in part and void for the rest; for where it consists of several particulars, it is to all purposes several bye-laws, though the provisions be thrown together under the form of one." That, however, being the question submitted to the court in that case, the bye-law itself was criticised. It stated, amongst other things, that the local board should approve or disapprove new buildings within the times specified for the deposit of notices, "but if the owner or person intending to construct any new street, or erect any new building, fail to give the notices herein required, or proceed to the execution of any of the works before the expiration of such notices, without the approval of the local board, or if any owner or person shall construct, or cause to be constructed, any works, or do any act, or omit to do any act, or to comply

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with any requirement of the local board"—words very wide indeed—"or shall make any alteration in any of the works after they have been completed, or make any deviation from, or alteration in, any plan which has been submitted to and approved by the local board, whether in new or existing buildings, contrary to the provisions herein contained, or do any act, matter or thing, contrary to the bye-laws made under the authority of the 34th section of the Local Government Act 1858, or omit, neglect, or fail to perform and execute any of the works, matters, or things, required by such bye-laws or any of them, or in any manner transgress the same bye-laws, or any of them, he shall be liable for each offence to a penalty not exceeding 5*l.*; and he shall pay a further sum, not exceeding 40*s.*, for each and every day during which such works shall continue to remain contrary to the said provisions." All the court say is that the bye-law is bad, being in excess of the authority given by the Act. And I think there would not be much difficulty in pointing out certain parts of the bye-law which were not authorised by the Act. It is curious that in the case of *Hattersley v. Burr* (*ubi sup.*), decided two years afterwards by the same court, the bye-law was that persons intending to build should give a written notice "of one month at the least;" to be left with the clerk at one of the monthly meetings of the board, and the court thought that length of time unreasonable, for Channell, B., said: "The bye-law does not simply require one month's notice, but that a month's notice shall be left with the clerk at one of the monthly meetings of the board. Could the board make a provision that if a person about to build met the clerk going to a board meeting and gave him the notice, that should not suffice, but that it must be given at one specific period only, recurring at considerable intervals?" The only other remark attributed in the report to the same learned judge is: "The argument for the respondents must go to this extent, that a man is liable to a penalty of 5*l.* for building on his own land before the month's notice has expired, although the building is in every respect in conformity with the bye-laws." I must confess that I cannot very well make out the exact grounds of the judgment in that case. The bye-law required the plans to be delivered within a time which, if the case came before us now for decision, I should say was an unreasonably long time; for it might well have come to two months. I should be very glad to have a more full account of the judgment in that case, which seems to have gone on the ground of the length of time being unreasonable; and if that were so I should be disposed to agree with it. But I am unable to say that the requirements of the bye-law in the present case are at all unreasonable, or that the local board have gone at all beyond what is warranted by the Act of Parliament. I am, therefore, of opinion that our judgment should be for the appellant.

QUAIR, J.—I am of the same opinion. I think that this bye-law is a good one, that it is not *ultra vires*, and that it is not in itself unreasonable. I should have no doubt whatever on this matter were it not for the two cases cited. There being no reasons given by the court for their judgments in those cases, I am unable to say whether our decision in the present case differs from the decisions in those cases or not. The only part of the

bye-law which we have to deal with here is that imposing a penalty for non-compliance with the requirements of the bye-law; and I think it is clear, upon the authorities, that a bye-law may be good in part and bad in part. In *Clark v. Denton* (1 B. & Ad. 95), Bayley, J. so expressly lays it down. And I think there was a case in which the penalty at the end of a bye-law was held bad and unreasonable, because, there being only one penalty, the parts of the bye-law were not separable. But where the parts are separable the bye-law may be good in part and bad in part. (a) An appropriate mode of enforcing a bye-law is by the infliction of a reasonable penalty; and the penalty of 40*s.* imposed by the bye-law in the present case is clearly a reasonable one. Then, had the local board power to make such bye-laws? Sect. 342 of the Local Government Act 1848, provides as follows: [His Lordship read the section.] By that section they may make bye-laws containing such provisions as they think necessary "as to the deposit of plans and sections by persons intending . . . to construct buildings." Unless we can see that the provisions actually contained in the bye-laws are unreasonable, I have no doubt whatever that they are within the power here given to the local board; and I see nothing whatever unreasonable about the provisions contained in this bye-law. I think that the bye-law is a perfectly good one. But it is urged that the local board has no power to impose a penalty because another remedy is given to them in the power which they possess to pull down any buildings which contravene their bye-laws. It seems to me that the two remedies are quite distinct and quite consistent with each other. Notice must be given before commencing to build, and plans must be deposited; the pulling down afterwards of buildings not properly erected is quite a different thing. It seems to me that both things are necessary to make the bye-law reasonable in itself. I am of opinion, therefore, that the case should be remitted to the justices, with our opinion that, under the circumstances, they should have convicted.

Case remitted, with opinion that respondent should have been convicted.

Attorneys for appellant, *Clarke, Rawlins, and Clarke.*

Attorney for respondent, *J. Scott, for Dale, North Shields.*

(a) In *Re v. Faversham* (8 T. Rep. 356) Lord Kenyon, C.J. said: "Though a bye-law may be good in part and bad in part, yet it can be so only where the two parts are entire and distinct from each other." And in *Reg. v. Lundie* (31 L. J. 157, M. C.; 5 L. T. Rep. N. S. 830), where one of the bye-laws made by the pasture masters of the common pastures of a borough under a local Act, passed to provide for the proper regulation thereof, provided that "if any person shall stock or depasture a vicious horse on any part of the common pastures, then, and in every such case, the person or persons so offending, and the owner or owners of the stock and cattle shall respectively forfeit and pay for every such offence 5*l.*," it was held that so much of the bye-law as referred to the infliction of the fine upon the person actually transgressing was divisible from that portion which referred to the owner of the stock; that the former part of the bye-law was reasonable and good, and might stand independently of the latter, which, if bad, might be rejected.

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COURT OF COMMON PLEAS.Reported by **ETHERINGTON SMITH** and **J. M. LELY**, Esqrs.
Barristers-at-Law.

Friday, Nov. 20, 1874.

HODGSON AND ANOTHER v. PEARSON.

Land tax, redemption of—Manor and woodland is—Inclosure after alleged redemption—Whether redemption affects lands inclosed after its date—Discrepancy between certificate and schedule—Burden of proof, whether upon Land Tax Commissioners or party claiming exemption.

Where a manor has once been charged with land tax, and the tax once redeemed, no after inclosure of the waste lands will render the manor liable to re-assessment.

If there be a discrepancy between the contract for and the certificate of redemption on the one hand and the schedule to such contract and certificate and the duplicate assessment on the other, the contract and certificate is to be deemed the true description, in the absence of affirmative evidence to the contrary, which evidence it lies upon the Land Tax Commissioners to produce.

The plaintiffs were the executors of the will of H., and the defendant was a collector of land tax. In 1799 the predecessor in title of H. had entered into a contract for the redemption of the land tax charged upon (inter alia) a manor of which such predecessor was lord. The certificate of contract given by the Land Tax Commissioners set out that the manor, grove, and woodlands were charged with land tax to the amount of 70l. 4s., and the contract for redemption, that the tax charged upon the manor, grove, and woodlands was redeemed for a sum therein mentioned, but neither the duplicate assessment nor the schedules to the certificate or contract made any mention of such manor, groves, and woodlands.

In 1844 H. bought the manor, and afterwards brought the waste into profitable occupation. No demand of land tax was made of him until 1867, when 12l. 17s. 4d. was demanded as a sum "assessed and not exonerated." H. refusing to pay, and being distrained upon by the defendant, brought an action for illegal distress, which was continued by the plaintiffs:

Held, by Keating, Lush, and Denman, JJ., upon a special case stated without pleadings, that the plaintiffs were entitled to judgment.

This was a special case without pleadings in an action by the executor and executrix of the will of Richard Hodgson, and the following are the material parts of such case:

1. The testator was Lord of the Manor of Chingford St. Paul, in the county of Essex, and the defendant the vestry collector of land tax for the parish of Chingford, and this action arises from a claim made by the defendant, as such collector, on the testator for 12l. 17s. 4d., as and for land tax assessed on the dwelling-house and lands of the plaintiffs, called Hawkwood Estate, for the year 1870-1, the said sum being described as "assessed and not exonerated."

2. The testator disputed, and his executrix and executor dispute the liability of the said dwelling-house and lands to assessment to land tax, under the circumstances hereinafter stated.

3. In the year 1799, the manor of Chingford St. Paul, and divers messuages, &c., lands, and premises, situate in the same parish, formed part

of the estate of John Snell, Esq., a lunatic, William Snell being his committee.

4. On the 29th June, 1798, a contract for the redemption of 70l. 16s. land tax, 12s. of which was in respect of land in the parish of Walthamstow, and the remaining 70l. 4s. in respect of land in the said parish of Chingford, was entered into between the Rev. Robert Lewis, clerk, and Walter Urquhart, two of the land tax commissioners, and the said William Snell. The following is a correct copy of the certificate of the commissioners, certifying the lands stated by them to be charged with the said land tax, and the contract for the redemption of the same:

Land Tax Redemption Office,

Office of Inland Revenue, Somerset House,

County of Essex.

Registered 18th Aug. 1799.

Office Register, No. 40,213.

Certificate of James Burwich, Esquire, and Walter Urquhart, two of the Commissioners of Land Tax for the county of Essex, that the Manor of Chingford St. Paul, and two enclosed groves, containing together by admeasurement twenty-six acres, and the woodland on the aforesaid manor, in the occupation of John Snell, Esquire; and that the manor-house called Chingford Hall, with the outbuildings, a small field garden held therewith, containing together six acres, in the occupation of John Temple; and that the farmhouse called Chingford Hall Farm, with the outbuildings and several closes of arable and pasture land, containing about 216½ acres, and that . . . [Here followed a specific enumeration of the various closes, with occupiers and measurements] . . . are charged with land tax to the amount of 70l. 4s., all which manors, messuages, lands, and premises, with their appurtenances, are situated in the parish of Chingford, in the said county of Essex, and are the estate of John Snell, Esquire, a lunatic, and in the duplicate for the parish of Chingford aforesaid are rated as under, viz.:

Parishes.	Proprietors.	Occupiers.	Sums Assessed.
Chingford.	John Snell, Esq.	Rt. Cooper.....	£ s. d. 18 4 0
		W. Hicks	9 12 0
		Geo. Newland	24 8 0
		M. Padmore	1 4 0
		D. Stiddolph	3 12 0
		Thos. Fooks	7 16 0
		Jas. Beasgrave	1 4 0
		W. Houghton	3 12 0
		Wm. King	0 12 0
			£70 4 0

Also certificate of a contract dated the 29th June 1799, whereby the Rev. Robert Lewis, Clerk, and Walter Urquhart, two of the commissioners for the purpose of the said Acts for the said county of Essex, certified that they had contracted with William Smith, of Shenley, in the county of Hertford, Esquire, committee of John Snell, Esquire, a lunatic, for the redemption of 70l. 16s. land tax, charged upon the Manor of Chingford St. Paul, and two inclosed groves, containing together by estimation twenty-six acres, and on the woodland on the aforesaid manor, in the occupation of the said John Snell, Esquire; and on the manor-house called Chingford Hall, and the outbuildings and a small field garden held therewith, containing together six acres, in the occupation of John Temple; and on a farmhouse called Chingford Hall Farm, with the outbuildings and several closes of arable and pasture land, containing about 216½ acres; and on . . . [Here followed a specific enumeration of the closes, as in the certificate] . . . All which manors, messuages, lands, and premises, with their appurtenances, are situate in the parish of Chingford, in the county of Essex, and on about 5½ acres of commonable land in Gravel Pit Field, in the parish of Walthamstow, in the occupation of John Temple, all which estates belong to the said William Snell, Esquire, as committee of the above-mentioned John Snell, Esq., and are rated in the duplicate as following. . . [Here followed a schedule similar to the above, except that the total sum in the 4th column was raised to 70l. 16s. by the addition of a sum set down of 12s. in respect of

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land in the parish of Walthamstow, the proprietor being named as William Snell.]

The consideration was declared to be 2596l. Government Stock by sixteen instalments, and a receipt was indorsed for 649l. 3s. Reduced Three Per Cents., being for instalments completed.

5. Although in the body of the certificate of assessment, the manor of Chingford, and two inclosed groves, containing together twenty-six acres, and the woodlands in the aforesaid manor, then in the occupation of John Snell, are specifically mentioned as being included among the lands stated to be charged with land tax to the amount of 70l. 4s., and to be rated in the duplicate assessment for the parish of Chingford, neither the schedule to the said certificate of assessment nor that to the contract, nor the duplicate assessment, comprises the said manor, groves, or woodlands; and there is no evidence beyond the statements in the said certificate and contract that the said manor, or groves, or woodland ever had been charged with land tax prior to the said contract of redemption.

6. [Copies of duplicate assessments for the years 1798 and 1799 made part of case. In these the amounts were the same as those in the certificate and contract, but the names of the occupiers were in many cases different.]

7, 8. The said manor, groves, and woodlands were bought by the testator of the representatives of John Snell, in 1844, at which date a large portion of the manor was uninclosed and subject to certain commonable rights.

9. On various occasions afterwards portions of the waste land were inclosed and brought into cultivation. The testator cut down much timber of the woodlands, and built a residence and farmhouse on some of the inclosed land. The same comprises the Hawkwood estate, now assessed to the land tax as hereinafter stated, and in respect of which the liability to assessment is in dispute.

10. Since the redemption, effected as described in paragraph 3, no claim for land tax is known to have been made in respect of the said manor, groves, or woodlands, until the year 1867, when the testator was assessed at and paid 12l. 16s. for land tax in respect of the Hawkwood Estate.

11, 12. In 1868 the testator was assessed at 12l. 16s., and in 1869 at 13l. 6s., but disputing his liability, refused to pay such sums, and upon the then collector distraining his goods, took legal proceedings against such collector, but afterwards discontinued them. The like happened in 1870.

13. In 1871 the defendant claimed 12l. 17s. 4d., which the testator again refusing to pay, a distress was again made, but the testator bought out the distress, and thereupon commenced the proceedings in consequence of which this special case was ordered to be stated.

14. The plaintiffs contend that all the land tax payable on the said manor and woodland was redeemed by the certificate of contract in 1799, and that whether the testator or his predecessors inclosed or not, they could not become liable to land tax, and that the defendant committed a trespass in distraining for the same.

15. The Land Tax Commissioners for the district, who defend the action, and the defendant, contend that the land tax was never legally redeemed, and, further, that assuming (which they do not admit) that the manor was in fact redeemed, such redemption could and did only affect such

incidents of the said manor as were assessable, such as fines, heriots, quit rents, amerciements, and other profits to the land, and could not and did not comprise (as being not assessable) the open and uninclosed wastes, which could not be properly assessable, unless and until they were inclosed and cultivated and brought into profitable occupation, and they contend that the interest of the lord and the commoners on the wastes of a manor cannot and ought not to be assessed to the land tax save in the shape of charges on the several commoners in respect of their rights of common to be included in the assessment of the messuages and lands in respect of which such rights of common are held; and that in consequence of the inclosure by the testator of the said waste lands and the bringing the same into profitable occupation, the same became liable to assessment, and was properly assessed accordingly.

16. [Court to draw inferences of fact.]

17, 18. The question for the opinion of the court is, whether the said land so being the subject of this action is liable to be assessed. The amount of assessment is not in dispute. If the court shall be of opinion that the land is not liable, the judgment is to be entered for the plaintiffs for 20l. and costs of suit. If the court shall be of opinion that the land is liable, then judgment of *nolle pro.*, with costs of defence, is to be entered for the defendant.

Grantham, for the plaintiffs.—The questions are, First, whether the reclamation of the waste made it subject anew to land tax once redeemed; and, secondly, whether the certificate and contract are not conclusive to show that the manor is exempt. This contract for redemption was entered into under 38 Geo. 3, c. 60, the Act in force at the time with reference to the assessment and redemption of land tax. By sects. 8 and 9 of that Act, two commissioners may contract with persons "holding any manors, messuages, lands, tenements, or hereditaments" for the redemption of the land tax charged thereon, in the form prescribed by schedule B to the Act, and that schedule is to describe the lands as they are described in the certificate of the commissioners. The value of the waste was calculated in the manor by reason of the assessment upon the farms adjoining the waste being enhanced in consequence of the waste adjoining them. [LUSH, J.—The waste was never assessed *eo nomine*.] That is so. [LUSH, J.—Can you redeem what is not assessed?] It is sufficient that it is stated in the certificate that everything held by Snell was redeemed. From schedule B to 38 Geo. 3, c. 60, it appears that it is the certificate which is to say what are the lands charged. [KEATING, J.—That is the strength of your case.]

Sir H. James, Q.C. (*F. M. White* with him), for the defendants.—First, the manor has not been exonerated in any sense at all; secondly, if it has been exonerated, the exoneration holds good only in respect of matters appertaining to the manor, such as quit rents and right of sporting, as distinct from the soil of the waste; thirdly, even if the lord's interest in the soil of the waste as it then stood was exonerated, yet the inclosure and the building over the soil has created a new property which is liable to be assessed. As to the first point, the burden of proof lies upon the defendants to show the exoneration. By the 17th section of 38 Geo. 3, c. 60, persons wishing the benefit of preference mentioned in the Act are to produce "a schedule or description in writing of all and every

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the manors, &c., charged with such land tax, which schedule shall contain the respective natures and quantities, or reputed quantities, of the premises." It is, therefore, not so much the certificate as the schedule which is to be looked to to see whether a legal redemption has been effected or not. As to the second and third points, it must be assumed that the waste was valueless, as it might well be if the rights of common were appurtenant to lands occupied by other persons. [DENMAN, J.—There must always be some value attached to a right in the soil.] For the purpose of assessment to land tax it must have brought in, or be capable of bringing in, some yearly profit; but it was in fact so uncertain in value as to be incapable of assessment. This is not like the case of land tax redeemed upon ordinary land upon which a house is afterwards built; in such a case, no doubt, the tax is redeemed once for all; but in this case there has been nothing more than the exemption of a mere manorial something, whatever you may term it, under the term manor. Formerly quite uncertain, and therefore unassessable, it has now become certain, and therefore the subject of assessment.

Grantham was not called upon to reply.

KEATING, J.—In this case the question arises upon the validity of an assessment to the land tax made upon Richard Hodgson by the Commissioners of Land Tax, in which the rate is made on a rental of 38*l.*, and the sum assessed is 12*l.* 17*s.* 4*d.* Mr. Hodgson's executors say he was not liable to that assessment, asserting that so far back as the year 1799 the manor and lands of a manor in the parish of Chingford were redeemed from the tax. In support of that assertion they bring before us a certificate, dated June 1799, which states that the manor of Chingford St. Paul, and other lands and hereditaments, are charged with the land tax to the amount of 70*l.* 4*s.*, "all which messuages, lands, and premises," runs the certificate, "are situate in the parish of Chingford, and are rated as under." Then follows the schedule of rating. It is to be observed that whilst the certificate contains a minute description of the lands and hereditaments said to be included in the rate of 70*l.* 4*s.*, the schedule of rating contains no description whatever, except the names of the supposed occupiers of the property in respect of which the assessments are made. The total is 70*l.* 4*s.*, but inasmuch as the names only of the parties assessed are given, we have no means whatever of knowing how far the assessments correspond with the descriptions mentioned in the certificate. Now it is contended for the defendant that in order to seek relief from the assessment to the land tax, it lies upon the present plaintiffs to show that the land in respect of which the exemption is claimed was assessed and afterwards exempted from the assessment; and it is contended that this exemption is not shown, inasmuch as the certificate does not fit in with the schedule, and is therefore incorrect. Undoubtedly it is impossible to reconcile the certificate with the schedule. The certificate contains a positive assertion that the hereditaments as described are rated under the 70*l.* 4*s.*; but upon looking to the sums and names, there is certainly no accurate correspondence between them, and the question is, which is right and which is wrong. Now it would seem that the contract is made first, and the certificate is enrolled afterwards; but the certificate would apply only to the lands in the parish of Chingford,

whereas the contract includes also five acres and a half of commonable land in the parish of Walthamstow. It is clear, therefore, from these assessments, that they were not indifferent altogether to commonable land. The certificate and the description in the contract agree accurately, with the exception I have pointed out, and the amount, 70*l.* 16*s.*, is the amount of 70*l.* 4*s.*, plus the 12*s.* in the parish of Walthamstow. Here again is a description which it is impossible to reconcile. It is contended with great force by Sir Henry James, that it is impossible that the manor and these lands—the waste of the manor and the woodland of the manor—could have been included in this assessment. I cannot say that I see any impossibility in it, although I agree that there is a very great discrepancy between the two assessments. It is quite impossible to reconcile the assessments with the description in the contract and the certificate. But I should say that it is to be taken more against the party granting the enfranchisement than the other, what it is that the Crown means to enfranchise; and if a minute description of the land intended to be enfranchised is set out in the contract and certificate, it is not the circumstance of the schedule being inaccurate that will necessarily derogate from the force of that description. Now we are to draw inferences of fact. All this takes place in the year 1799, and things remain undisturbed until upon various occasions some of the commoners, and also the lord of the manor, began to inclose, and the lord of the manor also erected a residence and farmhouse upon a portion of the inclosure. We have not the dates of all these operations, nor do we know when the state of things occurred which first awakened the vigilance of the Land Tax Commissioners. All we know is, that it was not until the year 1867 that the tax was imposed. It seems to me that if we are to grope our way in finding out how far the schedule does or does not necessarily exclude the lands described in the certificate and the contract, that the undisputed facts of acquiescence tend strongly to show that these lands were considered as included, and so treated by the Land Tax Commissioners. But the strength of the plaintiff's case is, that he has in express terms that which would include his lands stated by the commissioners in 1799 to be exempted; and I do not think that that description can be defeated by merely pointing to a schedule which is no doubt referred to in the certificate, but which either must be inaccurate itself, or must render the contract and certificate inaccurate. I prefer to give weight to the certificate and contract, and think, under all the circumstances, that the plaintiffs are entitled to our judgment.

LUSH, J.—I am of the same opinion. The property which is said to be assessed consists of a residence and farmhouse, together with farm offices and buildings, and a considerable quantity of land. The whole estate was in the year 1799 part of the waste of the manor. At various times since that period portions of the waste have been inclosed, and came into the hands of Mr. Hodgson as a purchaser for value; the whole of these are comprised in what is called the Hawkwood Estate. The question is, whether the Hawkwood Estate has or has not been redeemed, and whether it is or is not exempt from land tax. It is admitted, and cannot indeed be denied, that if the waste of the manor was comprised in the contract for redemption, it cannot be assessed now. The land tax once redeemed is

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redeemed for ever. All we have therefore to determine is, what is the reasonable construction of the contract of the 29th June 1799. Now this purports to be a contract whereby the commissioners certify that they have "contracted with William Snell, of Shenley, in the county of Hertford, Esq., the committee of John Snell, Esq., a lunatic, for the redemption of 70l. 16s. land tax charged upon the manor of Chingford St. Paul, and two inclosed groves, containing together by estimation twenty-six acres, and on the woodland on the aforesaid manor in the occupation of the said John Snell, Esq." It then enumerates various other properties which are to be subjects of the contract. The words, "which are charged on the manor together with other properties the groves and woodlands of the manor," *prima facie* embrace not only the seigniorial rights, but also the waste lands and everything which is the property of the lord; therefore it is said in terms that the land tax which it was proposed to redeem was charged upon the manor. I fail to see anything whatever to qualify these words. We read, "all which manors, messuages, lands, and premises are situate in the parish of Chingford, in the said county of Essex, and are rated in the duplicate as follows." We then find a list of names set out, the name of Mr. Snell as proprietor, and the names of a number of other persons as occupiers of that which constitutes the manor and other lands described in the contract. It is contended that there is an inconsistency, because the contract states that the manor, together with the woodland and groves, at the date of the contract were in the occupation of John Snell the proprietor, whereas in the schedule there is no land put down as being in the occupation of John Snell. But for aught we know, an old description was adopted when the assessment was made out in 1799, and persons were put down as occupiers who had been so once, but had ceased to be so. I see no necessary inconsistency, no impossibility of the lands which are put down as being in the occupation of these persons, embracing the manor. There may have been a demise of the manor or of the waste lands; the manor may have been at one time or the other in the occupation of these persons. I may add, that we do not know the acreage of the manor or of the waste lands, or the rental of the manor; there are no facts whatever stated on this case which enable us to draw the conclusion that the mistake is in one part of the contract more than in another. We must give effect to the words of the contract. The commissioners say that the proposal is that the contract is to embrace the whole of the manor, together with the other lands, and that what they mean to redeem "is rated in the duplicate under the following terms." We must come to the conclusion that the whole of the manor was exempted—and that would include the waste lands which are the subject of the present action. I think, therefore, that we can only put this construction upon the contract without in effect saying where the error is.

DENMAN, J.—The only difficulty that has presented itself to my mind in agreeing to the full extent with the judgment of my brother Lush is, that the fifth paragraph of the case finds as a fact, that "although in the body of the certificate the manor of Chingford and two inclosed groves, containing together by admeasurement twenty-six acres, and the woodland in the aforesaid manor

are specifically mentioned as being included among the lands stated to be charged with the land tax; neither the schedule to the certificate nor that to the contract, nor the duplicate assessment, comprises the said manor, groves, or woodland, and there is no evidence beyond the statement in the certificate and contract that the said manor, groves, or woodland, ever had been charged with land tax." Therefore I think we are bound to take it that in the duplicate both to the contract and certificate, these lands are not included, and that they are not to be found among the things stated in the duplicate. But still the question is left open whether there is evidence here upon which we can conclude that these particular lands were really included in the contract. In order to decide that point, the first thing we have to look to is this contract, which was made on the 29th June 1799, two years after the passing of the Act under which it was made. It is a contract for the express purpose of redeeming the land tax upon the manor of Chingford and two inclosed groves and woodlands. The parties agree that the land tax upon these lands shall be redeemed, and in accordance with the Act a certificate is given by the commissioners in the August of the same year, stating that the manor and manor-house, and the woodlands, and all the disputed parts of the property, are charged with the tax to the amount of 70l. 4s. The certificate goes on, no doubt, to set out a duplicate which makes out the 70l. 4s. in a manner which, according to the finding in the case, does not specifically include the land, at least not the manor and the woodlands. How this happened it is not for us to speculate. We are bound by the words of the certificate, and I apprehend that it is a fallacy on the part of the defendants to say that the onus of proof lies upon the other side to make out their exemption. We have the statement upon the face of the certificate that the manor and woodlands, and the other subjects of dispute, are the subjects of a contract for the redemption of land tax, and that they have been charged with land tax. It is difficult, no doubt, to reconcile that statement with the duplicate; but we do not know how and on what principle the statement was made. It may be that in assessing the value of these lands very little indeed was attributed to the value of the manor, and very little to the waste lands, and yet that in point of fact they have been assessed so that the land tax upon them could be redeemed. However that may be, as against the certificate itself and as against the practice under it, as found in the case, that for a long series of years the tax was not claimed, I think the onus of proof is upon those who contend now that this transaction did not include what was intended to be included in the contract, and which is included in the governing words of the certificate. I think, therefore, in the absence of any clear proof that this manor was not rated and not exempted, we are bound to hold that it was rated and was exempted.

Judgment for plaintiffs.

Attorneys for the plaintiffs, *Kingsford and Dorman*.

Attorneys for defendant, *Monckton, Long, and Co.*

C. P.] FLEMING AND ANOTHER v. CAVE AND ANOTHER (BARNSTAPLE ELECTION PETITION). [C. P.]

Monday, Feb. 1, 1875.

FLEMING AND ANOTHER v. CAVE AND ANOTHER
(BARNSTAPLE ELECTION PETITION).*Costs, taxation of—Election petition—Instructions for brief—Lump sum allowed—Discretion of master—Adjudication upon items.**In taxing the costs of the respondent to an election petition, the master may allow a lump sum under the head of instructions for brief.**The solicitor of one of the respondents to the B. election petition had, with six other persons, been engaged for more than six days in visiting 238 persons alleged, on the part of the petitioners, to have been bribed. Having before him an affidavit to that effect, the particulars delivered by the petitioners, and the brief of the respondents' counsel, the master, upon reviewing a former taxation, pursuant to an order of Amphlett, B., allowed the lump sum of 200*l.*, under the head "Instructions for brief," being the same sum as he had allowed under the same head upon such former taxation.**Held, that the master's discretion ought not to be interfered with, and a rule that he should further review his taxation discharged.*

THIS was a rule calling upon the respondents to the Barnstaple Election Petition to show cause why the master should not be at liberty to further review his taxation of the said respondents' costs in respect of the instructions for brief.

The matter had originally been brought before Amphlett, B., in chambers, who had made two orders thereon, first, that the taxation should be reviewed, and subsequently, that the amount of costs allowed after the review should be paid to the respondents; but the learned baron had stayed the operation of the subsequent order until the fifth day of Hilary Term, so that the petitioners might have the opportunity of disputing the correctness of the review upon the argument of the present rule.

The said first order of Amphlett, B., proceeded upon the opinion that the matters contained in the following paragraph of the affidavit of the managing clerk of the petitioners' agents "required further consideration."

I objected at length to the instructions for brief, and insisted that I was entitled to call for an affidavit in support of the allegations contained in such item, and the master at first considered he was bound to call for such affidavit, but afterwards said he would take the responsibility of dealing with the items without the affidavit, as no sufficient explanation could possibly be given in such a case. I then argued that the charge must be confined to a period within six days, and that the remuneration must be allowed with reference thereto, but the master considered that that was the reason that none should be charged than as if a longer period had been consumed.

The amount allowed by the master and so objected to was 200*l.*

Upon the review of the taxation, as ordered by Amphlett, B., the master had before him an affidavit by the respondents' solicitor that he had specially employed six persons, who had been constantly engaged from the time of the particulars being received up to the time of the hearing of the petition (extending over a period of six days) in visiting various persons (238 in number) alleged to have been bribed and to have been guilty of bribery, &c., in order to get up evidence to rebut the allegations of the petitioners.

Upon considering this affidavit, together with the briefs and particulars (which he had previously

gone through), the master expressed himself satisfied that the said amount of 200*l.*, which he had allowed for "instructions for brief," was a fair and proper one, and refused to alter it.

Wilberforce showed cause, and cited

The Tamworth, Penryn, and Southampton cases, 22 L. T. Rep. N. S. 98; L. Rep. 5 C. P. 172;

Tillett v. Stracey (The Norwich case), 23 L. T. Rep. N. S. 101; L. Rep. 5 C. P. 185; 39 L. J. 93, C. P.

W. G. Harrison supported the rule.

LORD COLERIDGE, C.J.—I am of opinion that this rule ought to be discharged. It appears that there was a taxation before the master in the first instance, and that afterwards my brother Amphlett made an order that that taxation should be reviewed, on the ground that a lump sum had been allowed under the head of "Instructions for brief," and that the petitioner was entitled to have the particular items making up this lump sum judicially considered by the master. Thereupon the master went carefully through the brief and exercised his judgment. He had before him the bill of particulars, which would suggest to his mind the kind of charges made. He had also before him the affidavit of the solicitor for one of the respondents, which shows in great detail what the deponent and six other persons had done in getting up evidence to answer the charges made in the petition. Having all these materials before him, the master looked into the matter again, and came to a conclusion as to the amount which it would be reasonable for him to allow. This being so, the taxation was really conducted upon the principle which Mr. Harrison contends for. It is not necessary to set out items, it is only necessary to go through them; and the principle is clearly recognised in the authorities. In the *Tamworth* case and also in the *Penryn* case it appears that exactly the same thing was done by the master, and afterwards upheld by the court. In both those cases a lump sum had been allowed under the head of "Instructions for brief." In the *Southampton* case (*ubi sup.*), no doubt the court ordered a review. But when the special circumstances of that case come to be considered, it will be found to be an authority not in opposition to but to the same effect as the two other cases. Bovill, C.J., says: "The costs charged on account of preliminary expenses amounted to nearly 1000*l.*, and 105*l.* only has been allowed. The master has not a very distinct recollection as to the principle on which he acted; and looking to the affidavits, and the absence of any answer to them, to the particulars, the number of votes objected to, the length of the briefs allowed by the master, the number of witnesses, and the other circumstances of the case, we think the decision of the master should be reconsidered by him. We think also that the parties are entitled to have his judgment upon the particular items in the preliminary expenses, if they think fit, instead of their being included in the allowance of one sum in gross to cover the whole of what the master may think ought to be allowed. This means that the taxation must not be effected in any haphazard fashion, but that the lump sum must be made up of adjudicated items." And it is to be observed that Willous, J., dissented even from this.

BRETT, J.—If the master had done nothing here but allow a lump sum, without having gone into the items, I should have thought that he was wrong. But it appears that the master did go

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into the items with a special affidavit and the brief before him. Mr. Harrison objects to the particular kind of evidence that satisfied the master that the 200l. was a fair sum to allow. But I do not think the court should interfere with the discretion of the master so as to dictate to him upon what evidence he is to proceed.

GROVE, J.—In *Hill v. Peel* (22 L. T. Rep. N. S. 28; L. Rep. 5 C. P. 172), Bovill, C. J., says: "Where a principle is involved, the court will always entertain the question, and if necessary give directions to the master, but where it is a question of whether the master has exercised his discretion properly, or it is only a question as to the amount to be allowed, the court is generally unwilling to interfere with the judgment of its officer, whose peculiar province it is to investigate and to judge of such matters, unless there are very strong grounds to show that the officer is wrong in the judgment which he has formed." I see no such "very strong grounds" in the present case, and therefore think that this rule ought to be discharged.

DENMAN, J.—I also think the rule ought to be discharged. I see no breach of principle, on the ground of which we ought to interfere with the master.

Rule discharged.

Agents for the petitioners, *Stevens, Wilkinson, and Harries.*

Agents for the respondents, *Wyatt, Hoskins, and Hooker.*

EXCHEQUER CHAMBER.

Reported by M. W. M'KELLAR, Esq., Barrister-at-Law.

Tuesday, Feb. 2, 1875.

PLUMSTEAD BOARD OF WORKS v. BRITISH LAND COMPANY.

Owners of land—Public cross roads—Land bounding, or abutting on a new street—Metropolis Management Acts 1855 & 1862 (18 & 19 Vict. c. 120, ss. 105 & 250; 25 & 26 Vict. c. 102, s. 77).

The defendants, having laid out an estate they had purchased for building purposes, cut roads crossing each other, and conveyed the various lots to different persons, these roads being described as the boundaries. The plaintiffs assessed the owners of the houses in some of the streets, and the owners of land bounding or abutting on them, for the expense of paving those streets under 18 & 19 Vict. c. 120, sect. 105, and 25 & 26 Vict. c. 102, s. 77; and in so doing they assessed the defendants as owners of such land in respect of those streets which ran into the sides or ends of the streets paved.

Held, by the Exchequer Chamber (reversing the decision of the Queen's Bench), that, assuming the defendants still to possess their former interest in the soil of the streets which bounded the lots they had conveyed, they were not owners of the land at the points of intersection with the paved streets within the meaning of the Metropolis Management Acts.

THIS was an appeal against a decision of the Court of Queen's Bench (Blackburn and Archibald, JJ.), in favour of the plaintiffs, on a special case stated at Nisi Prius.

The case was argued in the court below on Thursday, Nov. 12, 1874, and is fully reported *ante*, p. 315; 31 L. T. Rep. N. S. 752; L. Rep. 10 Q. B. 16.

Fitzjames Stephen, Q.C. (with him *Shaw*), now argued for defendants, the appellants.—The Court of Queen's Bench decided against the defendants upon both points raised by them; if either of these points was wrongly decided the judgment must be reversed. The first question is whether the soil of the intersections of the streets is vested in the defendants, they having conveyed away the pieces of land adjoining. [The court expressed no opinion on this point, and no argument on behalf of the plaintiffs was heard upon it.] The second question is whether the defendants, assuming them to be owners of the soil of the cross streets at the points of intersection, are owners of the land bounding or abutting on "the main street," so as to be liable to contribute to the rates sued for, under 25 & 26 Vict. c. 102, s. 77. The duty imposed upon the owners of houses forming streets by 18 & 19 Vict. c. 120, s. 105, was extended to the owners of unbuilt spaces by this sect. 77 of the later Act of 1862, which enabled the vestry or district board to apportion the rates as might be just and expedient between the owners of land and houses; the section proceeds: "and any such cost or expenses including the costs of paving at the points of intersection of streets, and all other incidental costs and charges shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion," . . . "either by action at law, or in a summary manner." The part of this section concerning the points of intersection of streets would have no effect if the owners of the soil of the cross streets can be rated. By sect. 250, the interpretation clause of the Act of 1855, "the word 'owners' shall (with an exception not material) mean the person for the time being receiving the rack rent of the lands or premises in connection with which the said road is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent." The necessary inference from that definition, and from the cases which have been decided upon it, is that the ownership of land to be ratable must be profitable in a different and more direct manner than that of the defendants in this case:

Angell v. Paddington, L. Rep. 3 Q. B. 714;

Bowditch v. Wakefield, 25 L. T. Rep. N. S. 88; L. Rep. 6 Q. B. 567;

Pound and Lord Northbrook v. Plumstead Board of Works, L. Rep. 7 Q. B. 183;

Higgins v. Harding, 22 L. T. Rep. N. S. 483; L. Rep. 8 Q. B. 7.

Barrow (with him *Brown*, Q.C. and *Morgan Howard*, Q.C.), for the plaintiffs.—To begin with the second point raised on behalf of the defendants, these cross streets are land within the meaning of the Act of 1862. Their beneficial value to their owners is the same as that described by Cockburn, C.J. with respect to the private roads in *Lord Northbrook's* case; that part of the judgment is cited by Blackburn, J. in giving his decision on the case in the court below. The argument here based upon the definition of the word owner was overruled by the Court of Queen's Bench in the case of *Pound and Lord Northbrook v. Plumstead Board of Works*. The reason for expressly providing for the points of intersection was probably only the greater expense of the pavement there than in other parts of the street.

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LORD COLERIDGE, C.J.—I am of opinion that this judgment should be reversed. It is a proceeding to recover the defendants' proportional part of paving certain new streets in the plaintiffs' district, the liability for which is alleged on the ground of the defendants' ownership of the soil of certain new streets running across or into the streets paved. The important facts are that the defendants bought this estate for building purposes, and ran roads across in various directions, some of which intersected others. The defendants afterwards sold their interest in various lots, described as bounded by these roads. After dedication to the public the plaintiffs did certain paving, of which they can recover the expenses from the adjoining owners of property under the Metropolis Management Acts of 1855 and 1862. They have allotted these expenses not only upon the owners of houses forming the streets, but also upon the defendants as owners of the soil of the cross streets, who it is said are liable as owners of land bounding or abutting on such streets, as well as the owners of houses therein, within the meaning of sect. 77 of the Act of 1862. It was contended in the court below that, although the defendants had sold nearly the whole of the estate they had purchased, they had by their form of conveyance reserved to themselves the soil of these streets, which bounded the various lots of land sold for building, and which intersected the streets paved. On that point, having heard an argument only on one side, I express no opinion. Assuming, therefore, for the decision of the other point, that the judgment of the court below on this one is correct, and that the intersecting streets are the lands of the defendants, the question whether the defendants can be liable depends upon two sections, the 105th of the Act of 1855, and the 77th of the Act of 1862. The former of these sections empowers the vestry or board to well and sufficiently pave any new street, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street, shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement." It is admitted that this section alone would not touch the defendants at all; nor would the 250th, the interpretation section, but the latter applies as well to the subsequent Act; and, as the two Acts are to be read together, we must find from the definition of "owner" here given the meaning of "owner of land" as used in the Act of 1862; he must be the person receiving the rack rent of the land or premises, if let at rack rent. By the 77th section of the Act of 1862 the owners of the land bounding or abutting on such new street as that referred to in sect. 105 of the previous Act "shall be liable to contribute to the expenses or estimated expenses of paving the same as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do." We are not asked as to the propriety of the proportion here, but whether the defendants are liable at all. Now, it appears to me that the defendants are neither within the interpretation clause, nor within this sect. 77, owners of land to be charged for the pavement of these streets. The persons liable under the first Act were those who owned

the houses, and if some of the land were not yet built upon, the burdens upon the owners of the houses which had been built was severe. That was rectified by the second Act by making the owners of such land share in the contribution with those whose houses were finished, but in both cases the Legislature points to the same kind of property. This ownership of the soil of a cross road was not, however, in my opinion, such a property. If the Acts be looked at carefully, it cannot be said that such a liability as this would impose upon the defendants was contemplated by the Legislature. Perhaps cross roads may be said to bound or abut upon a main road; but when we see that by this sect 77 the owners of lands and houses are to be liable not only for the pavement of the streets but also expressly for the cost of paving at the points of intersection, it seems to me that those expenses must be proportioned rateably only upon the owners of profitable property fronting upon the new street. The common sense and reason of the thing go the same way, and the cases do not seem to me to embarrass us at all. The only authority near this is *Pound and Lord Northbrook v. Plumstead Board of Works*; but although an expression of the court there may be pressed to the assistance of Mr. Barrow's contention, the facts and the point decided were very different from the present. Lord Northbrook reserved for his own objects private roads running into a public road; he prevented the public from exercising rights over these private roads, and there had been no dedication of them whatever. The Queen's Bench held under these circumstances that the owner of these private roads was the owner of land under this section, and liable therefore for contribution to the paving expenses of the public road. That does not touch the case of a public cross road, which could not possibly be let at a rack rent; and it must be remembered that the same court has held that trustees of a church could not be owners of a house or land under this definition. I, therefore, think that on the strictest construction of the statutes, on the sense of thing, and on the decided cases, the court below was wrong in this decision. It is possible that this point was not fully brought to their notice, for no mention is made of its discussion in the report; and the arguments seem to have turned almost entirely upon the other point which we need not decide. Our judgment will be for the defendants.

BRAMWELL, CLEASBY, BB., GROVE, J., POLLOCK and AMPHLETT, BB., concurred.

Judgment reversed.

Attorneys for plaintiffs, *Newman, Dale, and Stretton*.

Attorneys for defendants, *B. and A. Russell*.

ROLLS.]

BUSH v. THE TROWBRIDGE WATERWORKS COMPANY.

[ROLLS.]

ROLLS COURT.

Reported by G. WELBY KING and S. H. S. LOFTHOUSE, Esqrs.,
Barristers-at-Law.

Friday, Feb. 12, 1875.

BUSH v. THE TROWBRIDGE WATERWORKS COMPANY.

Riparian owner—Diversion of part of stream—Owner of stream—Injurious affecting—Waterworks Clauses Act 1847 (10 Vict. c. 17) s. 6—Lands Clauses Consolidation Act 1845 (8 Vict. c. 18), ss. 18, 68.

The Trowbridge Waterworks Company were empowered to take certain brooks and streams for the purposes of their undertaking. B. was the owner of a water meadow which was watered by a stream called Biss Brook. Biss Brook was supplied in part by Biss Springs. The company took Biss Springs and so diminished the amount of water in the Biss Brook, and thus caused injury to plaintiff's meadow. The company had served no notice on B. under sect. 18 of the Lands Clauses Consolidation Act; B. then filed a bill for an injunction to restrain the company from taking the Biss springs.

Held, that the Biss Brook was injuriously affected and not taken within the meaning of the 6th section of the Waterworks Clauses Act 1847, and that, therefore, the company were not bound to serve a notice on B. under sect. 18 of the Lands Clauses Consolidation Act 1845.

THE Trowbridge Waterworks Company was incorporated by an Act of Parliament in the year 1873, in which Act were incorporated the Lands Clauses Consolidation Act and the Waterworks Clauses Acts 1847 and 1863.

By the Trowbridge Water Act 1873, the company were empowered to make and maintain certain works, and to collect and divert into their said works, and thence distribute and supply, the waters of certain springs called Biss Springs, and also certain brooks and streams. The Biss Springs furnished the principal supply of the water of the Biss Brook.

The plaintiff, Elinor Maria Bush, was the tenant for life of a certain estate called "Cutteridge Estate," and part of the Cutteridge estate consisted of an ancient water meadow abutting upon, and almost surrounded by, two streams of water, one of which was the Biss Brook. The plaintiff claimed as riparian owner to be entitled to irrigate the meadows with the said streams of water.

The plaintiff was served by the Trowbridge Company with a notice under the Act to treat for the purchase of part of the Cutteridge estate, including the water meadows, but afterwards the plaintiff was informed by the secretary of the Trowbridge company that the company did not desire to purchase more than the easement of laying the main pipe through the lands included in the notice to treat. No other notice to treat was served on the plaintiff.

The company, being desirous of entering upon the said lands for the purpose of laying their pipes before the compensation to be paid had been ascertained, paid a sum into the Bank of England in pursuance of the provisions of the 85th section of the Lands Clauses Consolidation Act 1845, and executed and delivered to the plaintiff the necessary bond.

As the notice to treat did not include the value of the Biss Brook, which the Trowbridge Company proposed to take; the plaintiff claimed a

further sum for compensation, but the waterworks company having commenced taking the waters of the Biss Springs for the purposes of their undertaking, the present suit was instituted.

The bill alleged that the waterworks company were taking so much water from the Biss Brook that the plaintiff's lessee of the water meadow, who was yearly tenant thereof, could not properly irrigate the water meadow, as he had been accustomed, and was entitled to do.

The prayer of the Bill was for an injunction to restrain the waterworks company from taking or using any of the water of the Biss Brook, until they should have given notice to the plaintiff of their intention to take such water, and should have offered to treat for the purchase of the interest of the plaintiff, and the said remainderman in fee, in the water, and until the purchase money or compensation for the interest in the said water should have been settled, and until such purchase money or compensation should have been paid or deposited in the Bank of England in the manner provided by the Trowbridge Water Act 1873.

The 6th section of the Waterworks Clauses Act 1847 is as follows:—

Where by the special Act the undertakers shall be empowered, for the purpose of constructing or supplying waterworks, to take or use any lands or streams otherwise than with the consent of the owners and occupiers thereof, they shall in exercising the powers so given them, be subject to the provisions and restrictions contained in this Act, and if the waterworks be situated in England or Ireland to the provisions and restrictions contained in the Lands Clauses Consolidation Act 1845, and if the waterworks be situated in Scotland the provisions and restrictions contained in the Lands Clauses Consolidation (Scotland) Act 1845; and shall make to the owners and occupiers of, and all other parties interested in, any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorised or otherwise by the execution of the powers thereby conferred, full compensation for the value of the lands and streams so taken or used, and for all damage sustained by such owners, occupiers, and other persons, by reason of the exercise as to such lands and streams of the powers vested in the undertakers by this or the special Act, or any Act incorporated therewith; and, except where otherwise provided by this or the special Act, the amount of such compensation shall be determined in the manner provided by the said Lands Clauses Consolidation Acts respectively for determining questions of compensation with regard to lands purchased or taken under the provisions thereof, and all the provisions of the said last mentioned Acts respectively shall be applicable to determine the amount of any such compensation, and to enforce payment or other satisfaction thereof.

Southgate, Q.C. and G. C. Price, for the plaintiff.—The defendants have taken water from the springs supplying this brook, higher up than where the plaintiff's land is, without the consent of the plaintiff, and without giving her notice to treat. Plaintiff is an owner of the stream, and therefore, in accordance with the 6th section of the Waterworks Clauses Act, is entitled to receive a notice from the defendants under section 18 of the Lands Clauses Act. This is a case of taking

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and not of injuriously affecting the stream. The Legislature, when they were framing the Waterworks Clauses Act, took into consideration the difference between water and land. If the same distinction existed between water which is taken and water which is injuriously affected, as exists between land taken and land injuriously affected, there would have been no necessity to make any difference between land and water. But the Legislature foresaw that there would be a contest in every instance, as to whether there was a taking or an injuriously affecting of the water—the two things are so mixed up that they cannot be properly distinguished; and therefore they said, You shall not injuriously affect water and then leave the person who is injured to his compensation under sect. 68, but you shall give notice of your intention injuriously to affect, and you shall pay as though you were taking and permanently using land. The 6th section of the Waterworks Act united both methods of affecting land in one, and applied one method only of the Lands Clauses Consolidation Act to those two sorts of injury. Therefore before the defendants injuriously affected, or took, or whatever they may call it, plaintiff's water, they were bound to give her notice to treat. That they have not done, and therefore she is entitled to a decree.

The following cases were referred to :—

Eagle v. Charing Cross Railway Company, L. Rep. 2 C. P. 688;

Ferrand v. The Corporation of Bradford, 21 Beav. 412.

Rosburgh, Q.C. and Whitaker, for the defendants, were not called on.

Sir GEORGE JESSEL.—I am clearly of opinion, so far as I can give an opinion upon a section so worded, that it never was intended to entitle the owner or occupier of a stream to sell his land or stream to the company, because the company, not diverting the stream at all, have taken some of the water away higher up, whereby the flow of water has been diminished. To say that the words of the section are plain is to say what is not clear to my mind at all; but the words of the section are these: "Where, by the special Act the undertakers shall be empowered, for the purpose of constructing or supplying waterworks, to take or use any lands or streams otherwise than with the consent of the owners or occupiers thereof." The first question is, what is the meaning of "owners and occupiers of a stream"? It does appear to me that it is the owners and occupiers of the portion with which the company are interfering, and they are the persons to give consent. If, therefore, the persons who are the owners and occupiers of a portion of the stream with which the waterworks are interfering, give consent, it appears to me then that there is an end of that part of it. The section then proceeds: "They shall, in exercising the power so given to them, be subject to the provisions and restrictions contained in this Act, and if the waterworks be situated in England or Ireland to the provisions and restrictions contained in the Lands Clauses Consolidation Act 1845, and, if the waterworks be situated in Scotland, to the provisions and restrictions contained in the Lands Clauses Consolidation (Scotland) Act 1845, and shall make to the owners and occupiers of, and all other parties interested in any lands or streams,"—there are two things

there, we have a new person introduced, a person interested who is not an owner or occupier,—"in any lands or streams taken or used for the purposes of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorised, or otherwise by the exercise of the powers thereby conferred, full compensation," and the compensation is to be ascertained in the modes pointed out by the Lands Clauses Act. Now, therefore, the latter part merely gives the person a title to compensation if the lands or streams are injuriously affected—that is, the compensation to be claimed under the 68th section of the Act. If the land is taken away, that is under another clause of the Act altogether. Therefore, if these people are taking the land or stream, they will be within the first words of the Act, which are—"the provisions and restrictions contained in the Lands Clauses Consolidation Act;" and the restrictions are that you shall not take away any land without giving notice to treat, and when you do take it you must make compensation for the value of what you take. If the plaintiffs were right, the result would be this, that every owner or occupier of any part of a stream of which a bucket of water is taken away—or perhaps a bucket would be too little; but a number of buckets sufficient to appreciably injure the stream below—would have the right of saying, "buy my stream and pay me the value of it," for that is the effect of the Lands Clauses Act; "if you interfere with property, you must buy it all. You have no right to say you shall buy a part of it—if you take land at all for the purpose of works, you must take it as it is; and what you are to pay for is the value of the land or stream interfered with." Then if this is an interference with the land or stream, in that sense, of the riparian owner, the result will be that every riparian owner along the whole course of the stream could compel the waterworks company to buy that portion of the stream. Well, that may be so, but I do not so read the Act of Parliament. I think such a reading would be very extraordinary; and I think the sensible way of reading it is the way in which I have read it, and which it appears to me gives the meaning that the words fairly bear—that is, that these are people whose interests are injuriously affected, and that they must proceed by notice to get compensation in accordance with the 68th section of the Act.

Solicitors: *Warry, Robins, and Burges; Whitakers and Woolbert*, agents for *Clark and Collins, Trowbridge*.

RAIL COURT.

Reported by R. A. KINGLAKE, Esq., Barrister-at-Law.

Friday, Jan. 29, 1875.

REG. v. THE MAYOR OF CHIPPING WYCOMBE.

Municipal election—Burgess list—Qualification—House and counting-house.

A. was the occupier of a counting-house for business purposes, and also of a private residence in the same borough.

In the burgess list the premises he occupied as a counting-house were set down as his qualification but they were set down under the denomination "house."

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Held, that the mayor was right to expunge A.'s name from the list of burgesses, and that he had no power to amend it by altering the qualification.

Held also, that although the mayor had no power to alter the qualification on the list, he might have treated it as a nullity, and registered the voter for his other qualification.

Channell showed cause against a rule which had, on a previous day, been obtained by Cave, calling upon the Mayor of Chipping Wycombe, to show cause why he should not insert the name of a Burgess on the Burgess roll of the borough.

From the affidavits it appeared that one Baines, who had lived for some years at Chipping Wycombe, lived in one house and carried on his business in an office in another part of the borough. This office was a room on the ground floor of a house, and access to it was obtained from an outer door; there was no communication between the room and the rest of the house, and the outer door only communicated with this room. In the list of the burgesses in the borough, Baines' name appeared, and the nature of the property rated was described as a "house." An objection having been made to the nature of his qualification, the mayor refused to amend, and expunged his name from the Burgess list of voters for the borough, the qualification not having been proved to his satisfaction.

Channell.—By the 1st section of the 32 & 33 Vict. c. 55, which is an Act to shorten the term of residence required as a qualification for the municipal franchise, it is enacted that every person of full age who, on the last day of July in any year shall have occupied any house, warehouse, counting house, shop, or other building within any borough during the whole of the preceding twelve months, and also during the time of such occupation shall have resided within the said borough or within seven miles, shall be a Burgess of such borough and member of the body corporate of the mayor, aldermen, and burgesses, provided he has paid all the rates due on or before the 20th of July, in such year. The Act expressly mentions the term counting house, yet he appears on the list for a house. [BLACKBURN, J.—The list describes him as the occupier of a house, which he clearly has not got. Can it not be amended?] That appears to depend on the provisions of the Municipal Corporation Act. The latter part of the 18th section (5 & 6 Will. 4, c. 76) enacts that in case the qualification of a person objected to shall not be proved to the satisfaction of the court, the mayor shall expunge the name of every such person from the lists, and he shall also correct any mistake or supply any omission which shall be proved to the court to have been made in any of the lists in respect of the name or place of abode of any person who shall be included in any such list, or in respect of the local description of his property. There is no other clause which gives the mayor power to amend. [BLACKBURN, J.—I don't doubt that the Legislature meant that if you claim for a counting house you ought not to call it a house, else the description would be mere tautology.] The mayor could not act on the fact that the person had another qualification besides the one on the list; all he has to do is to see a regular proof of the qualification claimed made out, and if not to expunge the name from the list.

Cave.—There is no provision enabling a person to claim for a different qualification to the one

inserted on the borough list. By the 6 Vict. c. 18, s. 15, every person who has been omitted from the list, or is desirous of being registered for a different qualification than that for which his name appears on the list, is to give notice to the overseers to have his name inserted. Then by sect. 40 the revising barrister is not at liberty to admit any evidence of any other qualification than that described in the list of voters, nor may he change the description of the qualification as it appears on the list, except for the purpose of more clearly and accurately defining the same. When dealing with a municipal borough, where the qualifications would be low, and where every person's qualification would be known, the power to the mayor should be of the widest. If an unskilled man look at the list, and sees his name has been omitted, he can go to the mayor and have it reinstated. But if his name were there he would not look perhaps at the qualification, and then, when he is objected to and goes before the mayor, it would be hard if he could not have the qualification altered.

BLACKBURN, J.—I am of opinion this rule should be discharged. The Municipal Corporations Act requires that the lists shall be made out, and that the person's residence shall be correctly described, and the 18th section says, that where the name of any person inserted in any one of the lists shall have been duly objected to, and the person objecting shall appear by himself or by some one on his behalf, the court shall require proof of the qualification of the person so objected to; and in case the qualification of such person shall not be proved to the satisfaction of the court, the mayor shall expunge the name of every such person from the lists. Mr. Cave argues that that qualification mentioned in the section does not mean the qualification in the list, but any qualification whatever; and, therefore, if pushed far enough, it would mean a qualification in a different place or a different street. I assume here that the applicant was entitled to be put on the list as the occupier of a counting house. He was put on for a house; the question is, can the mayor amend? If the wrong number of the street had been put down on the list he might amend, but a wrong description the mayor cannot amend. The applicant's remedy is to say, "You have omitted me, as I have no qualification," and the mayor may put him on for his other qualification.

Rule discharged.

Channell applied for costs.

BLACKBURN, J.—If you can show me any authority I will grant them.

Channell referred to *Reg. v. The Mayor of Bridgnorth* (10 A. & E. 70), in which Lord Denman stated that where a person is bound by law to pronounce a decision, and that decision is disputed before the court, and proved to be right, he is entitled to costs.

BLACKBURN, J.—Then let this rule be discharged with costs.

Attorney for applicant, *Letts*.

Attorney for respondent, *A. Cox*.

V.C. H.] *Ex parte* RECTOR OF BRADFELD ST. CLAIRE—BANKS (app.) v. CROSSLAND (resp.). [Q. B.

V. C. HALL'S COURT.

Reported by RICHARD MARRACK, S. H. S. LOFTHOUSE, and HENRY C. DRAKE, Esqs., Barristers-at-Law.

Friday, March 19, 1875.

Ex parte RECTOR OF BRADFELD ST. CLAIRE.

Glebe land—Purchase money for glebe land applied in building a rectory—Railway company—Lands Clauses Act 1845.

The purchase money for glebe lands, taken by a railway company, may, with the consent of the bishop, be paid by the court to the rector for the building of a rectory house.

IN 1864 the Great Eastern Railway Company, under their statutory powers, took for the purposes of their undertaking part of the glebe land belonging to the rectory of the parish of Bradfield St. Clare, in the county of Suffolk, the purchase money being agreed upon between the company and the then rector, at the sum of 325*l.* On the 16th Dec. 1864 the company paid this sum into court; and subsequently it was ordered that the sum should be invested and placed to the account of the Rector of Bradfield St. Clare, and that the interest should be paid to the rector for the time being.

In Sept. 1873 the present rector, the Rev. Alexander Swiney was inducted into the rectory. He then found there was no parsonage house belonging to the rectory. Thereupon he entered into a contract for the building of a rectory house at the cost of 1697*l.* This was now in the course of erection, but was not yet completed. Towards meeting the costs thereof there were, First, 111*l.* 14*s.* 6*d.* recovered from the representatives of the previous rector in respect of dilapidations. Secondly, about 200*l.* arising from the sale of some cottages on the glebe land, and, Thirdly, about 934*l.* 6*s.*, advanced by the governors of Queen Anne's Bounty on mortgage of the living; or in all 1246*l.* 0*s.* 6*d.*, leaving a deficiency of 560*l.* 17*s.* to be provided by the rector.

The rector now petitioned that the proceeds of the sum in court might be paid to him to be applied in part payment for the building of the rectory house. The petition stated that the Bishop of Ely, in whose diocese the living is, and also the patrons of the living, had approved of the building of the house, and of the application of the money towards meeting the expenditure incurred therein.

G. Borrett, for the petitioner, referred to

Ex parte Rector of Hartington, *Weekly Notes* (1875), 40;

Williams v. Aylesbury and Buckingham Railway, 28 L. T. Rep. N. S. 12; L. Rep. 9 Ch. 684;

Ex parte Rector of Claypole, L. Rep. 16 Eq. 574; 29 L. T. Rep. N. S. 51.

Jason Smith, for the company, suggested that it would be right to pay the money to a nominee of the bishop. He also referred to

Re Incumbent of Whitfield, 1 J. & H. 610.

The VICE-CHANCELLOR said no general rule could be laid down in these cases. Under the circumstances of the present case he should order the money to be paid to the rector upon the production of an approval in writing, signed by the bishop of the diocese, of payment to the rector, the rector undertaking to apply the money in payment for building the rectory house.

Solicitors for the petitioner, *White, Borrett and Co.*

Solicitor for the railway company, *Shaw.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqs., Barristers-at-Law.

Wednesday, Nov. 11, 1874.

BANKS (app.) v. CROSSLAND (resp.)

Master and servant—Service not entered upon—Contract not in writing—Statute of Frauds, 4 Geo. 4, c. 34, s. 3—Master and Servant Act 1867 (30 & 31 Vict. c. 141), s. 3.

Where a contract for service in husbandry is not in writing, and has not been entered upon, no proceedings can be taken to enforce it under the Master and Servant Act 1867.

Where such a parol contract is not to be performed within a year from the making thereof, the 4th section of the Statute of Frauds also prevents its being enforced by any means.

THIS is a case stated by us, the undersigned, three of Her Majesty's Justices of the peace in and for the East Riding of the county of York, under the stat. 20 & 21 Vict., c. 43, on the application in writing of the appellant, who was dissatisfied with our determination upon the question of law which arose before us, as hereinafter stated, on the 27th Dec. 1873, at Howden, in the said riding, the appellant having duly entered into a recognizance to prosecute the appeal.

1. Upon the hearing of an information in writing, preferred on the 6th Dec. 1873, by the appellant against the respondent, under section 4 of the Master and Servants Act 1867 (30 & 31 Vict. c. 141), that the respondent did, at Howden, in the said riding, on the 11th Nov. 1873, enter into a certain contract with the appellant to serve him as a servant in husbandry for a period unexpired at the date of preferring the said information, but that the said respondent had neglected to enter into such service, contrary to the form of the statute in that case provided, and claiming 3*l.* as a compensation for the non-performance of the said contract, we dismissed the said information without costs.

2. The following facts were either proved before us, or admitted by both parties.

3. That the contract of hiring was by parol only, at Howden statute hirings, held on the 11th Nov. 1873, and was that the respondent should serve the appellant as a servant in husbandry for one year, to commence at Martinmas (23rd Nov. 1873), at the wage of 13*l.* the appellant paying to the respondent 3*s.* for his fastening money, which money was returned on the 30th Nov. 1873, by the respondent to the appellant, and retained by him.

4. The respondent did not enter into his service, according to his contract, but refused so to do.

5. We being of opinion that the contract, not being in writing, was, within the meaning of the 4th section of the Statute of Frauds, a contract not to be performed within a year from the making thereof, and, therefore, inoperative;

6. We being also of opinion that, prior to the passing of the Master and Servants Act 1867, justices of the peace had no jurisdiction to adjudicate in cases of masters and servants in husbandry, except under the Act 20 Geo. 2, c. 19, in the case of servants who had actually entered upon their employment, or under the Act 4 Geo. 4, c. 34, in the case of servants who had refused to enter upon their employment, and where there had been a contract in writing and signed by the contracting parties; and being also of opinion that, as the above-

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mentioned Acts of 20 Geo. 2, c. 19, and 4 Geo. 4, c. 34, are included in the first schedule to the Master and Servants Act 1867, the latter Act is, by sect. 3, limited in its operation to cases, within the Acts of Geo. 2 and Geo. 4 before stated, and that therefore we had no jurisdiction to convict the respondent or make any order upon him in this case.

7. The question of law upon which the case is stated for the opinion of the court therefore is, whether we were right in dismissing the said information, and the court is humbly solicited, according to the power vested in the court by the said statute 20 & 21 Vict. c. 43, to remit the case to us the said justices, with the opinion of the court thereon, or to make such other order as to the court may seem fit.

Given under our hands this 10th Jan. 1874, at Howden, in the riding aforesaid.

THOMAS CLARKE.

PHILIP SALTMASTRE.

JOHN WM. EMPSON.

Gibbons, for the appellant.—The justices were wrong in not convicting the respondent. In the first place, it is submitted that the Statute of Frauds does not touch the case. Sect. 4 of that Act provides that "no action shall be brought" upon any agreement not to be performed within a year from the making thereof, unless the agreement or some note or memorandum thereof is in writing, signed by the party to be charged therewith, or his agent thereunto lawfully authorised. This, however, does not make the contract void, but only takes away the remedy by action. In *Crosby v. Wadsworth* (6 East, 610), Lord Ellenborough, C.J., said: "The statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them by charging the contracting party or his representatives, on the ground of such contract and of some supposed breach thereof, which description of action does not properly apply to the one now brought, viz., a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise." The only effect, then, of the 4th section of the Statute of Frauds is to forbid the remedy by action where the contract is not in writing; the contract itself is not rendered void. In *Laythoarp v. Bryant* (2 Bing. N. C. 745, 747), the distinction in this respect is pointed out between the 4th section of the Statute of Frauds and the 17th section, which enacts, as to the cases which fall within it, that "no contract, &c., shall be allowed to be good, except, &c." This was acted on in *Leroux v. Brown* (12 C. B. 801), where it was held that an action cannot be maintained in our courts upon a verbal contract made in France, not to be performed within a year, though the contract in question was valid according to the law of France, on the ground that the 4th section of the Statute of Frauds, in declaring that an action shall not be brought upon such a contract, operates not upon the validity of the contract but only upon the mode of procedure to be adopted with reference to it, which latter is to be regulated in accordance with our own rules and practice. [LUSH, J.—Sect. 3 of the Act of 1867 enacts that nothing in the Act shall apply to any contract of service other than a contract within the meaning of the enactments described in the first schedule to the Act. One of these is 4 Geo. 4, c. 34, s. 3, which deals

only with a service entered on, or a contract for service not entered on where the contract is in writing. The service here was not entered on, and the contract was not in writing; is not that decisive of the case?] If the jurisdiction of justices under the Act of 1867 is strictly confined to cases within the Act of 4 Geo. 4, c. 34, that may be so; but in *Crane v. Powell* (20 L. T. Rep. N. S. 703; L. Rep. 4 C. P. 123) Willes, J., declined to express an opinion on this subject, saying, "Whether the effect of the late statute is, that all contracts of such a character that they would fall within any of the former Acts, whether by parol or not, and whether the service has been commenced or not, are within the jurisdiction of the magistrates, or whether 4 Geo. 4 is still to be looked at, and the contract must necessarily be in writing when the service has not been commenced, it is unnecessary to pronounce an opinion, because I think that in this case there was a contract in writing which would have given jurisdiction to the magistrates under the Act of Geo. 4." Brett, J., goes further, and doubts the necessity of the contract being within the older statute. He says: "The only objection on which it remains for us to give judgment is, whether the contract was within 30 & 31 Vict. c. 141. It is said that the contract could not have been within 4 Geo. 4, c. 34, or any of the other Acts mentioned in the first schedule to the new statute, because it was not in writing and the service had not been commenced. That raises two questions: First, whether there was a contract in writing; secondly, whether, if not, it was necessary that there should be such to bring the case within the late statute. Now I must say that I have very considerable doubts whether, in order to bring the case within the late statute, the contract need be such as would have given jurisdiction to the magistrates under 4 Geo. 4, c. 34, or one of the other statutes mentioned in the schedule above referred to; but it is unnecessary to decide that point, because I agree that this contract was in writing." [BLACKBURN, J.—I must confess that I am unable to see the grounds for the doubts entertained by my brother Brett.] By sect. 2, the interpretation clause of the Act of 1867, the words "contract of service," are defined to include "any contract, whether in writing, or by parol, to serve for any period of time or to execute any work, and any indenture or contract of apprenticeship, whether such contract or indenture has been or is made or executed before or after the passing of this Act." This definition is inconsistent with the enactment contained in sect. 3, if contracts "by parol" are held not to come within the operation of the Act.

Kingsford, for the respondent.—The intention of the Legislature, in the 4th section of the Statute of Frauds, was undoubtedly to make contracts not complying with the requisites of that section, unenforceable by any process whatever in this country. The contract in the present case not being one to be performed within a year from the making of it, clearly comes within the section; and on this ground the justices were right in dismissing the information against the respondent. They were also right on the other ground. Whatever the definition of "contract of service" in sect. 2 of the Act of 1867, sect. 3 provides expressly that the provisions of the Act are to apply only to contracts within the meaning of the enactments described in the first schedule. Nothing to the

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contrary was decided in the case of *Crane v. Powell* (*ubi sup.*), the court being of opinion that there *there* was a contract in writing.

Gibbons, in reply.

BLACKBURN, J.—I think it is clear that in this case the magistrates were right in their decision; and I think they were right on both grounds, though either would be sufficient. Sect. 3 of the Act of 1867 (30 & 31 Vict. c. 141) enacts that “nothing in this Act shall apply to any contract of service other than a contract within the meaning of the enactments described in the first schedule to this Act, or some or one of them, or to any employer or employed other than the parties to a contract of service to which this Act applied as aforesaid, or to any case, matter, or thing arising under or relating to any contract of service, or arising between employer and employed, other than cases, matters and things to which the said enactments respectively apply; and in respect of all contracts of service, employers, employed, cases, matters, and things to which this Act applies, the respective provisions of this Act shall be deemed to be and are hereby substituted for such of the said enactments, or so much or such parts of the same as would have applied thereto if this Act had not been passed.” The enactments contained in the schedule give a summary jurisdiction in a variety of cases. I cannot construe this provision as meaning anything else than this, that the Legislature was not in the Act of 1867 creating a summary jurisdiction in any new case whatever. I think this is not only the sound construction, but in fact the only construction which can be put upon the enactment. But in the case of *Crane v. Powell* (*ubi sup.*), my brother Brett says: “It is said that the contract would not have been within 4 Geo. 4, c. 34, or any of the other Acts mentioned in the first schedule to the new statute, because it was not in writing and the service had not been commenced. That raises two questions: First, whether there was a contract in writing? secondly, whether, if not, it was necessary that there should be such to bring the case within the late statute? Now, I must say that I have very considerable doubts whether, in order to bring the case within the late statute, the contract need be such as would have given jurisdiction to the magistrates under 4 Geo. 4, c. 34, or one of the other statutes mentioned in the schedule above referred to; but it is unnecessary to decide that point, because I agree that this contract was in writing.” This fully justified Mr. Gibbons in calling our attention to the enactment, in order that we might see, if possible, the reasons for the doubt expressed by my brother Brett; but we are unable to see them. I can only come to the conclusion that the new Act applies only to some one of the classes of service which could previously have been enforced in a summary way under some of the Acts mentioned in the schedule. A contract for service in husbandry could only be enforced in this way under the Act of Geo. 4, if it had been entered upon or if it were in writing signed by both the parties to it. In the present case neither of these things happened, and, therefore, the new Act does not apply to it. Further, I think that the magistrates were right on the other ground also. Sect. 4 of the Statute of Frauds says that “no action shall be brought . . . upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon

which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto lawfully authorised.” I think that is equivalent to saying that such a contract shall not be enforceable at all; and, therefore, it cannot be enforced, as this proceeding seeks to have it, under the Act of 1867. On both grounds, therefore, I think the magistrates were right in their decision.

MELLOR, J.—I am of the same opinion. I was anxious to discover if I could, but I have not been able to do so, what were the grounds of the doubts expressed by my brother Brett in the case of *Crane v. Powell* (*ubi sup.*); for I confess I am unable to agree in those doubts. In the present case, it is found expressly by the justices that the contract of service was entered into on the 11th Nov. 1873, and was for a year, to commence on the 23rd Nov. following. It was therefore a contract not to be performed within a year from the making thereof; therefore it came within the Statute of Frauds, and, not being in writing, was not enforceable by action at law. Unless, therefore, there is something in the statutes giving a summary jurisdiction where no action would lie, the proceedings against the respondent cannot be sustained. It certainly would be very extraordinary if a person could be proceeded against criminally for not performing a contract which could not be enforced civilly against him by action at all. On both grounds I think the justices were right in dismissing the information against the respondent.

LUSH, J.—I am of the same opinion. There is an inconsistency between sect. 2 (the interpretation clause of the Act of 1867), and sect. 3 of the same Act, for which we must endeavour to find a solution; and I think that the solution is not hard to be found when we come to consider what was the object of the Act, which was to bring together the various enactments as to employers and employed contained in many other Acts of Parliament, some of them referring to apprentices, others to journeymen tailors, journeymen shoemakers, &c. All these various enactments are brought together into one schedule, and all are repealed. Summary language is used by the Legislature to embrace and repeal them all in sect. 3 of the new Act. In sect. 2, the words “contract of service” are defined to “include any contract, whether in writing or by parol, to serve for any period of time, or to execute any work, and any indenture or contract of apprenticeship, whether such contract or indenture has been or is made or executed before or after the passing of this Act.” I take it that the object of this definition was simply to prevent the necessity of repetition; and if we put that interpretation upon it, there is no contradiction between it and sect. 3, which says that “nothing in this Act shall apply to any contract of service other than a contract within the meaning of the enactments described in the first schedule to this Act, or some or one of them,” &c. Now, one of those enactments is 4 Geo. 4, c. 34, s. 3, which applies to servants in husbandry as well as artificers. It provides that “if any servant in husbandry, &c., shall contract with any person to serve him for any time, and shall not enter into or commence his service (such contract being in writing and signed by the contracting parties), or having entered into such service shall absent himself or herself from his or her service before the

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term of his or her contract (whether such contract be in writing or not in writing) shall be completed, or neglect to fulfil the same, &c., then and in every such case" a summary remedy is given by proceedings before a justice of the peace. The contract in the present case was a contract of service within the meaning of that enactment, and therefore the words of that Act apply to it. There was here no contract in writing, and the service had not been entered on, therefore the respondent could not have been proceeded against under that Act. The justices, consequently, were right in dismissing the information against him. I am also inclined to agree on the other ground, that where a contract is not enforceable by action it cannot be enforced summarily by a criminal proceeding. It is unnecessary, however, to decide this, as the other ground is sufficient.

Judgment for the respondent.

Attorneys for the appellant, *Bidsdale and Craddock.*

Attorney for the respondent, *W. Eley.*

COURT OF THE RAILWAY COMMISSIONERS.

Reported by WILLIAM EVANS, Esq., Barrister-at-Law.

Nov. 25 and 27, and Dec. 2, 5, 7, 10, and 23, 1874.

MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY, AND TRENT, ANCOLME, AND GRIMSBY RAILWAY COMPANY v. THE GUARDIANS OF THE POOR OF THE CAISTOR UNION,

AND

MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY, AND THE TRENT, ANCOLME, AND GRIMSBY RAILWAY COMPANY v. THE GUARDIANS OF THE POOR OF THE GLANFORD BRIGG UNION.

Rating of railway—Rating of docks—Method of ascertaining rateable value.

A better criterion of the receipts due to the portion of a line of railway within the limits of a certain parish may be gained by taking the average mileage receipts of the whole line than by taking a mileage division of the gross rates less the amount charged at each end for collection and delivery, although every line may not have equally contributed to the receipts of the whole line.

Whatever part of a goods rate covers ordinary station work at a terminus, should all be taken to be receipts of the line to which the terminal station belongs.

A railway company provided the working stock of a line of railway, the company being paid for a time at the rate of 1s. 1d. per train mile, and afterwards by a per centage of 33½ upon the total traffic receipts. The amount they received in 1872 was 7254l.

Held, that this sum should be taken as the aggregate amount of the expenses for locomotive power and repairs of carriages and waggons, and relative services, and be divided amongst the parishes according to the train miles run in each.

Held further, that there should be no deduction for profits on capital, but that there should be a deduction for tenant's profits as distinct from profits on capital, and that the amount should be 5 per cent. upon the gross receipts, such percentage to cover outlay in floating capital, stores, furniture, and the like.

The main line of a railway company ran through a certain parish for a distance of two miles and eight chains. The gross receipts in the parish were ascertained by dividing the gross rates by mileage between the forwarding and receiving stations, after deducting in the case of the merchandise traffic the amount charged at each end for collection and delivery.

Held to be a proper mode of calculating such receipts, provided a deduction for cartage is made at the Clearing House, and, that as regards local traffic, only what the company expend in carting goods carried at carted rates, and a reasonable profit thereon, shall be taken off the gross rate.

A railway company owned and occupied certain docks, which on their seaward side are employed in the accommodation of shipping and the transit of goods by sea. In other respects they were an adjunct of the railway.

Held, that the company were liable to be rated for the same, but that the rate should be ascertained in the following manner: From the estimated value of the docks should be deducted the value of such portions as gave to the company an income arising from dock dues and the like, so as only to charge them with expenses relating to the maintenance and repair of the docks, locks, and wharves, the hydraulic apparatus, and the pay of the staff employed in and about the admission and despatch of vessels; and if the receipts were not equal to the expense, the company should only be rateable for this land according to its unimproved value, the other receipts in the docks being brought into the company's railway account.

THIS was an appeal against an assessment of poor rates. The action was brought under the 9th section of the Railway and Canal Traffic Act, 1873, by which the Commissioners are empowered to pronounce upon any difference to which any railway or canal company may be party. The appellants are owners of certain lines of railway from Great Grimsby to Appleby, running through the two unions of Brigg and Caistor, in the county of Lincoln, and traversing in all no less than twenty-five distinct parishes; that portion from Grimsby to Ulceby belongs to the Manchester and Sheffield, and that from Ulceby to Appleby to the Trent line. The respondents are the guardians of the poor of the above mentioned unions. The present appeal was made against the rates at which the appellants' line had been assessed by the respondents on valuations made by them, and approved by the assessment committee of the Glanford Brigg Union. The appeal was heard at the last Lincolnshire July Quarter Sessions, and referred to the decision of the Court of Railway Commissioners. The respondents in their reply had refused to accept the table of returns furnished by the Trent Company, on the ground that it differed from that supplied to the shareholders in the last half-yearly report—a difference, it was stated, which was due to a method of dealing with terminals; but they were prepared to accept the returns of the Sheffield line, if proved in evidence to be correct. Both parties were agreed to accept the rating of the commissioners for the two parishes of Stallingborough and Appleby, the former in the Brigg, the latter in the Caistor Union, as a general basis for the settlement of the entire case. There were a few points in the original appeal as to which agreement had been mutually arrived at; but with regard to the rating of the Grimsby

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Docks, a question separate from the rating of the Grimsby line, neither party had been able to agree on a single point. It was agreed that the case of each of the appellants should be argued separately.

Field, Q.C., Mellor, and Webster, for the appellants, contended, on the evidence of a mass of accounts, that the principle upon which the appellants had reckoned the sum at which they should be rated was the correct one. This sum amounted to 741l. 9s. 6d., whereas the respondents placed it, according to the last approved valuation dated on the 10th of last Jan., at 1162l.

Mr. Pollett, chief accountant of the Sheffield line, stated that the principle on which he had worked was to take the gross receipts on all traffic passing through the station of Stallingborough, deducting the amount allowed by the Clearing-House for collection and delivery, and dividing the remainder by mileage throughout the whole district.

Barrow, Speke, Castle, and M^r Meikan for the respondents.—It was a fact beyond all dispute, that before the year 1862 railway companies had never borne their fair share of parochial expenses. But since the appointment of assessment committees in 1862 and 1864, by which various bodies had banded together to bear the necessary expenses of making inquiries, the case was somewhat different. Now, by the figures supplied by the appellants, the parish of Stallingborough should be rated at 388l.; but by the very lowest figure so supplied the rateable value stood at 141l. per mile, and taking the account of miles run over in the parish, the rate on this estimate could not be less than 638l. The gross receipts had been calculated altogether on a wrong principle. The terminal charges allowed for goods collected and delivered at each station on the line had been omitted from the calculation. Again, no consideration had been taken of the Grimsby Docks. The learned counsel for the appellants had been careful to entirely separate the docks from the line, because the docks were starved to feed the line. But the docks and the line were one and indivisible, impossible to be dissociated as independent subjects of rating. The former should, in fact, be regarded as a great water terminus of the latter. The appellants were the parties who had the control of the traffic of the docks, and of the management of the dues, and could suit such traffic to their convenience. The two could not be separated. As to the charges allowed for cartage from the wharves to the goods station, a distance of about half a mile, and performed on the company's line, and by the company's stock, they ought to be included in the general profits of the line. With regard to the amount of tenant's capital required, Mr. Barron pointed out that, though the appellants were enabled to put their rolling stock on the line at prime cost of labour and material, they yet made a claim for maker's charges. The amount of profit, viz., twenty per cent., they required on such capital, was exorbitant. Lastly, it was not fair to deduct the repairs of the permanent way and works from the working expenses, as they were statutable deductions, to be taken from the gross estimated rental.

On the completion of the case for the appellants so far as the Grimsby Docks were concerned,

Field, Q.C., addressed the court on behalf of the Trent Company.—This was a case which would

possibly involve a difference of opinion between him and his learned friend as to the mode in which it should be dealt with. The peculiarities of the case were, that, although the Trent Company were a separate corporation, the greater portion of the stock was held by the Sheffield Company, and that, although the former were the owners of the line, the latter were by Act of Parliament authorised to contribute funds towards it, and to acquire the undertaking of it. The funds had been contributed, but the undertaking not acquired. It would be alleged no doubt by the other side that the Trent Company had had no tenant's capital; but it is contended that they were entitled to claim such a sum as the hypothetical tenant would have to find. The length of line running through the parish of Appleby—which had by consent been taken to illustrate the Trent Company's system, as the parish of Stallingborough had been taken for the others—was five miles two furlongs three chains, all of which, excepting two chains, lay in the Brigg Union. The total number of train miles was 95,536, and the gross receipts 48l. 9s. 4d. per train mile, deducting the charges for collecting and delivering. The appellants had given an accurate return of the cost of all expenses in the locomotive department, and all the figures had been prepared on the same principle as the Stallingborough parish.

Barrow, for the respondents, declined to enter into any minute comparison of the returns of the Trent Company, as the establishment of the respondents' assessment would depend upon the right to take into consideration the actual existing state of things under which the Trent Company were owners, and worked the line; nor should he consider the right to introduce into the case calculations founded upon a hypothetical tenant's capital, which did not and could not exist. The sole question before the court was a question whether the rate made for 1873 was to be held a just and equitable one, considering the then existing state of things. The Trent Company were owners of a line for which they paid another company a fixed sum. How, then, could they make a demand for interest on tenant's capital, seeing that they neither had nor required any such capital, unless it might be some small sum for the furnishing of their stations.

Field, Q.C., in reply.

Judgment was delivered by the CHIEF COMMISSIONER.—These are appeals by railway companies against the sums at which hereditaments in their occupation have been rated to the relief of the poor under the Union Assessment Committee Acts. The appeals were respite by the quarter sessions by consent, in order that the matters in dispute between the companies and the boards of guardians might be referred for our decision under the 9th section of the Regulation of Railways Act, 1873. The Manchester, Sheffield, and Lincolnshire Railway runs through twenty-two parishes of the Caistor Union and the Trent, Ancolme, and Grimsby Railway, a line thirteen miles long, through seven parishes of the Glanford Brigg Union. In all these parishes, the respondent unions have proceeded upon the same principles in rating the profits of the two railway companies, and the convenient course, therefore, has been taken of putting the appeals before us as if they related to only one parish in each union, the parish of Stallingborough in the Caistor Union, and the

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parish of Appleby in the Brigg Union. If the guardians are right in their mode of assessment in Stallingborough and Appleby, they are right in all the parishes, and if wrong they have agreed with the appellants, the railway companies, to recast the figures for the rest of the parishes upon the basis which we may rule to be the correct one to found the valuation upon for Stallingborough and Appleby. Another question referred to our decision is the rateable value of the Grimsby Docks, which are the property of the Manchester, Sheffield, and Lincolnshire Railway Company. We will deal first with the appeal of the Trent and Ancolme Company. The Appleby portion of this company's line is three miles six furlongs and three chains long, and its rateable value is assessed at 1851*l.*, and the Appleby Station at 50*l.*, station and line together having been previously rated at 300*l.* The assessment has been made in the usual manner by ascertaining the gross receipts of the parochial portion of line, and, after deducting working expenses and profits and all outgoings allowed by statute, assuming the remainder to be the rent or net annual value to let of the lands and buildings. The first question here is whether the gross receipts have not been understated by the company, by their having deducted in the case of merchandise traffic the amount charged at each end for collection and delivery. The receipts for the whole line in 1872 averaged 1885*l.* per mile; but, according to the company, in Appleby parish the average per mile was only 1448*l.* We do not see why the receipts in this parish should have been so considerably below the general average. As to through traffic, the receipts brought to account half-yearly would be mileage receipts only, and would include no station or cartage terminals due to other companies, and as regards other traffic the company admit that they perform no cartage. Every mile may not have equally contributed to the earnings of the whole line, but those earnings seem to us in a case like this a better criterion of the receipts due to the portion in the parish than taking a mileage division of the gross rates less the amount charged at each end for collection and delivery. We also think that whatever part of a goods rate covers ordinary station work at a terminus should all be taken to be receipts of the line to which the terminal station belongs. We understood it to be contended that where less than half the transit is on the local line, part of its terminal should for rating purposes be deemed to be earned on the foreign line, but we think that what would belong to the local line for other purposes should be treated as belonging to it in a question of rating.

The next difference has reference to the deduction to be made from the gross receipts for working expenses and tenant's profits. The working stock of this line is provided by the Manchester, Sheffield, and Lincolnshire Company, who until June 1872 were paid at the rate of 1*s.* 1*d.* per train mile, but since then have been paid by a percentage of 33½ upon the total traffic receipts. The amount they received in 1872 was 7254*l.* The respondents contend that this sum should be taken as the aggregate amount of the expenses for locomotive power, and repairs of carriages and waggons, and relative services, and be divided amongst the parishes according to the train miles run in each, and moreover, that, as the hypothetical tenant would not in this case require any

capital for working stock, no deduction should be made from the gross receipts for profits on capital. The company, on the other hand, would ignore the amount actually paid to the Manchester and Sheffield Company, and they multiply the number of train miles run in Appleby by the cost per train mile of the total locomotive expenses, and total carriage and waggon repairs of the Manchester and Sheffield Company as given in their printed accounts, and maintain that the product is the proper deduction to be made for such working expenses. They claim further to have it assumed, that the tenant would require a capital of the same proportion to the number of train miles run in Appleby as the capital of the Manchester and Sheffield Company bears to the train mileage of their entire system, and that the deduction for tenant's profits should be at the rate of 20 per cent. upon the assumed capital. We think as to this difference that the respondents are right. Admitting that the Manchester and Sheffield Company might at any time withdraw their rolling stock, still during the ten years the line has been open for traffic it has never been worked in any other way, and we think that the supposed tenant, calculating his probable outgoings in the year commencing with the prospective period for which the rate is made, might reckon that the working of the line would continue to be provided for as before. For the same reason there should be no deduction for profits on capital; but, as an occupancy should yield profit of some kind—which profit in this case may be calculated either upon the gross receipts or upon the value of the rolling stock—we think there should be a deduction for tenant's profits as distinct from profits on capital, and that the amount should be 5 per cent. upon the gross receipts, such per-centage to cover outlay in floating capital, stores, furniture, and the like. The deduction for traffic charges, general charges, and compensation should, in our opinion, be what the respondents propose. We need not stop to notice the small differences between the parties in the items of Government duty, rateable value of stations, law charges, and the amount per pound of the rates and taxes in Appleby, and we come to the only remaining difference, which is as to the amount to be deducted for maintenance and renewal of the permanent way and works. The respondents at first would only allow 584*l.* for both maintenance and renewal for the whole distance in the parish, but at the hearing they admitted such an amount to be inadequate, and proposed instead that 726*l.* should be allowed for maintenance, and 524*l.* for renewal. These sums do not differ much from the sums claimed by the company, which are 812*l.* for maintenance, and 630*l.* for renewal. The difference is partly due to this, that the respondents calculate the cost per train mile of the repairs to way and works by the amount expended on the whole Trent line as shown in the Trent Company's published accounts, while the company make the calculation by the amount they find by their books to have been expended on the Brigg Union. Considering that the whole of this line, except three-quarters of a mile, is in the Brigg Union, and that the half-yearly accounts printed and distributed to the shareholders are the only documents to which both sides have equal facilities of access, we think the mode of calculation adopted by the respondents is in this case to be preferred. We will proceed next to the appeal

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of the Manchester, Sheffield, and Lincolnshire Railway Company from the valuation made of their property by the Caistor Union. The main line of this company runs through the parish of Stallingborough for a distance of two miles and eight chains. The gross receipts in the parish, ascertained by dividing the gross rates by mileage between the forwarding and receiving stations, after deducting in the case of merchandise traffic the amount charged at each end for collection and delivery, come, according to the company, to 4447*l.* per mile. The respondents object to this mode of calculating the receipts from merchandise as too favourable to the company. We see no objection to it where a deduction for cartage is made by the Clearing House; but for local traffic it was not shown to us that the allowance the Clearing House make for cartage, as between different railway companies, is added to the goods rate, and ought to be regarded as an extra not chargeable to land, but referable to the trade of a carrier by road, and we think that, as regards local traffic in Stallingborough, only what the company expend in carting goods carried at carted rates, and a reasonable profit thereon, should be taken off the gross rate. We have no means of knowing whether that mode of ascertaining the receipts would make the total sum earned in Stallingborough differ from the company's estimate of it. The respondents' further claim to have the receipts of the parish calculated upon the assumption of the railway and docks being one undertaking, is a matter upon which we will reserve our views till we come to the question of the rateable value of the docks.

Coming next to the working expenses incurred in the parish in earning the gross receipts to be credited to it, we have, in the first place, to consider the difference between the respondents and the company as to the expense for carriage and waggon repairs. The company divide their total outlay on that head of charge by the gross number of train miles run on their own lines, excluding mileage on the lines of other companies, and the product multiplied by the number of train miles run in Stallingborough gives the expense, as they estimate it, of this item in the parish. The respondents, on the other hand, refer to the company's half yearly accounts showing the train miles run in 1872, including ballasting and mileage run for other companies, to have been 6,214,608, and excluding the same 4,718,629 only, a difference of nearly one million and a half, and they claim that the divisor of the sum expended by the company in 1872 in repairs to carriages and waggons should be the mileage of 6,214,608, instead of the smaller one taken by the company. The company admit that the six million and odd miles are the right divisor to find locomotive cost, but they say that their engines draw other rolling stock on the lines of other companies, admitting at the same time that their own carriages and waggons do to some extent run on other lines. So far as they do, they increase their wear and tear, and therefore the miles they run should be added to the divisor; but, as the company could not give the number of these miles, we think the number may be taken approximately at one-fifth of the difference of the two mileage totals. "Rent of shops" follows "Repairs of carriages and waggons" as a working expense in the amended schedule of the company. The deduction was not much insisted

upon, and we propose to omit it. This seems the place to refer to the rents paid to this company by other companies; and by this company to other companies for the use of stations. In 1872 the rents received were 2620*l.*, and paid 5218*l.* The difference is 2598*l.*, and Stallingborough should take a share of this expense in proportion to its train miles. A principal deduction from gross receipts to find the rateable value of the subject of assessment is the allowance to be made to the tenant for profits of capital. The tenant of the two miles and eight chains of line in Stallingborough would require a capital bearing the same proportion to the work done on that piece of line that the capital of the company bears to the whole work they do. What that capital was worth in 1872 is a principal point in dispute. The rolling stock of 1872, to take that part of the capital first, is valued by the company at 1,680,000*l.*, and by the respondents at only 1,110,000*l.* There was an increase of stock during the year; 10 more engines in December than in June, 36 more carriages, 256 more waggons. The respondents take the stock as it stood in June, the company the stock in hand in December. The latter course seems to us the correct one as a general rule, and the former in this particular case. For a yearly tenancy commencing with the making of a rate, the tenant should take the actual rolling stock in use at the time, because as its quantity so will be the capacity for doing work, and the work done. But in this case it was agreed to accept the accounts of 1872, and for the receipts of that year, which have been made the measure of the receipts of the tenant, the average working stock during the year, or, as the increase was progressive from beginning to end, the stock in the middle of the year, was a sufficient quantity for him. For the same reason the value of the stores will be their value on the 30th of June. The points to be next considered as to this stock are its prime cost and present value. The difference as to the prime cost of the coaching and merchandise stock, the difference between 831,000*l.* and 819,000*l.*, is not so considerable but what we may accept without scrutinizing the higher valuation of the company, and we approve also of their engines being valued at 2700*l.* each instead of the lesser sum by 100*l.* at which their value is put by the respondents. But the prime cost would not be the value of the stock at the time of making the rate, and only capital for present value would be required. The respondents assume a depreciation of 30 per cent., but we think it probable that the stock would be kept up nearer than this to its original value, and that if from being in actual use it would not sell at a less reduction than 20 per cent., repair and renovation would prevent any lower fall. We do not doubt that an expenditure of 320,000*l.*, the sum by which at 20 per cent. the value would be diminished, would suffice to restore the rolling stock to its full original value. The railway company have shops at Gorton and elsewhere, in which there are machines more or less of the nature of fixtures. These machines are valued by the company at 68,750*l.*, and we are asked to say which of them are chattels to be provided out of tenant's capital, and which have been made rateable by fastenings to the ground or to buildings. We cannot do better than apply to this question the principle laid down in the case of the Southampton Dock Company, and in the Halstead case; and so doing, and having before us the evi-

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dence of Mr. Sacre, the company's chief engineer and locomotive superintendent, and as such the officer in charge of their works at Gorton and other places—and who knows how and with what object the different machines have been placed *in situ*, and states that the machines which are fastened only to steady them, and not so as to give them any permanent attachment, are worth about 20,000*l.*—we decide that a tenant would have to find capital to buy them of that amount. We accept the company's estimate of value as to locomotive cranes, tools, sheets, horses, and office and station furniture, and the only remaining question is whether the company's claim to a floating capital of 200,000*l.*, and to a deduction for interest thereon, should be allowed or not. The *North Staffordshire* case was cited to us as negating any such claim. To us it seems rather to leave such a claim when arising to be dealt with according to circumstances; and, considering on the one hand the daily expenses of a line and the rent periodically recurring, and on the other the proportion of earnings locked up in ledger balances or due on running accounts by other companies and the Clearing House, we think a tenant could not get on without some working capital, but that, as it would not be always wanted, 125,000*l.* would be sufficient in the case of this line. Thus far we have been considering the capital required for the whole line, and we will now state the share which the parish of Stallingborough should receive, and the per-centage which will give fair and reasonable profits. The share we think should be found by the method adopted by the company of dividing capital in the ratio of sectional train miles. It seems to us simpler than the method taken by the respondents, and at the same time to be sufficiently accurate. As regards the per-centage, 20 per cent. upon the capital invested, not including floating capital and value of stores, is the deduction claimed by the company for tenant's profits and profits of trade, for which the respondents propose 10 per cent. as sufficient. Taking into account that the stock is not valued as new, that we ought to assume it to be kept up to the highest standard set by any company, that parts of it, as tools for instance, require frequent replacement, and that the trade of a railway carrier is attended with much risk, we do not think it will unduly reduce the value of the occupation or make an unreasonable deduction from the receipts and profits of the parish if the rate we allow, insurance from risks included, is fixed at 20 per cent. As regards floating capital and value of stores, we propose to allow 5 per cent. upon the former and 10 per cent. upon the stores. Another deduction to be made from gross receipts is the expense of maintaining the permanent way. Such repairs as are a charge upon a tenant are not alone sufficient for maintenance. The deterioration always taking place, in spite of such repairs, obliges a landlord to devote a part of his rent to the renewal of the line. As a matter of fact repair and renewal go on simultaneously, and their respective costs are not separately shown in the accounts. In 1872 the railway company expended 107,020*l.* in the maintenance of 258 miles of way, &c., including in that sum the cost of a large quantity of steel and iron rails laid down in that year and charged to revenue. The respondents propose to divide this gross sum amongst the several parishes in the

proportion of their train mileages; and, admitting that this is preferable to a simple mileage division, it has yet the defect of assuming, that if the traffic were the same from end to end of the line, the expense of maintenance would be at a uniform rate throughout. The appellants or company follow a different method as regards at least the item of repairs. They have prepared a return of the actual cost of repairs only, excluding renewal, in the Caistor Union, and divide this cost amongst the 22 parishes in the union in proportion to their train mileage; and, as we think this is the better mode in principle on account of the smaller area, we allow the deduction they claim for repairs of 374*l.* per mile in Stallingborough parish. The company claim in addition a deduction of 168*l.* per mile as the annual cost of renewal, but we are not prepared to allow them a deduction of more than three-fourths of this, or 126*l.* per mile, which we think enough, because repairs and maintenance together did not in 1872 exceed an average of 415*l.* per mile for the company's whole line, and the train miles per mile in Stallingborough, viz., 17,695, were below the average number of train miles per mile for the whole 258 miles of that line. We have only to add upon the subject of the assessment for this parish, that the deduction for stations and works separately assessed should have reference to the aggregate rateable value of all the stations, &c., and should be in the proportion which the gross receipts due to Stallingborough bear to the total traffic receipts of the line. We come lastly to consider the rateable value of the Grimsby docks. Great Grimsby is one of the parishes in the Caistor Union, and the stations and lines of railway of the Manchester and Sheffield Company situated in the parish will be valued by the same rules as in Stallingborough. But the railway company are also the owners and occupiers of the Grimsby docks, and appeal is made to us to say whether the docks are fairly rated at an annual value of 36,990*l.* We have already shown that where a line of railway passes through many parishes, and the rateable value of the part lying in one parish has to be determined, such part cannot be fully valued without a knowledge of the rateable value, or at least of the ordinary elements in estimating the rateable value of the entire property to which it belongs. It seldom happens that the bounds and limits of the entire property are not well defined, but in this case the question turns upon whether the railway and the docks should be recognised as one property or not. For if we take the view of the respondents as to the rateability of the docks as forming with the railway a united undertaking, we give to the docks the relation of the stations on a line of railway to such line, and at once their rateable value becomes large, possibly as large as the respondents have estimated it, because there are no expenses to deduct from the rent. But the company maintain that the docks are quite a separate concern from the railway, and that their expenses being largely in excess of the receipts, they possess no rateable value, and that no tenant of them could upon sound commercial principles afford to give any rent for them. We incline to a view of these docks intermediate between these views of the one side and the other. To us it appears that they are neither wholly absorbed in, nor yet wholly distinct from, the railway property. They have a double aspect, and are a common link of the land and sea routes. The company have and exercise steam-

boat powers, and the docks on their seaward side are concerned in the accommodation of shipping and the transit of goods by sea. But in other respects they are an adjunct of the railway, and we think should be treated as such for rating purposes. What we propose, therefore, is to take Mr. Lee's estimate of the present value of the docks, warehouses, sheds, and station appurtenances, and, deducting from it the sums at which he values the wharves, docks, tidal basin, and buildings at the tidal basin end, to deal with the remainder, consisting of the sidings, sheds, stores, warehouses, and coal staging, as part of the railway property of the company. The accounts, therefore, should be revised so as to give to the company in respect of their dock property such income only as arises from dock dues, graving dock dues, hard dues, wharfage, &c., and also so as to charge them only with expenses relating to the maintenance and repair of the docks, locks, and wharves, the hydraulic apparatus, and the pay of the staff employed in and about the admission and dispatch of vessels; and if the receipts are not equal to the expenses, the company will only be rateable for their land according to its unimproved value. The other receipts in the docks, from labour other than that already mentioned, from warehouse rents, collecting and delivering traffic, &c., will be brought into the company's railway accounts, and in like manner all expenses incurred upon such services, and in horses, engines, and the maintenance and renewal of the roads, sidings, turntables, &c., will be a charge upon the company in respect of their railway property. We will conclude by saying, in case of there being any points which we have overlooked, or as to which we have not made our meaning sufficiently clear, or of there being any difficulty in working out the figures upon the basis of the rules we have adopted, that we shall be happy to answer any questions from either side in connection with this decision.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by JAMES P. ASPINALL, Esq. Barrister-at-Law.

Jan. 23, 28, and 29, March 16, 1875.

(Present, the Right Hons. Sir JAMES COLVILLE, Sir BARNES PEACOCK, Sir M. SMITH, and Sir R. COLLIER.)

REG. v. MOUNT AND ANOTHER.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY
OF VICTORIA.

Criminal jurisdiction of Colonial Courts—Manslaughter on the high seas—Sentence of penal servitude—Stats. 12 & 13 Vict. c. 96; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.

Stat. 12 & 13 Vict. c. 96 first conferred upon Colonial Criminal Courts jurisdiction to try persons for offences committed at sea within the jurisdiction of the Admiralty, and enacted (sect. 2) that convicted persons should be subject to the same punishment as "by any law now in force" in England. At the time this Act was passed the punishment for manslaughter in England was transportation or imprisonment.

Stat. 16 & 17 Vict. c. 99 substituted penal servitude for transportation in some cases, and, by sect. 6, enacted that persons sentenced to penal servitude

might be confined in such prison or place as a Secretary of State might direct.

Stat. 20 & 21 Vict. c. 3 substituted penal servitude for transportation in all cases.

The respondents were convicted in Victoria of manslaughter upon the high seas, and sentenced to fifteen years' penal servitude. On a return to a writ of habeas corpus, the court ordered them to be discharged, on the ground that a sentence of penal servitude could not be carried out in the colony without the preliminary direction of one of the Secretaries of State.

Held (reversing the judgment of the court below), that such order was wrong, for that the provisions in 16 & 17 Vict. c. 99, s. 6, related to matters of administration only, and need not be resorted to in the case of colonial sentences; and that 20 & 21 Vict. c. 3 was applicable to the colonies, with respect to sentences to be passed on persons only triable there by virtue of 12 & 13 Vict. c. 96; and that, as it appeared that by virtue of the above imperial statutes and various acts of the Colonial Legislature, a sentence of penal servitude could be carried into execution in the colony, the return to the writ that they were in custody "to undergo such sentence," was sufficient.

In any event, a person convicted of felony ought not to be set at large during the term of his sentence, until it is clear that no lawful means of executing it can be found.

At the Sessions of the Supreme Court of general gaol delivery of the Colony of Victoria, held at Melbourne on Dec. 16th 1872, a criminal information was filed against the respondents, Henry Mount and William Morris, for murder on board the British ship *Carl*, a vessel engaged in the South Sea coolie traffic, on the high seas. They were tried before Barry, C.J., and a jury, and found guilty of manslaughter. The chief justice, entertaining some doubts as to the proper sentence to be passed, remanded the prisoners until the April Sessions 1873, and consulted with some of the other judges, and, in accordance with their opinion, passed a sentence of fifteen years' penal servitude. After the passing of this sentence the respondents were confined in the gaol at Melbourne, which is a penal establishment within the meaning of the colonial Statute of Gaols 1864, and were afterwards removed to Pentridge Gaol, also an establishment within the meaning of the statute, to be detained until the expiration of the sentence.

Afterwards, on 12th Sept 1873, a writ of *habeas corpus* was issued out of the Supreme Court, directed to the Inspector General of Penal Establishments, requiring him to bring up the bodies of the respondents; to which he made a return, which is set out in full in the judgment of their Lordships, that he detained the respondents by virtue of the sentence passed upon their conviction "for the cause and to the end that they may undergo such sentence." Upon this the court, after argument, delivered judgment that the return was bad, on the ground, among others, that a sentence of penal servitude could not be carried out in any gaol in the colony without the direction of one of Her Majesty's Principal Secretaries of State, and ordered the prisoners to be discharged from custody.

From this order the Crown obtained special leave to appeal.

J. F. Stephen, Q.C. and Bowen, for the appellant,

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argued that the order was wrong, because stat. 16 & 17 Vict. c. 99, s. 6, on which it was made, only applies to prisoners convicted in the United Kingdom, and that in any case they ought not to have been discharged, but remanded till an order under the Act could be obtained. They referred to the following statutes :

9 Geo. 4, c. 31, s. 9;
12 & 13 Vict. c. 96, ss. 1, 2;
16 & 17 Vict. c. 99, ss. 3, 6, 7;
20 & 21 Vict. c. 3, ss. 1, 2, 3;

and the cases of

Reg. v. Allen, 3 E. & E. 338;
Ex parte Lees, E. B. & E. 828;
Parker's case, 5 M. & W. 32;
Watson's case, 9 A. & E. 731;
Cobbett's case, 5 C. B. 418;
Hale, and Hawkins' Pleas of the Crown.

Field, Q.C. and Bompas, for the respondents, contended that upon the true construction of the statutes the detention was illegal; and further the court was only competent to pronounce a sentence of "detention and compulsory service on public works," which is distinguishable from "penal servitude." They cited:

Bacon's Abridgement, title, "*Habeas Corpus*;"
Reg. v. Souden, 4 B. & Ald. 294;
Reg. v. Nash, *Ibid.* 295;
Reg. v. Deybel, *Ibid.* 243;

and went through the earlier statutes as to transportation before 9 Geo. 4, c. 31.

Stephen, in reply, referred to *Ex parte Krans* (1 B. & C. 258). *Cur. adv. vult.*

March 16.—The judgment of their Lordships was delivered by Sir MONTAGUE SMITH.—The respondents, Mount and Morris, were tried at the sessions of the Supreme Criminal Court of the Colony of Victoria, upon a criminal information for murder committed on board a British ship on the high seas, and were convicted of manslaughter. The Chief Justice, who tried them, entertaining doubts as to the nature of the sentence which, by law, might be passed, consulted the other judges of the Supreme Court, who were of opinion that a sentence of penal servitude might be awarded; and, accordingly, at a subsequent sessions, the respondents were sentenced to penal servitude for fifteen years. In pursuance of this sentence the respondents were first confined in a gaol at Melbourne, being a public gaol within the meaning of the Colonial Act, The Statute of Gaols 1864, and were afterwards, under a warrant of the Inspector-General of Penal Establishments, removed to another gaol at Pentridge, being also a public gaol within the meaning of the above Act, there to be detained until the expiration of their sentence, or until discharged or removed by lawful authority. The respondents, complaining that their detention in Pentridge gaol was illegal, obtained a writ of *habeas corpus* from the Supreme Court of Victoria, to which the Inspector-General made a return as follows:—"I, George Oliphant Duncan, Inspector-General of Penal Establishments in the Colony of Victoria, do hereby certify and return in obedience to this writ, that before the coming of the said writ to me, to wit, on the 15th day of April, in the year of our Lord 1873, I did take into custody, and still retain in custody in gaol, the said Henry Clark Mount and William Charles Morris, under and by virtue of a certain sentence of the Supreme Court of General Gaol Delivery, holden at Melbourne on the 19th day of December, in the year of our Lord 1872, delivered

in open court (the said court being then sitting) for a certain felony, that is to say, manslaughter on the high seas, whereof the said Henry Clark Mount and William Charles Morris had been by the said court then and there respectively tried and convicted, which said sentence is that each of them, the said Henry Clark Mount and William Charles Morris, should be kept in penal servitude for the period of fifteen years; and I do further certify that the said Henry Clark Mount and William Charles Morris are now detained in my custody, for the cause and to the end that they may undergo the sentence aforesaid.—Geo. O. DUNCAN." After hearing arguments upon this return, the court made an order that the prisoners "be discharged from their imprisonment and set at large," mainly, as appears from their judgment, on the ground that a sentence of penal servitude cannot be carried out in any gaol in the colony without the preliminary direction of one of her Majesty's Secretaries of State. The judgment on this point concludes as follows:—"The punishment of transportation could not have been enforced unless the King in Council appointed the places to which offenders were to be transported, nor unless the Secretary of State specified which of the places so appointed each particular offender was to be sent to (5 Geo. 4, c. 84, s. 3). A sentence of penal servitude, whether passed in the United Kingdom or in a colony, requires the same preliminary Act of a Secretary of State (16 & 17 Vict. c. 99, s. 6). Without it the sentence cannot be put into execution. In cases of penal servitude it ascertains the place where the hard labour is to be performed, just as in ordinary cases the sentence of the court ascertains the gaol in which imprisonment is to be undergone; and although the discipline to which the prisoners are subjected may be, as was urged by the Attorney-General, the same as if the Secretary of State's direction had been obtained, the imprisonment which the prisoners are now undergoing is not in accordance with the sentence passed upon them, nor is it in any way subservient or auxiliary to its execution." The present appeal is from the order discharging the respondents. It was not disputed by their counsel at their Lordship's Bar that the sentence of penal servitude was correct, and their argument was limited to alleged errors in the manner of its execution. Before, however, dealing with these objections, it will be convenient shortly to consider the statutory law on which the sentence itself is founded. The jurisdiction to try persons charged with offences committed on the sea within the jurisdiction of the Admiralty was, for the first time, conferred on Colonial Criminal Courts in 1849, by the Imperial Act (12 & 13 Vict. c. 96). For this purpose it was enacted (sect. 1) that these courts should have the same jurisdiction for trying such offences, and be empowered to take and exercise all such proceedings for bringing persons charged therewith to trial, and "for and auxiliary to and consequent upon the trial," as by the law of the colony might have been taken if the offence had been committed upon any waters within the limits of the colony. The second section, which relates to the sentence to be passed in such cases, provides that convicted persons shall be subject to the same punishment as "by any law now in force" persons convicted of the same offence would be liable to, in case such offence had been committed,

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and was "inquired of, tried, and adjudged in England." The words "now in force" occasioned the doubts entertained by the Chief Justice as to the nature of the sentence to be passed. At the time this Act passed the punishment for manslaughter in England (under the 9 Geo. 4, c. 51, s. 9) was transportation for life, or for a term not less than seven years, or imprisonment, with or without hard labour, not exceeding four years, or fine. In consequence of the difficulty of finding suitable places to which offenders might be transported, penal servitude was substituted in some cases for this punishment by the 16 & 17 Vict. c. 99. This Act was soon followed by the 20 & 21 Vict. c. 3, which enacted that no person should be sentenced to transportation, and that persons who, if the Act had not passed, might have been sentenced to transportation, should be liable to be sentenced "to be kept in penal servitude." It could not be disputed that penal servitude would have been a proper sentence if the respondents had been tried in England, and the doubt thrown upon the validity of such a sentence in the colony arises upon the question whether the words "now in force," in the 12 & 13 Vict. c. 96, allow of the application in the colonies of the punishment substituted in England for that in force when the Act passed. On this question their Lordships think that, although the Imperial Act abolishing transportation does not in terms include the colonies, it is applicable to them with respect to the sentences to be passed on persons convicted in the colonies of offences only triable there by virtue of the Admiralty jurisdiction conferred by the Imperial Act on Colonial Courts. Such offences might be tried, after that Act, either in England or the colonies, and the Legislature clearly expressed its intention that the punishment should be the same, wherever the trial might take place. This general intent and policy should, therefore, govern the construction of the Acts, unless it plainly appears from the language of the later statute that the Legislature meant to change it. The words "now in force," in the original Act, no doubt apply in terms to the existing law. But the latter part of the section, directing that the punishment should be the same as it would have been if the offence "were inquired of, tried, and adjudged in England," show with distinctness that the imperial Legislature was conferring power upon the colonies to try offences properly cognizable in England, with the consequences which would have attended a trial there. The punishment was accordingly directed to be the same as it would have been by the existing law if the offence had been tried in England. When the imperial Legislature altered that law, and substituted penal servitude for transportation, it was reasonable to suppose that the alteration was intended to embrace sentences for offences tried in the colonies under the special jurisdiction conferred by the 12 & 13 Vict., since there is no trace of any intention on the part of the Legislature to change the policy of that Act, which orders these sentences to be passed according to the law of England. This construction creates no conflict between imperial and colonial authority, and in no way affects the rights and privileges of the colonial legislatures. It simply affirms that the imperial statute which gave the courts of the colonies, *quod* offences committed upon the seas

beyond their territorial limits, a jurisdiction which their own legislatures could not confer, was altered by a subsequent imperial Act. Their lordships therefore see no reason for disagreeing with the judges who advised the Chief Justice that a sentence of penal servitude might be passed upon the respondents. The only question argued at the bar, on behalf of the respondents, related to the manner of executing this sentence in the colony, and must now be considered. At the passing of the Act conferring Admiralty jurisdiction on the colonies (12 & 13 Vict.), the punishment for manslaughter, according to English law, was, as already stated, transportation, or imprisonment with hard labour for four years. The 17th section of the Imperial Act (5 Geo. 4, c. 84), which consolidates the earlier Acts relating to transportation, recognised the power, then existing in some colonies, to transport offenders; and by the 4th section of the Imperial Act, passed in the following year (6 Geo. 4, c. 69), the king was empowered, by an order in council, to authorise governors of colonies to appoint places to which offenders sentenced in the colonies to transportation should be sent. The colonial Acts of New South Wales, which then included Victoria (afterwards made applicable to the new colony by the 14th Vict., No. 49), show that an order in council was issued by the king under the last-mentioned statute, and that provision was made by the colonial legislature for carrying sentences of transportation into execution. (See 7 Geo. 4, No. 5; 11 Geo. 4, No. 12; 3 Will. 4, No. 3.) But the same difficulty of carrying into execution sentences of transportation was experienced in the colonies as existed in England, and accordingly by the New South Wales Act (11 Vict. c. 34), it was enacted, whilst continuing the sentence of transportation, that in lieu thereof offenders might be sentenced to be kept to hard labour on roads or public works. Such was the state of the colonial law relating to transportation when the Admiralty jurisdiction to try offenders was conferred on colonial courts (12 & 13 Vict.), and there would seem to be no sufficient reason for saying, if a sentence of transportation had then been awarded in the colony, that its execution should have been transferred to the English authorities. The direction in the Act that the punishment should be the same as if the trial had been in England is satisfied by holding that the nature of the sentence must be the same. It could hardly have been intended, if the sentence were imprisonment, that the offender should be sent to England to be confined in an English gaol; or that the provisions relating to transportation from England, which include power to imprison in English gaols (see 5 Geo. 4, c. 84, ss. 18, 19), should be put in force. When the law of England abolished transportation, and substituted for it penal servitude, the latter, as already stated, became a sentence which might be lawfully passed by the colonial courts when acting under their Admiralty criminal jurisdiction. The argument for the respondents came to this: that there being no such punishment as "penal servitude," *eo nomine*, in Victoria, such a sentence could be carried into execution only in accordance with the disciplinary regulations of the English statutes, and if those regulations were not applicable, that it could not be carried into effect at all. It was said that the 6th clause of the Imperial Act (16 & 17

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Vict.), which for the first time introduced penal servitude as a substitute for transportation, was applicable to colonial sentences. This section enacts that persons sentenced to penal servitude may be confined in such prison or place in the United Kingdom or in her Majesty's dominions beyond seas, as a Secretary of State may direct. The Supreme Court yielded to this contention, and held that without a preliminary order of a Secretary of State appointing the prison or place where the labour was to be performed, the sentence could not be put into execution. The question is not free from difficulty; but their Lordships, on the whole, think that the directions in the 6th clause form no part of the sentence. They are not contained in the section of the Act defining the nature of the sentence, nor are they embodied in it when judicially pronounced. It appears to them that these provisions relate only to the manner of its execution and to matters of administration, and therefore need not be resorted to in the case of sentences passed in the colonies, which, in their view, may be carried into effect in accordance with the procedure provided by them. It is then said that no legislative provision has been made in the colony for executing this sentence. Supposing this were so, and that a sentence of penal servitude had been absolutely new in the colony, it could by no means follow after the imperial Legislature had directed such a sentence to be awarded, that, when passed, it might be treated as null, because no means had previously been provided there for carrying it into effect. But, on behalf of the Attorney-General, it is urged that means do exist in the colony for executing an analogous sentence, which are adapted to executing that of penal servitude. The Imperial Act, which substitutes penal servitude for transportation, defines or describes the sentence only by the following terms: that the offender "be kept in penal servitude;" "kept," of course, implies detention, and "penal servitude" compulsory labour. This, then, is the nature of the sentence. The Colonial Act (11 Vict. c. 34) provides that in lieu of transportation offenders may be sentenced to be kept to hard labour on roads or public works; and now, by the Criminal Law Consolidation Act (27 Vict., No. 233), transportation is virtually abolished in the colony, and detention and keeping to hard labour on public works at places to be appointed for that purpose is substituted for it (sect. 291). By the Statute of Gaols 1864, the Governor in Council may appoint places in Victoria at which offenders under such a sentence of detention shall be detained and kept to hard labour (sect. 4), and it is directed that all gaols and hulks shall be under the charge and direction of the sheriff, or such other officer as the governor may appoint (sect. 8). By a later Act (The Statute of Gaols Amendment Act 1871) the 8th section of the former Act is repealed, and the Governor in Council is empowered to appoint an Inspector-General of Penal Establishments, who was to have the charge and direction of all gaols and hulks, with power to remove prisoners under sentence from one gaol to another. This statutory officer was invested with the powers which before belonged to the sheriff. Moreover, by a recent imperial statute, The Colonial Prisoners' Removal Act 1869, which in effect authorises inter-colonial transportation, it is enacted that prisoners "under sentence of transportation, imprisonment, or penal

servitude," may be removed under certain conditions and regulations, and by agreement between any two colonies, from one colony to the other, for the purpose of undergoing their sentence in the other colony. This statute recognizes "penal servitude" as a punishment existing in, at least, some colonies, and places it in the same category with "transportation and imprisonment." In the result, it appears to their Lordships, upon a review of the above-mentioned Acts of the imperial and colonial Legislatures, that sentences of penal servitude, in other words, of detention and compulsory service, may be carried into execution in the colony; and, therefore, that the return of the Inspector-General that he detained the respondents by virtue of the sentence passed upon their conviction "for the cause and to the end that they may undergo such sentence," is correct. But if this were not so, and if the judges of the Supreme Court were right in holding that an order of the Secretary of State was necessary, their Lordships think they erred in setting the prisoners at large. In any event, some time must have elapsed after the sentence had been passed before such an order could be obtained, during which the prisoners must have been necessarily detained by the Inspector-General, as the statutory sheriff; and in any view of the case, the court should, in their opinion, have remanded the prisoners to his custody, to give the opportunity for an application to the Secretary of State for the order the court thought necessary. The prisoners, who had been convicted of felony, ought not to have been set at large during the term of their sentence, until it was clear that no lawful means of executing it could be found: (*Ex parte Krans*, 1 B. & C. 258; *Parker's case*, 5 M. & W. 32.) The case of *Reg v. Allen* (3 E. & E. 338) was exceptional in its circumstances; the prisoner had been tried by a court-martial in India, and when he had been brought to England under an invalid warrant, there seemed to be no lawful way of carrying the sentence into effect. For these reasons their Lordships will humbly advise her Majesty to reverse the order under appeal.

Solicitors for the appellant, *Freshfields and Williams*.

Solicitors for the respondents *Stoneham and Legge*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Monday, April 19, 1875.

Re THE GUARDIANS OF THE POOR OF THE
DARLINGTON UNION.

Elementary Education Act 1873 (36 & 37 Vict. c. 86), s. 3—*Payment of school fees of pauper children.*

Money granted under the Elementary Education Act 1873 (36 & 37 Vict. c. 86), s. 3, *for the education of the children of persons receiving relief out of the workhouse, need not be paid to the parents, but may in the discretion of the guardians be directly applied in payment of the school fees.*

Manisty, Q.C. (O. Crompton with him) moved, on behalf of a guardian and ratepayer, for a rule calling on the auditor and the guardians of the poor of the Darlington Union to show cause why

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a writ of *certiorari* should not issue to bring up the school fees account together with the allowances and reasons for the allowances. The object of this motion, which is made under 7 & 8 Vict. c. 101, s. 35, is to obtain the decision of the court on the construction of the Elementary Education Act (36 & 37 Vict. c. 86), s. 3, as to which a difference of opinion has arisen among the guardians. That section repeals Denison's Act (18 & 19 Vict. c. 34), and in lieu thereof enacts the following provisions: "Where relief out of the workhouse is given by the guardians or their order by way of weekly or other continuing allowance to the parent of any child between five and thirteen years of age, or to any such child, it shall be a condition for the continuance of such relief that elementary education in reading, writing, and arithmetic shall" (except under certain circumstances) "be provided for such child, and the guardians shall give such further relief (if any) as may be necessary for that purpose. Any such relief to a parent as above mentioned shall not be granted or refused on condition of the child attending any public elementary school other than such as may be selected by the parent. The guardians shall not have power under this section to give any relief to a parent in order to enable such parent to pay more than the ordinary fee payable at the school which he selects, or more than one farthing for each attendance at such school, as defined by the minutes of the education department for the time being in force with respect to the Government grant. All relief given by guardians under this section shall be paid out of their common fund." According to the true construction of this enactment, it is obligatory on the guardians, where relief is granted for the purpose of education, to pay the money to the persons relieved, and the practice which has been adopted of paying the money direct to the master or mistress of the school which the children attend is illegal. The other children bring the money for the fees with them to the school, and, consequently, when the children of parents who are in receipt of relief come to school without the money, they become known among their schoolfellows as pauper children. There is no suggestion in this case of any apprehension on the part of the guardians that the money may be misappropriated by the parents.

COCKBURN, C. J.—I am of opinion that there ought to be no rule. All that the Act was passed to secure was, that where parents were in a condition of pauperism, and could not find the money to get their children educated, in order to insure the education of the children, the guardians should find the money necessary for that purpose. This may be done either by paying the money to the parents, or by paying the school fees for the children, as is done here; as to adopting the one course or the other, it is left in the discretion of the guardians under the particular circumstances of each case to do what they think most beneficial. There may in this particular instance be no danger of diversion of the money to other purposes; but cases might arise where persons of bad character, and of bad habits and mode of life, might do so. With regard to the alleged hardship on the children, it does not appear to be unjust that children who are the children of paupers should be looked upon as being in that position at school, just as they would be anywhere else.

BLACKBURN, J.—I am entirely of the same opinion. The intention of the Act is that the guardians are to insist on the children of paupers being sent to school and educated, and, if necessary, are to provide the funds required for that purpose, but in so doing the Act leaves them at liberty to pursue whichever course they think fit.

MELLOR and FIELD, JJ., concurred.

Rule refused.

Attorney, C. T. Foster.

Saturday, April 24, 1875.

BALDWIN (app.) v. WHITE (resp.)

Watch houses—County police stations—Extension of boroughs into counties—5 & 6 Will. 4, c. 76, s. 84.

The Municipal Act 1835, s. 84, enacts a penalty on summary conviction for refusal to give up to watch committees of boroughs all watch houses within their boroughs, the expenses for which had been provided for by previous Acts.

By a local Act of 1873, the borough of Brighton, which was incorporated in 1854, was extended to include East Preston, in which were a police office and cells, forming part of a police station which had been provided for the county by the quarter sessions in 1870, under the powers of the County Police Acts, the first of which was passed in 1839.

Held, upon a case stated in a summary conviction of the superintendent of the county police station, for refusing to give up these offices and cells to the Brighton Watch Committee, that sect. 84 of the Municipal Act applies only to such watch houses as those the expenses of which had been provided for by earlier Acts, and not to county police stations authorised by subsequent Acts.

THIS was a case stated by the stipendiary magistrate and justice of the peace for the borough of Brighton, for the opinion of the court, pursuant to 20 & 21 Vict. c. 43.

Upon the complaint of the respondent, the appellant was summoned for that he at Preston, in the said borough, on the 5th Jan. 1874, being then and there the person having the charge, control, and possession of a building, part whereof had been theretofore used as a watch house, to wit, the police office and cells, did refuse to give up such part thereof from the hour of four in the afternoon until the hour of nine in the forenoon, for the use and accommodation of the constables appointed for the said borough, under the Act 5 & 6 Will. 4, c. 76, s. 84.

A charter of incorporation was on the 1st April 1854 granted to the borough of Brighton, declared to be co-extensive with the parish of Brighton, and constables were thereupon and have been since appointed by the watch committee for the said borough, according to the provisions of 5 & 6 Will. 4, c. 76.

By a local Act, to be cited as "The Brighton Borough Extension Act 1873," which received the Royal assent the 7th July 1873, it was enacted, "that from and after the 31st Oct. 1873, the said borough should extend to and include part of the parish of Preston, in the county of Sussex (which parish adjoins Brighton parish)" in such Act referred to as East Preston.

In East Preston there existed, at the passing of the said Brighton Borough Extension Act, and at

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the date when the offence of which the appellant was summoned was alleged to have been committed, a station of the East Sussex County Constabulary. This station consisted of a residence for the superintendent of a district of the county comprising other parishes besides Preston, and for two other constables with families, or five single constables, a police office and cells, and other buildings.

This station and these buildings were provided about three years before the passing of the said local Act of 1873 by the justices of East Sussex in quarter sessions, under the powers of the Act 3 & 4 Vict. c. 88, and the other Acts relating to the county police. The cost thereof and of other police stations provided for the county from time to time was raised at interest by charges on the county police rates, the principal being repayable by twenty annual instalments, of which some have been paid off and some remain unpaid.

The appellant was the superintendent of the county constabulary, residing at and having charge of the said station at East Preston at the time when the offence was alleged to have been committed.

On the 3rd Nov. 1873, a notice signed by the mayor of the said borough, was, pursuant to 5 & 6 Will. 4, c. 76, s. 84, fixed on the door of the Town Hall and every church within such borough. The following is a copy of such notice:

Borough of Brighton.

The Brighton Borough Extension Act 1873, and the Municipal Corporations Act.

Whereas, pursuant to the powers contained in the above Municipal Corporations Act, the watch committee of the said borough have appointed a sufficient number of men to act as constables for preserving the peace by day and by night, and preventing robberies and other felonies, and apprehending offenders against the peace within the limits of the borough, as extended by the Brighton Borough Extension Act 1873. Notice is hereby given, that the constables appointed as aforesaid will, on Saturday, the 8th Nov. 1873, begin to act in and for the said extended borough as constables, in conformity with the said Acts; and I hereby appoint George White, the chief constable of the said borough, the person to whom all watch houses and watch boxes within the said extended borough, and all arms, accoutrements, and other necessities provided at the public expense for any watchmen, constables, patrol, or police therein, shall be given up for the use and accommodation of the constables so appointed as aforesaid.

Dated 1st Nov. 1873.

JAMES IRELAND,

Mayor of the borough of Brighton.

There had been no appointment of any constables by the watch committee of the said borough between the time of the said Brighton Borough Extension Act coming into operation. (the 1st Nov. 1873) and the fixing of the said notice, but there was on the 1st Nov. 1873, an efficient body of police who had been appointed by the watch committee previously to the said 1st Nov. 1873, constables of the said borough, as it then existed, and by whom the watching of the extended borough was after the said 1st Nov. 1873 conducted.

On the 5th Jan. 1874, the day on which the offence is charged, the respondent, who was chief officer of the Brighton Borough Police, went after the hour of four in the afternoon to the station at East Preston, and saw the appellant, and demanded of him possession of such part of the said station as had been theretofore used as a watch house, in the following words:

I, George, White, the person named by the mayor of the borough of Brighton for that purpose, demand to

have given up to me, for the use and accommodation of the constables appointed under the statute 5 & 6 Will. 4, c. 76, that part of this police station which has been heretofore used as a watch house (that is, the police office and cells), every day from the hour of four o'clock in the afternoon until the hour of nine in the forenoon, and it is now four o'clock, and I require you now to give up possession.

The appellant refused to give possession thereof and the complaint on which he was summoned, as before stated, was made against him by the respondent.

The said justice was of opinion that such part of the said station as had been used as a police office and cells constituted a watch house within the meaning of 5 & 6 Will. 4, c. 76, s. 84; and that sect. 84 applied to such part of the said station; and that possession of such part of the said station ought on demand by the respondent, as before stated, to have been given by the appellant; and that he had jurisdiction to convict the appellant of the offence charged in the summons; and he convicted him of such offence, and sentenced him to pay a fine of 1l. and costs, or in default to be imprisoned seven days, whereupon the appellant applied for this case.

If the court should be of opinion that the said judgment delivered by the said justice was correct, the said conviction of the appellant is to stand and have full effect; but if the court should be of a different opinion, the said complaint against the appellant is to stand dismissed.

Merrifield (with him *Mortimer*) argued for the appellant.—This is in effect a disputed claim to this police office by the county of Sussex and the borough of Brighton, the county being here in the position of appellants against the magistrate's order. The 84th section of the Municipal Act 1835 (5 & 6 Will. 4, c. 76), enacts, "That as soon as constables shall have been appointed by the watch committee for any borough, a notice signed by the mayor of such borough, specifying the day on which such constables shall begin to act, shall be fixed on the door of the town hall and every church within such borough; and on the day so specified in such notice, so much of all Acts named in conjunction with such borough in the schedule E to this Act annexed, and of all Acts made before the passing of this Act, as relates to the appointment, regulation, powers, and duties, or to the assessment or collection of any rate to provide for the expenses of any watchmen, constables, patrol or police for any place situated within such borough, shall cease and determine; and all watch houses and watch boxes in any such place, and all arms, accoutrements, and other necessities provided at the public expense for any watchmen, constables, patrol or police therein, shall be given up to such persons as shall be named by the said mayor in such notice, for the use and accommodation of the constables to be appointed under this Act, and all the property so to be given up shall be deemed to belong to the body corporate of such borough; and in case any person having the charge, control, or possession of any watch house, watch box, arms, accoutrements, or necessities as aforesaid, shall neglect or refuse to give up the same, as hereinbefore required, every such offender, being convicted thereof before two justices of the peace, shall for every such offence forfeit and pay, over and above the value of the property not given up, such sum not exceeding 5l., as the justices shall think meet; and where there shall be any

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building in any such place as aforesaid, a part only of which building shall have been heretofore used as a watch house, such part shall be given up every day from the hour of four in the afternoon until the hour of nine in the forenoon, for the use and accommodation of the constables to be appointed under this Act; and if any person having the charge, control, or possession of any such building, shall neglect or refuse to give up such part thereof for the purposes aforesaid, or to permit free access thereto or egress therefrom during any portion of the time above prescribed, every such offender being convicted thereof before any two justices of the peace, shall for every such offence forfeit and pay such sum, not exceeding 5*l.*, as the said justices shall think meet." At the time that Act was passed, the watchmen and constables were appointed locally, and were not in any way connected with the county police, who were first brought into existence by an Act of 1839 (2 & 3 Vict. c. 93), and for whose use and accommodation this police office was constructed. Therefore, although the subsequent charter of incorporation which was granted to Brighton extended to its inhabitants the powers and provisions of the Municipal Act according to the 141st section, the 84th section cannot apply to the buildings here in dispute. [Stopped by the court.]

Manisty, Q.C. (with him *Finlay*), for the respondent.—By the 76th section of the Municipal Act 1835, constables are to be sworn, "and the men so sworn shall not only within such borough, but also within the county in which such borough or part thereof shall be situated, and also within every county being within seven miles of any part of such borough," exercise the powers and do the duties entrusted to them. It is but reasonable, therefore, that the borough police should have the use of the offices and cells within their seven miles range of jurisdiction, although the property remains still in the county at whose expense they were built. The words, "any such place," in which the watch houses to be given up are situated, must relate to all boroughs governed by the Municipal Act of 1835, whether then or afterwards incorporated.

Merrifield was not heard in reply.

BLACKBURN, J.—I think this conviction must be quashed. The watch houses are, by sect. 84 of the Municipal Act 1835, transferred to the watch committees of the boroughs mentioned in the schedule; but the section refers only to those watch boxes in any such places as those with which the Acts named in the schedule were in conjunction, and to those the expenses of which were provided by Acts made before the passing of the Municipal Act. Here the county of Sussex had obtained or constructed this office and these cells under Acts which were entirely subsequent to the Act of 1835, and sect. 84 of that Act can have no application to them.

LUSH, *QUAIN*, and *FIELD*, JJ., concurred.

Judgment for appellant.

Attorneys for appellant, *Burton*, *Yeales*, and *Hart*, for *W. K. J. Langridge*, *Lewes*.

Attorneys for respondent, *Tilleard*, *Godden*, and *Holme*, for *Black*, *Freeman*, and *Gell*, *Brighton*.

Thursday, April 22, 1875.

Re WILLIAM SMITH.

Justices of the peace—Jervis's Act (11 & 12 Vict. c. 43), ss. 1, 2—Service of summons—Hearing of information "ex parte"—Certiorari to quash conviction.

By 11 & 12 Vict. c. 43, s. 2, if a summons is proved to have been duly served a reasonable time before the time for appearance, and is disobeyed, the justices may hear the case "ex parte."

Held, that to give the justices jurisdiction to hear the case "ex parte," the circumstances should be such as to lead to the conclusion that the summons was brought to the knowledge of the defendant.

By sect. 1 a summons may be served on a defendant by leaving it with some person for him at his last or most usual place of abode.

Per *Quain*, J.—The nature of the summons must be explained to the person with whom it is left.

W. S. was convicted of assault before two justices in his absence on the 12th March, on proof that a summons had been left at his mother's house on the 10th. He was at sea, pursuing his vocation as a fisherman, from the 9th to the 13th, and did not know of the summons until after his conviction.

Held, that the justices had acted without jurisdiction, and a rule for a certiorari to bring up and quash the conviction made absolute.

Re Williams (21 L. J. 46, M. C.; 2 L. M. & P. 581) distinguished.

THIS was a motion on behalf of William Smith, a prisoner in the county gaol of Suffolk, for a rule calling upon two justices of the borough of Southwold, to show cause why a writ of certiorari should not issue to bring up and quash a conviction, on the ground that there was no service within the meaning of 11 & 12 Vict. c. 43 (*Jervis's Act*), s. 1, which provides that where an information is laid before justices of the peace that any person is suspected of an offence punishable on summary conviction, they may issue a summons requiring him to appear;

And every such summons shall be served by a constable or other peace officer, or other person to whom the same shall be delivered upon the person to whom it is so directed, by delivering the same to the party personally, or by leaving the same with some person for him at his last or most usual place of abode; and the constable, peace officer, or person who shall serve the same in manner aforesaid, shall attend at the time and place and before the justices in the said summons mentioned, to depose, if necessary, to the service of the said summons.

Sect. 2 provides:

That if the person so served with a summons, as aforesaid, shall not be and appear before the justice or justices at the time and place mentioned in such summons, and it shall be made to appear to such justice or justices, by oath or affirmation, that such summons was so served what shall be deemed by such justice or justices to be a reasonable time before the time therein appointed for appearing to the same, then it shall be lawful for such justice or justices, if he or they shall think fit, upon oath or affirmation being made before him or them, substantiating the matter of such information or complaint to his or their satisfaction, to issue his or their warrant to apprehend the party so summoned, and to bring him before the same justice or justices, or before some other justice or justices of the peace in and for the same county, riding, division, liberty, city, borough, or place, to answer to the said information or complaint, and to be further dealt with according to law; or, upon such information being laid as aforesaid, for any offence punishable on conviction, the justice or justices before

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whom such information shall have been laid may, if he or they shall think fit, upon oath or affirmation being made before him or them, substantiating the matter of such information to his or their satisfaction, instead of issuing such summons as aforesaid, issue in the first instance his or their warrant for apprehending the person against whom such information shall have been so laid, and bringing him before the same justice or justices, or before some other justice or justices of the peace in and for the same county, riding, division, liberty, city, borough, or place, to answer to the said information, and to be further dealt with according to law; or if, where a summons shall be so issued as aforesaid, and upon the day and at the place appointed in and by the said summons for the appearance of the party so summoned, such party shall fail to appear accordingly in obedience to such summons, then and in every such case, if it be proved upon oath or affirmation to the justice or justices then present, that such summons was duly served upon such party a reasonable time before the time so appointed for his appearance as aforesaid, it shall be lawful for such justice or justices of the peace to proceed *ex parte* to the hearing of such information or complaint, and to adjudicate thereon, was fully and effectually, to all intents and purposes, as if such party had personally appeared before him or them, in obedience to the said summons.

The motion was made on an affidavit by William Smith, who was described as a fisherman, in which he stated that on the 9th March 1875 he went to sea, and remained on board a lugger fishing off the east coast until 13th March, when he landed at Lowestoft, twelve miles from Southwold, and was immediately arrested, having been convicted in his absence before the Justices at Southwold on the 12th March of an assault upon a police constable, alleged to have been committed on the 6th March, and sentenced to six months' imprisonment with hard labour. He denied that he had any knowledge of the summons having been issued or served until after his conviction. The summons had been applied for on the 9th March, and had been left at his mother's residence by a police constable on the 10th. William Ruthen, the captain of the lugger of which Smith was one of the crew, also made an affidavit corroborating Smith's statement as to his absence at sea, and stating that no person had boarded the lugger during that period.

Wrenfordsley, in support of the motion. The conviction is bad. In the first place there was no service, for it is not shown that his mother's house was his last or most usual place of abode, or that the summons was left with any person for him, and, secondly, it was not served a reasonable time before the time for appearance, which is necessary by the last part of section 2, in order to give the justices jurisdiction to hear the case *ex parte*. For this purpose the summons ought to be brought to the knowledge of the defendant. *Re Williams* (21 L. J. 46, M. C.; 2 L. M. & P. 581) is distinguishable, for there the summons was actually brought to the knowledge of the defendant the night before the hearing, and it would have been possible for him to appear. The court granted a rule *nisi*.

Francis Turner showed cause in the first instance.—The justices have made an affidavit in which they state that it was proved before them at the hearing that the summons had been left for the defendant on the 10th. He was described in the summons as a stonemason, and the justices may have drawn the inference that he went away to sea to evade service. The question whether the summons was served is entirely one of fact for the justices, who are also made by sect. 2 the sole judges of what is reasonable time; they have

decided these questions, and the court will not review their decision. *Re Williams* (21 L. J. 46, M. C.; 2 L. M. & P. 581, is conclusive. [COCKBURN, C. J.—There the summons had reached the defendant before the day for appearance.] The defendant in this case might have appealed to quarter sessions. He also cited

Reg. v. Evans and Yale, 19 L. J. 151, M. C.

Wrenfordsley was not called on to support the rule.

COCKBURN, C. J.—This is a very dangerous exercise of power on the part of the magistrates. The alternative course of issuing their warrant to apprehend the defendant and bring him before them to answer the complaint, would have been much safer. They ought not to have acted as they have done here unless they were certain that the man was keeping out of the way in order to evade service of the summons. He left on the 9th of March, and went to sea; the assault is alleged to have been committed on the 6th; on the 10th the summons is left at his mother's house, which I will assume was his usual place of abode, after he had gone away; but it does not appear whether his mother was told what the nature of the summons was, and if she had been told probably she would have said that her son was away at sea. The magistrates not being aware of this convicted him. It is true that the latter part of sect. 2 provides that if the party summoned fail to appear, then, "if it be proved upon oath or affirmation to the justice or justices then present that such summons was duly served upon such party a reasonable time before the day so appointed for his appearance as aforesaid, it shall be lawful for such justice or justices of the peace to proceed *ex parte*, and adjudicate as if such party had personally appeared; but on that I think it should be shown that the circumstances were such, and that the time between the leaving of the summons and the time appointed for appearance was such as to lead to the conclusion that the summons must have reached the defendant. It cannot have been intended that the magistrates should exercise their jurisdiction in this way. They have convicted the man in his lawful absence, while he was following his vocation as a fisherman; it is true that in the summons he is called a stonemason, but if any inference is to be drawn from that, circumstances should be stated, to show that he assumed the character of a fisherman in order to get away and avoid service of the summons. The justices seem to assume that he was in the town at the time when the summons was served. If all the facts as to reasonable time had been before them perhaps we could not have overruled their decision on the case which has been cited, but here the time appears not to have been brought to their attention, and I think therefore that they acted without jurisdiction. It is contrary to the first principles of law to convict a man in his absence under such circumstances. The rule must be made absolute.

MELLOR, J.—I am of the same opinion. It is monstrous that a man should be convicted under these circumstances, where he never had the summons brought to his notice, and was away at the time of the hearing. There is some difficulty in giving a clear definition of good service. According to sect. 1, service is *prima facie* good provided the summons is left at the person's last or most usual place of abode, but I think that the

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provisions of sect. 2 show that what was done here was not good service. That section points out three courses which the justices may follow. First, the summons may be served, and, if it is disobeyed, then, upon proof of service, the justices have power to issue their warrant to apprehend the defendant, and bring him before them, and may then proceed to hear the case; or, secondly, if the facts are proved, they may issue their warrant without a summons having been served, and may bring him before them at the hearing; the third course is that which has been adopted here. It is difficult to put a consistent construction on the first and second sections, but I think the provision which allows a summons to be left at a person's most usual place of abode must have been intended to apply to such a case as that of a tradesman, or labourer, or, as in the case which has been cited (*Re Williams*), of a man working in a mine, who would return home at regular intervals, and not to a case where a man might very likely be away for a week or ten days at a time. It cannot be supposed that it was intended to apply to a case like the present. My impression is that the magistrates had no jurisdiction, and could not give themselves jurisdiction by finding that there was service.

QUAIN, J.—I am of the same opinion. I rest my judgment on the ground that the summons was not duly served within the meaning of the first section, and that there was no proof of service according to the provisions contained in the latter part of sect. 2. I think that where the service is effected by leaving the summons with another person, whoever serves it must tell the person with whom it is left that it is for the defendant, and such person must be made to understand its nature; he may not be able to read, and it ought to be explained to him. I think the Act means this by the use of the expression "duly served," in sect. 2. The power given to the justices is an extraordinary one, and the clause is highly penal; they should not have acted in this way where they had the power to issue a warrant.

Rule absolute.

Attorney for William Smith: *Andrew Story* for Archer, Lowestoft.

Attorneys for the Justices: *Paine* and *Hammond*.

Saturday, April 24, 1875.

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Manager of a company—List of members—General meeting—Companies' Act 1862 (25 & 26 Vict. c. 89), ss. 26, 27.

The appellant was summarily convicted under the Companies' Act 1862, sect. 27, which imposes penalties upon every director and manager of a company who shall knowingly and wilfully authorise or permit default in forwarding to the registrar, once in every year, a list of persons who, on the fourteenth day after the ordinary general meeting is held, are members of the company.

The appellant was not a director of the defaulting company, nor had he been appointed manager by the directors; nor had they power to appoint a manager outside their own number; but he was secretary of the company, made contracts for the

company as manager, had called one general meeting of the shareholders, and had threatened to call another in opposition to the directors themselves. During the preceding calendar year no general meeting had been held, and no list forwarded to the registrar, but these proceedings were taken before a complete year of the company's existence had elapsed without a meeting, the requirements of the Act having been complied with in the previous year.

Held, upon a case stated by the convicting justice, that the Act requires a general meeting, and a list of members, each calendar year.

Held also by Blackburn and Lush, JJ. (dissentiente Quain, J.), that the appellant was liable for the company's default, although not manager de jure, and although no general meeting had taken place.

THIS was a case stated by Sir Andrew Lusk, the Lord Mayor of the City of London, being one of her Majesty's justices of the peace for the said City and the liberties thereof, under 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with his determination upon the question of law which arose before him as hereinafter stated, on the 30th March 1874, at the Mansion House Justice Room, in the said City, the appellant having duly entered into a recognizance to prosecute the appeal.

Upon the hearing of a certain information, dated the 16th March 1874, preferred by the respondent, a member of the Steam Stoker Company (Limited), against the said company for that it being a company under the Companies Act 1862, having a capital divided into shares, unlawfully, in the said City, did make default in forwarding, and did not forward to the Registrar of Joint Stock Companies a copy of the list of persons who on the fourteenth day after the holding of the ordinary general meeting of the said company were members of the said company, as required by sect. 26 of the said Act, and that the said default continued for seventy-four days, contrary to the 27th section of the same Act, and also against five directors of the said company, and the said appellant as the manager thereof, for that they unlawfully, knowingly, and wilfully authorised and permitted such default, the Lord Mayor (having by virtue of the Statute 11 & 12 Vict. c. 43, s. 34, the authority of "two or more" justices in this behalf, as required by sect. 65 of the Companies Act 1862) convicted the said appellant and the other defendants.

The sections 26 & 27 of 25 & 26 Vict. c. 89, referred to, are as follows:

26. Every company under this Act, and having a capital divided into shares, shall make, once at least in every year, a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or, if there is more than one ordinary general meeting in each year, the first of such ordinary general meetings, is held, are members of the company; and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary, specifying the following particulars:—

- (1.) The amount of the capital of the company, and the number of shares into which it is divided;
- (2.) The number of shares taken from the commencement of the company up to the date of the summary;
- (3.) The amount of calls made on each share;
- (4.) The total amount of calls received;
- (5.) The total amount of calls unpaid;
- (6.) The total amount of shares forfeited;
- (7.) The names, addresses, and occupations of the persons who have ceased to be members since the last list

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was made, and the number of shares held by each of them.

The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall forthwith be forwarded to the Registrar of Joint Stock Companies.

27. If any company under this Act, and having a capital divided into shares, makes default in complying with the provisions of this Act with respect of forwarding such list of members or summary, as is hereinbefore mentioned, to the Registrar, such company shall incur a penalty not exceeding 5*l.* for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorise or permit such default, shall incur the like penalty.

The articles of association of the company were put in evidence, and all other preliminary facts legally necessary to give the Lord Mayor jurisdiction to hear and determine the offences alleged in the information were proved.

It was also proved that the memorandum of association of the company was registered on the 31st July 1872.

That a meeting was held within four months of such registration, in compliance with sect. 39 of the Companies' Act 1867, and that a list of shareholders up to the 27th Nov. 1872, was forwarded to the Registrar of Joint Stock Companies on the 20th Dec. 1872, according to which list 175 shares had been taken up to that time.

That no other general meeting had been held, and that no other list of shareholders had been forwarded until the 19th March 1874 (three days after the information had been laid), when a list was forwarded purporting to be made up to the 27th Nov. 1873, according to which list 1252 shares had been then taken up, and 4250 shares fully paid up had been allotted to the vendors of a patent acquired by the company.

It was also proved that the appellant had, before the formation of the company, entered into several contracts to enable the company to acquire patents to carry out its objects, and that he was a contracting party on behalf of the company to a subsequent agreement dated the 9th Dec. 1872.

The directors' minute book was put in evidence, under sect. 67 of the Companies' Act 1862, by which it appeared that there was no other manager of the company than the appellant, but that he was described as the secretary, and in this book were, among other minutes, the following entries :

(5a). At a meeting of directors of the Steam Stoker Company (Limited), held at 155, Fenchurch-street, on Monday, 9th Dec. 1872, present—Mayor Stuart, in the chair; P. Witham, Esq.; J. Glashier, Esq.; and Mr. Bompas, the solicitor to the company. The minutes of the last meeting were read and confirmed. The secretary reported, that in order to comply with the requirements of the Joint Stock Companies Act, he had called a general meeting of the shareholders, consisting of the seven signatories to the articles of association, and submitted the minutes of the said meeting.

(5b). The Steam Stoker Company (Limited), 155, Fenchurch-street, London, 13th Jan. 1874.

Gentlemen—I have already, from time to time, verbally protested against the Salford contract, foreseeing the danger of its being lost, but now that such danger has become imminent, I feel I should be wanting in my duty towards the shareholders if I did not put my protest formally and in writing, which I hereby do. You will remember that, from the very commencement of the company's operations, I have always contended that it only needed a little attention to secure this very contract, but I have always been met with the reply that nothing could be done in that quarter until the Chartered, or latterly the Imperial Company, had approved

the machines, and it was in spite of these opinions that (at my own expense, in the first instance, at any rate) I went to Salford and secured this contract, upon which only, in my opinion, does the success of the company mainly depend. It is now ten weeks since the contract has been secured, and we have apparently retrograded instead of progressed. I am quite certain that not one of the directors nor shareholders of this company would pursue a similar course in their own business; it certainly is very unusual to throw every obstacle in the way of receiving a clear profit of 1500*l.* to 2000*l.* a year. On the contrary, the recipient of such an income would naturally smooth the way, and not raise difficulties. Your solicitor tells me that, in equity, the contract would be good without the seal of the corporation, but that, in case of dispute, it might be necessary to file a bill in Chancery to enforce it. What risk can the company incur under such circumstances? If the machines are a failure, the corporation have nothing to pay; if, on the other hand, as I fully anticipate, they are a success, the corporation will be only too glad to carry out the contract into which they have now entered, with a full knowledge of all the facts, and evidently for the purpose of carrying it through in good faith. I repeat, I am anxious to be relieved from my present position, and desirous to remain only so long as may be necessary to complete this contract, that with the Imperial; and unless these are carried out in a business shape, I shall feel it my duty to summon a general meeting of the shareholders, which ought now to be held, and to lay before them the whole facts of the case. As regards my claim, so satisfied am I as to my rights that I am perfectly willing to leave it to arbitration, or, for the sake of prompt settlement, would be willing to compromise it in the manner suggested to your chairman some time ago, but it is not right that the shareholders' interest should be injured in the way they now are by the course the directors are now pursuing.—I am, Gentlemen, your obedient servant,

(Signed) WM. GIBSON.

To the Chairman and Directors of the
Steam Stoker Company (Limited.)

In addition to the minute book above referred to, it was sworn by the complainant that he knew the appellant as the manager of the company, and transacted business with him as such, but that he corresponded with him as the secretary; and, lastly, it was proved that no other person had been appointed to be manager or managing director of the company.

On the part of the appellant it was contended :

(A) That he was not the manager, and as the secretary he was not liable.

(B) That the statute required the list to consist of those persons who on the fourteenth day succeeding the ordinary general meeting were members of the company, and that there being no such meeting, no such list could be made up, and, therefore, that the then defendants could not be punished for not sending a list which could not be sent.

(C) That the appellant had been prematurely summoned, because the company having been registered on the 31st July 1872, and having held one general meeting in November of that year, in compliance with the statute, the year would terminate on the 31st July 1873, from which day the company were allowed by statute one year in which to hold their ordinary general meeting, which would thus allow them until the 31st July 1874 for holding such meeting.

These several points the Lord Mayor overruled, and severally decided as follows :

As to objection

(A) He decided as a fact, from the evidence before him, that appellant was the manager of the company.

(B) That as the statute required the list to be

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forwarded once at least in every year, and no such list had been sent in the year 1873, the company was in default on the 1st Jan. 1874, and on each succeeding day, excluding Sundays.

(C) On behalf of the respondent to the objection marked (C), it was urged that the meeting in Nov. 1872 was a meeting held in compliance with the 39th section of the Companies' Act 1867, and that no meeting had been held in compliance with the 49th section of the Companies' Act 1862; and that the officers of the company could not take advantage of their having failed to fulfil the requirements of the statute in another section, as a reason for not being amenable to punishment for the default complained of in the information, and the Lord Mayor overruled the appellant's objection.

He thereupon convicted the company and the five directors in several fines, which were paid. And he also convicted the appellant, and fined him 10s. for every day he knowingly and wilfully authorised and permitted the company's default in not forwarding the list required, that is to say, 32l. in respect of sixty-four days, being from the 1st Jan. in the present year to the date of information, excluding Sundays.

The questions of law are: First, whether there was evidence on which to find, as a fact, that the appellant was the manager of the company? secondly, whether, as the company had not held any general meeting since Nov. 1872, the appellant, as such manager, could wilfully authorise the company's default in not forwarding, during the year 1873, the list required by sect. 26 of the Companies' Act 1862? and, thirdly, whether the appellant was summoned prematurely?

A copy of the company's articles of association, signed by the Lord Mayor, accompanied this case, and was to be considered as forming part of the same. The following appeared amongst the said articles:

1. The regulations of Table A in the first schedule to the Companies' Act 1862 shall not apply to this company, except so far as the same are repeated or contained in these articles.

Throughout the articles all transactions necessary for carrying on the business of the company are to be performed by the directors.

38. A general meeting shall be held once in every year, at such time and place as the directors may from time to time determine.

40. The directors may, whenever they think fit, and they shall, upon a requisition made in writing by members of the company holding in the aggregate shares or stock to the nominal amount of one-fifth of the capital of the company, convene a special general meeting.

72. All acts done by any meeting of the directors or any of them, or of any committee of directors, or by any person acting as the agent of the directors, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed, and was qualified to be director or agent.

74. The business of the company shall be managed by the directors, who may pay all expenses incurred in or preliminary to getting up and registering the company, and may exercise all such powers of the company as are not by the Companies' Acts 1862 and 1867, or by these articles required to be exercised by the company in general meeting, subject, nevertheless, to any regulations of these articles, to the provisions of the foregoing Acts, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting.

83. William Gibson, of No. 1, Wellington-square, King's-road, London, shall, if the directors approve, be the secretary of the company at such salary, either fixed or based upon a percentage upon the profits of the company, or partly one and partly the other, as the directors may think fit.

90. The directors may appoint one or more of their number to be managing, travelling, or local directors, and may fix his or their remuneration, exclusive of or in addition to the remuneration provided for the directors under article 100.

97. The board may delegate any of their powers to committees, consisting of such member or members of their body as they shall think fit.

100. The remuneration of the directors shall, until otherwise determined by a general meeting, be an annual sum equal to 1500l., which shall be divided amongst the directors as they from time to time determine.

H. Matthews, Q.C. (with him *Warton*), argued for the appellant.—The 27th section of the Companies' Act 1862 imposes penalties for this offence upon every director and manager only. It is not suggested that the appellant is a director, and, not being a director, he cannot have the management of the company by the 74th article of association. There is no power given to the directors, either by the Acts of Parliament or the articles, to appoint as manager any person not one of themselves. [*BLACKBURN, J.*—The evidence goes to show that the appellant was a kind of manager *de son tort*.] He had no power to call a meeting nor to do any act to which a shareholder might object. He was merely the agent of the directors, and cannot be responsible for any default on their part. Sect. 45 requires a register of the names, addresses, and occupations to be kept by every company of its directors or managers, and also a notification to the registrar of any change that takes place in such directors or managers. The appellant, not being a director or manager upon this Company's register, cannot be liable for this default. As to the second question reserved for the opinion of the court: By the 49th section, "a general meeting of every company, under this Act, shall be held once at the least in every year;" there is, however, no penalty imposed upon a company for not holding such a meeting, and the only mode of proceeding against a company neglecting this provision is by indictment. By the 26th section, the ordinary general meeting is a condition precedent to the making of the list, and this penalty cannot attach until a meeting has been held. This conviction is, in reality, for not holding a general meeting, an offence not punishable summarily under the Act. The third point is as to the time when the general meeting is required; one at least must be held in every year—that must mean, in every year of the company's existence. Here the memorandum was registered on the 31st July 1872, and the first general meeting was duly held on the 27th Nov. of that year, within the four months required by the Companies' Act (1862) Amendment Act 1867, s. 39. There is no other direction by the Legislature as to the period of other meetings, except that in the 49th section of the Act of 1862; it was sufficient if the second meeting were held before the 31st July 1874, and therefore the information, which was dated the 16th March 1874, was premature. Clauses 29 and 30 of schedule A to the Act of 1862, although excluded from application to this particular company, confirm this meaning of the Act.

Metcalf, Q.C., for respondent.—[*BLACKBURN, J.*—You need not trouble yourself on the last point.

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We are all of opinion that "every year," in the 49th section, means every calendar year from 1st Jan. to 31st Dec.] The 72nd article of association cures all defects in the appointment of directors or persons acting for directors. [BLACKBURN, J.—If the appellant was a person acting as the agent of the directors merely, he could scarcely be responsible for their default; the question is, whether he should not be liable as manager, if all the directors' powers were delegated to him.] The quotation from the minutes, and the appellant's letter, are sufficient to show that he had power to summon a meeting when he thought fit. [BLACKBURN, J.—You may assume there is ample evidence that the appellant was manager of the company *de facto*; but you must show that he was liable under sect. 27, although he was not the manager *de jure*, so as to bind the shareholders by his acts.] The words, "every director and manager of the company," may well include an acting manager. [QUAIN, J.—But the appellant has been formally appointed secretary, not manager.] The object of the Act is clearly to prevent officers of the company, who have the power, from allowing default in making the yearly list. Directors and managers might always escape this penalty if their omission to call a general meeting were held to be a sufficient excuse for making no list. The appellant assumes the power to call meetings, and threatens the directors with its exercise, but his defence now is that he has not possessed it.

Matthews, Q.C., in reply.

BLACKBURN, J.—I am sorry that we are not agreed in this case. We have no doubt that every year, in sect. 40, means every calendar year; therefore default was made by the company in not making and forwarding to the registrar a list in 1873. The year meant is clearly from the 1st Jan. to the 31st Dec., and we are all unanimous on that point. The first question raised is, whether the case stated contains evidence that the appellant was manager of the company so as to make him liable for this penalty; and that involves two points, first, whether he was manager *de facto*; and, next, whether being so without appointment he can be held responsible. I am of opinion that the Lord Mayor was right on both these points. The 27th section makes every director and manager of a company committing default liable to incur the penalty. The appellant is not a director, and we must consider what a manager is. Ordinarily there is a person who for all purposes manages the business of the company, and that person is one of the directors; but the Act gives no definition of a manager, and the 74th article of association, following Table A in the schedule to the Act, clause 55, says the business is to be managed by the directors. I am inclined to think that if the board of directors delegated all its duties to one person who was not a director, the shareholders might refuse to be bound. This, however, it is not necessary to decide, nor need we consider the effect of a power in the articles to appoint such a manager. Here there was no such power nor any such appointment as manager; there was a mere permission on the directors' part, and in consequence the appellant took upon himself to act as the manager of the company. He may be said to have been manager *de son tort*, and the question arises whether he can protect himself from this penalty by saying he is not the manager *de jure*. I think he cannot do so, for he can have

no right to say I am wrongfully holding an office the duties of which I discharge. Just as an executor *de son tort* cannot throw off his liability for the distribution of assets which he has once undertaken, so the appellant cannot now say he is not responsible for the duties he has undertaken and neglected. Now there is evidence fully to justify the Lord Mayor in holding that the appellant acted as manager of the company. He entered into contracts for the company before and after its registration. He reported at a meeting of directors that he had called a meeting of shareholders once before, and he wrote a letter threatening the directors that he would call another meeting. There was besides this proof that he transacted the business of the company as the manager. All this afforded reasonable ground for the inference that he assumed to be the person solely charged with the management of the company's business; and I think he must therefore be liable for its neglect. The second question for us to decide is upon the 26th section. That requires the company to make a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting in each year is held, are members of the company. In the year 1873 the company held no meeting at all, and they are clearly liable for that default. They cannot escape the liability imposed by this section by evading a condition precedent to the act required of them. By the articles the directors are to determine the date of the general meetings, but a wilful default may be on the part of the manager, and here there was evidence that he could call a meeting when he liked. The question becomes, therefore, whether the appellant knowingly and wilfully authorised or permitted the omission of the condition precedent to the making and forwarding of this list; and being of opinion that he did, I think he also knowingly and wilfully authorised and permitted the default for which this penalty was inflicted. I think the conviction should be affirmed.

LUSH, J.—I am of the same opinion. I think the words, "once at the least in every year," mean once in each calendar year. The *prima facie* meaning of the expression is the period between every 1st Jan. and 31st Dec., and the intention to adopt that meaning here is supported by the articles given in the schedule to the Act. On the next question I agree with my brother Blackburn, that there is evidence in this special case upon which to conclude that the appellant was manager of this company. Besides the direct evidence of the complainant and the statement in the minute book that he had called a general meeting, there is set out a letter from the appellant to the directors, in which he mentions, amongst other things, his desire to complete a contract for the company, and threatens to call another general meeting, even in opposition to the directors. Except as manager of the company he could do none of these things; and that being so, is he within the 27th section, which imposes a penalty on every director and manager for every day during which they shall knowingly and wilfully authorise or permit default in sending to the registrar a list and summary? How can he say that he is not liable because he has not been appointed manager *de jure*? He is the person whose duty it chiefly was to carry out the requirements of the Act, and I think he has made the default provided against. Then comes the question whether the appellant

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knowingly and wilfully omitted to have the meeting held; this is an inference of fact, and to my mind nothing is shown to create a doubt about it. Although a condition precedent to the default for which a penalty is imposed, the appellant cannot escape liability by omitting the condition. I think the conviction was right.

QUAIN, J.—I am of the same opinion with regard to the third point, that every year must be computed as a calendar year; but I regret I cannot agree with the rest of the court on either of the other points raised in this case. First, this is a penalty imposed by an enactment creating a criminal offence, which should therefore be construed strictly, and imposed upon directors and managers only. I think the appellant is neither. I find the Act contemplates the existence of a manager, and makes provisions as to his duties and appointment; where no manager is appointed, Table A in the schedule says, and the articles of this association adopt the provision, that the business of the company shall be managed by the directors; they only, as it seems to me, can be liable for these penalties. If the articles contained authority to the directors to appoint a manager outside their own body, and the appellant had been duly appointed in accordance with the articles, then he would have come within the 27th section. Here the directors had no such power, and they appointed no such officer as manager; therefore, I think that, even if the appellant were manager of this company *de facto*, he would be a mere agent of the directors, and not responsible for their default. The directors themselves are no doubt properly liable for these penalties, so that by this decision there would be no evasion of the object of the statute, and I see no ground for holding that the appellant could be rendered responsible for this default. Further, I think there is not evidence on these proceedings that the appellant was even manager of this company *de facto*. To be so, he should transact all the company's business proceedings, and it is not enough that he should have once called a general meeting, and on another occasion threatened to do so. Another point raised was the liability when no general meeting had been previously held; on that point I feel still more strongly that there is nothing stated in this case which can make the appellant responsible. He had no power to call a meeting, and it was not his duty to do so. It was a matter entirely under the control of the directors, and I fail to comprehend why he should be convicted for what was only their default.

Judgment for respondent.

Attorney for appellant, *Henry Philipps*.

Attorneys for respondent, *Lewis and Lewis*.

• *Wednesday, April 28, 1875.*

REG. v. THE OVERSEERS OF WEST DERBY.

Poor rate—Industrial Schools Act 1866 (29 & 30 Vict. c. 118)—Liability of industrial school to rates.

An industrial school, certified by the Secretary of State under the Industrial Schools Act 1866 (29 & 30 Vict. c. 118), s. 7, and to which the Treasury contributes under sect. 35, is liable to be rated for the relief of the poor.

THIS was an appeal against an assessment to a rate

for the relief of the poor of the parish of West Derby, in Lancashire.

The court of quarter sessions quashed the rate, subject to a case for the opinion of this court.

The premises in question were leased at a yearly rent, to the appellant, a Roman Catholic clergyman, and were occupied as an industrial school for lodging, clothing, feeding, teaching, and training female children of the Roman Catholic religion.

The school was certified by the Secretary of State under 29 & 30 Vict. c. 118, s. 7, which is as follows:

The Secretary of State may, on the application of the managers of an industrial school, direct the inspector of industrial schools to examine into the conditions of the school and its fitness for the reception of children to be sent there under this Act, and to report to him thereon, and the inspector shall examine and report accordingly.

If satisfied with the report of the inspectors, the Secretary of State may, by writing under his hand, certify that the school is fit for the reception of children to be sent there under this Act, and thereupon the school shall be deemed a certified industrial school.

By sect. 5:—A school in which industrial training is provided, and in which children are lodged, clothed, and fed, as well as taught, shall exclusively be deemed an industrial school within the meaning of this Act.

By sect. 12:—A prison authority (as defined by the Prisons Act 1865 (28 & 29 Vict. c. 126, s. 5), has power to contribute money for the purposes of such schools.

By sect. 14:—Any person may bring before two justices or a magistrate, any child apparently under the age of fourteen found begging or wandering without home or proper guardianship, or visible means of subsistence, or found destitute, being an orphan, or having a surviving parent undergoing penal servitude or imprisonment, or that frequents the company of reputed thieves; and the justices or magistrate may order such child to be sent to a certified industrial school.

By sect. 15 children apparently under twelve charged with offences before magistrates, and not having been previously convicted of felony; by sect. 16 refractory children apparently under fourteen, whose parents are unable to control them; and by sect. 17 children in the workhouse apparently under fourteen, and who are either refractory or the children of convicts, may be dealt with by the magistrates in the same way.

Sect. 18 specifies the form of the order of detention, and provides that "The school shall be some certified industrial school . . . the managers of which are willing to receive the child; and the reception of the child by the managers of the school shall be deemed to be an undertaking by them to teach, train, clothe, lodge, and feed him during the whole period for which he is liable to be detained in the school, or until the withdrawal or resignation of the certificate of the school takes effect, or until the contribution out of money provided by Parliament towards the custody and maintenance of the children detained in the school is discontinued, whichever shall first happen. . . . In determining on the school the justices or magistrates shall endeavour to ascertain the religious persuasion to which the child belongs, and shall, if possible, select a school conducted in accordance with such religious persuasion, and the order shall specify such religious persuasion."

By sect. 35 the Commissioners of Her Majesty's Treasury may from time to time contribute, out of money provided by Parliament for the purpose, such sums as the Secretary of State from time to time thinks fit to recommend towards the custody and maintenance of children detained in certified industrial schools, subject to a limit as to amount in certain cases.

By sect. 44, the Secretary of State may withdraw the certificate on giving six months' notice; and by sect. 45 the managers, on giving six months' notice, or the executors of a deceased manager on giving one month's notice may resign the certificate, and in these cases the school shall cease to be a certified industrial school, whereupon, by sect. 48, the children detained therein shall be discharged or transferred to some other school.

The Commissioners of the Treasury under the

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power given by sect. 35, contributed an annual sum of 1200l. towards the custody and maintenance of the children, and the rest of the expenses were defrayed by private subscriptions and donations.

Since the school had been certified, the appellant had ceased to receive children except under the provisions of the Act, and regular monthly, quarterly, and annual returns were made to the Home Secretary in the forms ordered by him of the numbers, ages, and dates of commitment of the children detained there.

Charles Russell, Q.C. and Lewis Williams for the appellant, showed cause against a rule to quash the order of sessions. Under the original statute for the relief of the poor (43 Eliz. c. 2), it was held that the crown, not being named, was not bound, and therefore that land occupied by the crown was not rateable, and by a series of cases this principle has been extended and applied to property occupied by the servants of the crown or occupied for public government purposes. The present case is within that principle. These schools are recognised by the Legislature as an adjunct to the prison system, and are under the control of the government, as is shown by the terms of the Act. See especially sections 5, 6, 7, 8, 10, 11, 12, 13, 14, 18, 29, 35, 36, 39, 44. [BLACKBURN, J.—This was originally a private charity, and the question is, does the certificate change the nature of the occupation?] In *Sheppard v. The Overseers of Bradford* (16 C. B., N. S., 369; 33 L. J. 182, M. C.), a reformatory school established under 17 & 18 Vict. c. 86, was held not to be rateable. That case is in point here; for, though some of the reasons given by Byles, J. could not now be upheld, the principles on which Erle, C.J., and Willes and Keating, JJ., rest their judgments are untouched by *The Mersey Docks v. Cameron* (35 L. J. 1, M. C.; 11 H. L. C. 443). See the judgment of the Lord Chancellor (11 H. of L. C. 504, 505; 35 L. J. 24, M. C.), and of Lord Westbury in *Greig v. The University of Edinburgh* (L. Rep. 1 Sc. App. 348); *Reg. v. St. Martin's Leicester* (16 L. T. Rep. N. S. 625; L. Rep. 2 Q. B. 493; 36 L. J. 99 M. C.). The prison authorities have power under 35 & 36 Vict. c. 21, s. 7, to establish similar industrial schools; these would not be rateable, and this school is in the same position. The manager can detain children at the school; he has a delegated power from the Government, and is in the position of a gaoler, and therefore of a servant of the Crown.

Herschell, Q.C. (A. J. Cleaver with him), for the respondents in support of the rule.—*Sheppard v. the Overseers of Bradford* (16 C. B., N. S., 369; 33 L. J. 182, M. C.) is overruled by the *Mersey Docks v. Cameron* (11 H. of L. Cas. 433; 35 L. J. 1, M. C.). The children at this school are not criminals; it is an educational establishment. The Government contributes to National schools as well as to industrial schools. The School Board can establish industrial schools, and it would be strange if these were not rateable while board schools are. Every schoolmaster has power to detain children at school. The manager is not under the control of the Crown. His responsibility ceases after he has given six months' notice, or in the case of executors or administrators, one month (sect. 44). [He was stopped by the court.]

BLACKBURN, J.—I think we must say that the appellant is rateable. Originally he presided over a charity, established for a very laudable and

proper purpose, that is to say, a school into which he received children of that class commonly called street Arabs, provided they were of the Roman Catholic religion, for the purpose of educating them and bringing them up to useful trades. Institutions of this kind are not peculiar to the Roman Catholic religion, but there are many other schools established for similar objects. Then the Industrial Schools Act provided that if persons who had the management of these schools would obtain the Secretary of State's certificate, the justices of the peace should be authorised to send children to them, whom they may receive, but whom they are not bound to receive, and that the Government would contribute towards the custody and maintenance of these children; further, it is provided that in doing this, the justices shall, as far as practicable, select a school conducted according to the principles of the same religion as that to which the child belongs. Under this Act children were sent to the appellant's school, and it appears that after he had obtained the certificate he ceased to take in other children. It is contended that by these means he became in the position of a servant of the Government, and that, therefore, the premises are not rateable, but my opinion is that this is not so. Before the decision in the *Mersey Docks* case, there was an idea commonly prevailing that property used for public purposes, and for charitable purposes, was not beneficially occupied, and therefore, not rateable. It is clear that property in the occupation of the Crown is not rateable, because the Crown is not named in the Act of 43 Eliz. c. 2; but the *Mersey Docks* case decided that occupation for public purposes was not occupation for Crown purposes, and that property was rateable unless it was occupied for the Crown or, by an extension of that principle, by the servants of the Crown. The principle is clearly stated by Lord Cranworth in the latter part of his judgment, where he says: "The Crown not being named is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown, for the purposes of the Crown, are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes and property occupied by servants of the Crown, that this mistake has arisen." (11 H. of L. Cas. 508). We have been much pressed with the case of *Sheppard v. The Churchwardens of Bradford* (16 C. B., N. S., 369; 33 L. J. 182, M. C.), and if that decision had rested on the ground that a reformatory school was occupied by servants of the Crown, it might have been a serious question whether we should not have been bound to follow it in the present case. But on looking at that case it will be found that this was not the ground of the decision, but because the premises were occupied for a public purpose. But that principle is overruled by the *Mersey Docks* case. The question is, do the circumstances of the present case change the position of the appellant into the position of a servant of the Government? and it was argued by Mr. Williams that this is the case, because he has power to detain the children at the school, but I cannot think that this is so. There are many other cases where there is a power of detention, as, for instance, the case of a lunatic asylum. It seems to me that the mana-

ger of this school remains still in the same position in which he was before the school was certified; he is occupying the premises for a very proper purpose, but he is not within the exemption, and is not exempt.

MELLOR, J.—I am of the same opinion. I think that the buildings are not occupied by servants of the Crown or by persons who can be considered to be *in consimili casu*; they are not Crown buildings, but are used for the purposes of a charity. It is true that the Secretary of State can certify under 29 & 30 Vict. c. 118, s. 7, and the prison authorities, under certain circumstances, have power to contribute to the support of the school; but the Secretary of State can make this allowance merely in order to enable Government to supplement the already existing charity. The certificate enables the charity to become an industrial school, but it remains so only for so long as the managers think fit; for if they withdraw, the school returns to its old position. At first I was inclined to think that it was within the exception mentioned in the House of Lords, because the school is kept up for the purpose of preventing children from becoming criminals; but this can hardly be so; we cannot say that it is connected with the administration of justice. It is not a place for the detention of criminals, but is rather an educational establishment. I think, therefore, that it is not within the exception, or within the extension of the doctrine that the Crown is not bound, and this being so, the buildings are rateable. I should have been glad if I could have seen my way to a different conclusion, the object of the charity being so laudable. But at the same time this observation would apply to many other cases of charities which are undoubtedly rateable.

*Rule absolute to quash the order of sessions.
Judgment for the respondents.*

Attorneys for appellant, Pitman and Lane, for Baxter, Liverpool.

Attorneys for respondent, T. W. Goldring, for Holder and Cleaver, Liverpool.

COURT OF COMMON PLEAS.

Reported by ETHELINGTON SMITH and J. M. LELY, Esqrs.
Barristers-at-Law.

Jan. 23 and Feb. 25, 1875.

CLEMENTSON v. MASON.

Ballot Act 1872 (35 & 36 Vict. c. 33, ss. 9, 20)—
Schedule 1, rules 21, 31, 33, 47, 48, 50, 51, 54, 57
—Municipal election—Right of candidate to be present in the polling booth.

At a contested election under the Ballot Act 1872, Parliamentary or municipal, a candidate may be present at any polling station during the taking of the poll, and at the place of counting votes. The word "candidates" is to be read into the exceptions in rules 21 and 33 in the first schedule to the Ballot Act; and rule 51 does not restrict the right of a candidate to be present at any place at which his agent may, in pursuance of the Act, attend, by requiring him, as a condition of his admission, either to have come or to state that he has come for the purpose of undertaking the duties of, or of assisting, his agent.

THIS was an action for assault to which the defendant pleaded not guilty by statute 7 Jac. 1, c. 5; 21 Jac. 1, c. 12; 42 Geo. 3, c. 85; and also that the

plaintiff had misconducted himself within the meaning of sect. 9 of 35 & 36 Vict. c. 33; and that his refusal to leave the booth was a disobedience of a lawful order. The assault complained of was the removal of the defendant by the plaintiff from a polling booth at a municipal election in the borough of Ashton-under-Lyne, and the question really raised was as to the right of a candidate to be in a polling booth during the polling. The case came on for trial before Denman, J. at Manchester, when he ruled that the Ballot Act, though it gave a right to a candidate to be in a polling booth to undertake the duties which his agent might have done, or to assist or instruct his agent, yet did not give him the right to be there without any such object. Accordingly the verdict was entered for the defendant, but, upon leave reserved, a rule was subsequently obtained to enter the verdict for the plaintiff for 40s.

The facts were shortly these. In Nov. 1873 the plaintiff was a candidate for the office of Town Councillor at Ashton, and the defendant was the returning officer at the election which then took place. The plaintiff went to one of the booths during the progress of the polling, where the defendant was acting as presiding officer. He had an agent in that booth, and claimed the right to be there independently of any special object in connection with the duties of his agent. The defendant requested him to retire; he refused, and produced a copy of the Act of Parliament and said he could prove that he was entitled by the Act to be present. The defendant, however, declined to discuss the question, and ordered him out, and as he would not go, eventually caused him to be removed without any unnecessary force, assuming the power to do so under sect. 9 of the Ballot Act 1872, which enacts as follows: "If any person misconducts himself in the polling station, or fails to obey the lawful order of the presiding officer, he may immediately, by order of the presiding officer, be removed from the polling station by any constable in or near that station, or any other person authorised in writing by the returning officer to remove him; and the person so removed shall not, unless with the permission of the presiding officer, again be allowed to enter the polling station during the day." It was to be taken that the plaintiff did not misconduct himself in any other way than by the refusal to obey the order.

Pope, Q.C. and Edwards, Q.C. showed cause.—The case turns upon the construction of the Ballot Act and the rules. The object being to have secret voting the various sections must be reasonably construed so as not to defeat that object. Sect. 4 says, "every officer, clerk and agent in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station, &c., and no person who-soever shall interfere with or attempt to interfere with a voter marking his vote, or otherwise attempt to obtain in the polling station information as to the candidate for whom any voter in such station is about to vote, or has voted or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote, or has voted, &c." Sect. 8 gives the returning officer powers for carrying the provisions of the Act into execution, and sect. 9 gives him power to remove any person misconducting him-

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self in the polling station. [DENMAN, J.—The question shortly was whether a candidate who had appointed an agent had any right to go into the polling booth himself, his agent being already there.] Yes, that arises upon the rules. Rule 21 is, "The returning officer shall appoint a presiding officer to preside at each station, and the officer so appointed shall keep order at his station, shall regulate the number of electors to be admitted at a time, and shall exclude all the persons except the clerks, the agents of the candidates, and the constables on duty." Rule 51 is, "A candidate may himself undertake the duties which any agent of his if appointed might have undertaken, or may assist his agent in the performance of such duties, and may be present at any place at which his agent may in pursuance of this Act, attend." The contention of the plaintiff is therefore founded upon the 51st rule, and is that a candidate is allowed to go everywhere, and at all times if his agent might; but the true construction it is submitted is that a candidate may go only to assist or perform the duties of his agent, and has no general authority to be in any booth at any time with no object beyond that of looking on and making inquiries, or, as the plaintiff was here, to use the words of the judge at the trial, fustily in the booth without doing anything to assist his agent. It is not clear that at a municipal election a candidate may appoint an agent, for though by sect. 52 an agent may at a Parliamentary election be appointed for attending the counting of the votes, and rule 21 contemplates the attendance of an agent to prevent personation at the polling booths, yet sub-sect. 6 of sect. 20 expressly says, "Nothing in this Act shall be deemed to authorise the appointment of any agents of a candidate in a municipal election, but if in the case of a municipal election any agent of a candidate is appointed and notice in writing of such appointment is given to the returning officer, the provisions of this Act with respect to agents of candidates shall, so far as respects such agent, apply in the case of that election." And by rule 57, the expression "agents of candidates," used in relation to a polling station, means agents appointed in pursuance of sect. 85 of 6 & 7 Vict. c. 18, that is, personation agents. As the agents of the candidates are thus allowed to attend in the booths for this particular purpose, viz., of detecting personation, the question is does rule 51, which gives to candidates themselves a right to be present at any place where their agents may give them a right to be there for any purpose other than that for which the agents are allowed to attend. It surely cannot; the Act providing that none but certain persons shall be present at the polling, cannot intend that persons who, if they came for a specific purpose, would be admissible, should be also admissible when they came for no recognised purpose, and when there were already present persons authorised to do the only work they themselves could be permitted under the Act to perform. The presence of a candidate might unduly influence the voters; suppose him to be a large employer of labour for instance, his presence might amount to intimidation. The returning officer was, therefore, bound to exclude the plaintiff by rule 21, and justified in removing him by sect. 9. [KEATING, J.—The candidate could not tell how the voters voted; they would still be free in the exercise of their

vote.] But sometimes promises are made not to vote, and influence is used almost as much in preventing voting, as in obtaining votes to be given for a particular person. [KEATING, J.—Might not the influence be exercised while he was assisting his agent, which he had a right to do?] But he could only do agent's work in one booth, and here the plaintiff claimed the right to go into all the booths just as he pleased, without assigning any reason. [BRETT, J.—At common law could the presiding officer turn out any member of the public?] There is no case showing such a right. [BRETT, J.—Can the common law right of the candidate as one of the public be taken away by the statute without express words?] We say that rule 21 does expressly exclude him by omitting him from the exception to "all other persons," and as rule 51 does not admit him except for the particular purposes specified, and it is here to be taken that the plaintiff did not go instead of or to assist his agent.

The *Solicitor-General* (Sir J. Holker, Q.C.) and *Baylis* in support of the rule.—The candidate has a right to be in the booth irrespective of the 51st rule. There is good reason why he should be allowed to be there, and none why he should not; he cannot see anything as to the voting, and can, therefore, exercise no improper influence, but he may have the best knowledge of the voters so as best to be able to detect personation, and he may wish to see if his agent is doing his duty. At common law he certainly has a right to be within the booth; he paid for it, and has always been allowed inside. The contention on the other side would amount to this, that if the candidate once appointed an agent he could never supersede him. It is said rule 21 excludes him; but it must be read with rule 51, for, if read alone, the candidate would be excluded, even if he had no agent in a booth, or if he went to assist his agent in any booth; and yet he is authorised in performing agents' duties, and in assisting by the very terms of the rule. The words are "may be present." He could not do what might be necessary outside, because he could not tell whom a voter intended to personate; but there is no question that he might stand at the door of the booth, and the irregular influence that is suggested would be quite as powerful there as inside. But they admit that he might go in to assist his agent; so it would result in a trial by the presiding officer of the question, for what purpose was the candidate coming into the booth? Now it is clear that he had a right to enter for one purpose, and, that being so, and there being no machinery in the Act for investigating that purpose, we say that it was not necessary even to assert that purpose. Indeed, it may be put even higher, as coming within the principle that if there is any right, it is immaterial if the entry was made under a wrong claim of another right. If a trespass is committed upon one ground, it may be justified on another. If a servant is dismissed for one cause, the master may justify on another, if it existed at the time of his dismissal. So that if no purpose were avowed, or an insufficient one, still the plaintiff having a right to be present under rule 51, could not be removed. See *Trent v. Hunt* (9 Ex. 14). Another point arises upon the action of the defendant who was returning, but not presiding officer. Looking at sect. 9, and rules 21 and 47, it will be seen that the returning officer may appoint a presiding officer, or he may himself pre-

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side at any polling station; but if the former is done, then the person so appointed alone has the powers of acting under sect. 9 and rule 21. There cannot be two presiding officers at any particular booth. [BRETT, J.—Might the defendant not supersede the presiding officer for a short time, and then restore him?] It would lead to great confusion if this could be done arbitrarily, and the Act seems to contemplate a permanent responsible officer for each polling station for the day.

Our adv. vult.

Feb. 28. The following judgments were delivered:—

BRETT, J.—This action was brought in the form of an action for an assault, to try the question whether in the particular case, the defendant, the returning or presiding officer acting in a polling station at a municipal election, was justified under the circumstances in forcing the plaintiff, a candidate, to leave a polling station. The facts in substance were that the plaintiff, a candidate, being present in a polling station whilst the polling was proceeding, was asked by the defendant, the returning officer, whether he claimed to be present in order to act on his own behalf instead of appointing an agent, or in order to assist an agent appointed by him. The plaintiff stated that he did not claim a right to be present for either of such particular purposes, but that he did claim the right to be present from the mere fact of his being a candidate. The plaintiff was not in any way misconducting himself, or interfering with the polling or the electors. The defendant denied the plaintiff's right to be present on the mere ground of his being a candidate, ordered him to quit the polling station, and, on his refusal, directed him to be removed. The question, therefore, in this case is, whether, upon a true construction of the Ballot Act (35 & 36 Vict. c. 33), a candidate at a municipal election has a right, as such, without in any way interfering or attempting to interfere with the polling or the electors, or in any other way misconducting himself, to be present in the polling station during the polling. The polling at a Parliamentary contested election is now regulated entirely by the Ballot Act and its schedules, and such parts of former Acts as are incorporated into it. The polling at a municipal contested election is regulated by the Ballot Act, its schedules, and the Municipal Corporation Act (5 & 6 Will. 4, c. 76), as altered by the Ballot Act in its fourth schedule. In both cases it is necessary to interpret the Ballot Act. By sect. 2 of the Ballot Act "in the case of a poll at an election (i.e., a Parliamentary or municipal election), the votes shall be given by ballot." Where, then, there is a poll in either election, we are at once driven to the Ballot Act to seek in it and its schedules the form and course of proceedings in taking the poll and determining and declaring its result. We need not consider the mode of "nomination," otherwise than by stating that by rule 1 of schedule 1 a place is appointed for the election, i.e., "the nomination." By sect. 5 of the Act, there are to be "polling districts," and in each district a "polling place." By sect. 8 of the Act and rule 15 of the schedule, the returning officer shall, at every polling place, provide a sufficient number of "polling stations." By rule 32, the returning officer must appoint and give notice of a "place for counting the votes." There are, therefore, three kinds of places: the place of nomination, the

polling stations, and the place for counting the votes. The places being thus fixed, the Act next provides for the persons who are to take part in the taking of the poll and the ascertaining and declaring its result. By sect. 8 the returning officer may, under certain circumstances, appoint a "deputy." By rule 21, he shall appoint a "presiding officer" to preside at each station. By rule 48, he may, in addition to any "clerks," appoint "persons to assist him in counting the votes." By rule 50, "the presiding officer" may do certain things "by the clerks appointed to assist him." The officials, therefore, on the part of the returning officer are, himself or deputy, presiding officers, clerks, and assistants. Then there are "the agents of the candidates." By rule 57, the expression "agents of the candidates" used in relation to a "polling station," means agents appointed in pursuance of 6 & 7 Vict. c. 18, s. 85. These are the agents who are usually called "personation agents." They attend only at polling stations. By rule 31, the candidates may respectively appoint "agents to attend the counting of the votes." These two kinds of agents are the only agents who can take part for the candidates in the taking of the poll or ascertaining and declaring its result. We thus have the persons who are to take part in the polling, &c. We must next consider the rules which are to govern the conduct of all these persons. By rule 54, every returning officer, and every officer (i.e., deputy returning officer or presiding officer), clerk, or agent authorised to attend at a polling station or at the counting of the votes, shall, before the opening of the poll, make a "statutory declaration of secrecy." The form of such declaration is given in schedule 3, and declares that the declarant will not do anything forbidden by sect. 4 of the Act. Now, by sect. 4, in the first place, "every officer, clerk, and agent in attendance at a polling station shall maintain, &c., the secrecy of the voting in such station, &c., and shall not communicate, &c., before the poll is closed, to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper, or voted, at that station," &c. This enactment is plainly pointed, not only to secrecy as to the way in which an elector has voted (secrecy as to that is to be maintained for ever), but it requires secrecy until the poll is closed as to the names, not only of those who have voted, but of those who have not offered to vote. The intention, as to these last, must be to prevent pressure being put upon those electors who do not wish to vote. The persons towards whom this secrecy should, it would seem, be most observed are, the candidate and his canvassing agents. This part of the section does not name or of itself include the candidate. The second enactment in the section is that "no such officer, clerk, or agent, and no other person whatsoever, shall interfere with or attempt to interfere with a voter when marking his vote, &c., or communicate at any time to any person any information obtained in a polling station as to the candidate for whom any voter in such station is about to vote or has voted," &c. This part may include the candidate, if he may be present in the station. The section then enacts that "every officer, clerk, and agent in attendance at the counting of the votes, shall maintain, &c., the secrecy of the voting," &c. This part, again, does not of itself include the candi-

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date. The section then again alters its phraseology, and says that "every person who acts in contravention of the provisions of this section shall be liable, &c., to imprisonment." This may include a candidate, and does include him if, under the middle part of this section, or, by reason of being admitted under other sections to a polling station or to the place of counting the votes, he is enabled to and does contravene the secrecy enjoined by this section. But, if he may be present at either place, there is nothing which obliges him to make the statutory declaration of rule 54, or which enables anyone to administer it to him. So far, his presence does not seem to be contemplated; the inconvenience of it is not provided for. So, in sect. 11, the wilful misfeasance or wilful act or omission in contravention of the act of others is made subject to a penalty of 100*l.*; but any such misfeasance or act of the candidate is not made liable. The words are, "every returning officer, presiding officer, and clerk who is guilty," &c. By sect. 9, however, "If any person misconducts himself in the polling station, or fails to obey the lawful orders of the presiding officer, he may immediately, by order of the presiding officer, be removed," &c. The candidate is included in this, if he may be and is present. Having thus far considered the places prepared for, and the persons who may take part in, the polling, and the ascertaining and declaring its result, we must now consider what things may be done in such places, and in whose presence such things may be done. Rule 8 enacts what is to be done at the place of election or nomination, and in whose presence:—"The candidate, &c., and his proposer and seconder, and one other person selected by the candidate, and no other person other than aforesaid, shall, except for the purpose of assisting the returning officer, be entitled to attend," &c. Here, where the candidate is to attend, he is expressly mentioned. Sect. 4 describes persons who may be present at a polling station. The candidate, as has been pointed out, is not mentioned in the section, though he may be included in some part of it. Rule 21 is an excluding rule: "The returning officer shall appoint a presiding officer to preside at each station, and the officer so appointed shall keep order at his station, shall regulate the number of electors to be admitted at a time, and shall exclude all other persons except the clerks, the agents of the candidates, and the constables on duty." This, if it stood alone, or if it did not by reason of other enactments require necessarily a limitation, would clearly exclude the candidate. But it will be seen that some words, at all events, of limitation must be introduced. The question will be what words. Turning next to what is to be done at the place of counting the votes,—by sect. 2 "the counting is to be in the presence of such agents, if any, of the candidates as may be in attendance." Those are the agents appointed under rule 31. By rule 33, "the returning officer, his assistants and clerks, and the agents of the candidates, and no other person, except with the sanction of the returning officer, may be present at the counting of the votes." This rule, again, if words of limitation were not necessary to be added to it, would clearly exclude the candidate. But here, too, it will be seen that some words of limitation must be added. Before, however, coming to the material and difficult rule which we

must interpret, we must notice rule 26. By that rule (r. 26), "The presiding officer, on the application of any voter who is incapacitated by blindness or other physical cause from voting in manner prescribed, &c., or of any voter who makes such a declaration as hereinafter mentioned that he is unable to read, shall, in the presence of the agents of the candidates, cause the vote of such voter to be marked on a ballot-paper in manner directed by such voter," &c. It is obvious that, if the candidate be present during this operation, he will know whether such voter votes for or against him. It seems insufficient to say that the candidate, if he disclosed his knowledge to anyone else, as, for example, to the voter's employer, might incur a penalty under sect. 4. If the voter were under his own influence, he might act on his own knowledge without any disclosure to anyone, and therefore without any penalty. If, therefore, there were not circumstances under which by clear enactment in this statute this mischief must arise by reason of the candidate's presence, the existence of this section would give strong ground for excluding a candidate from a polling station. Everything hitherto considered, indeed, seems to be against the right of the candidate to be present except at the nomination; and in that case his presence is admitted by express affirmative words. But now we come to rule 51, which deals expressly with the candidate and with his right to be present. The very question of his presence is before the Legislature. By rule 51, "A candidate may himself undertake the duties which any agent of his, if appointed, might have undertaken, or may assist his agent in the performance of such duties, and may be present at any place at which his agent may, in pursuance of this Act, attend." The duties here mentioned are the duties of the personation agent at the polling station, and of the agent appointed to attend at the counting of the votes. The candidate may, then, under certain circumstances at all events, be present in the polling station and at the place of counting. In certain circumstances, then, he may be present without making any statutory declaration. In certain circumstances, he may be present whilst the returning officer is taking the direction of a voter under rule 26. The mischiefs pointed out if the presence of the candidate be allowed, and which seemed to be reasons for disallowing his presence, do not, under certain circumstances, prevent his presence from being allowed. And it is now obvious that some words, at all events, must be added to the exceptions in rules 21 and 33; you must at least add the words, "and the candidates, if they undertake the duties, &c., or if they desire to assist their agents." Unless words be added in rule 51, the phraseology admits the candidate, as such, to the polling stations and the place of counting the votes. Unless in the last phrase of the rule you add the words "for such purposes," that last phrase of the rule admits the candidate, as such, to any place at which his agent may attend, that is to say, to the polling stations and the place for counting the votes. If the section be considered by itself, the first matter to be determined is, what is the meaning in it of the word "undertakes." "A candidate may himself undertake the duties," &c. That may mean that the candidate may engage that he will fulfil, or declare that it is his intention to fulfil the duties, that he may

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fulfil or begin to fulfil the duties. If it means the first, the sentence, so far, does not enable the candidate to be present in the polling station; then the last sentence of the section is required to complete the idea of enabling the candidate, not only to engage to fulfil, but also to fulfil, the duties. The second part, however, is,—“or may assist his agent in the performance of such duties.” Now, the candidate cannot assist without being present. That part of the section, therefore, carries with it necessarily the presence of the candidate. But it is coupled with the former part by the conjunction “or.” And the third part, if it is to be read with one of the former parts so as to make it complete, should, according to ordinary rules of grammar, be read also with the other. It cannot be read with the second as part of it, without manifest tautology; and yet, if it be read with the first, it must also be read with the second. It must be treated, if the suggested words of limitation be added to it, as tautologous, and if the suggested words be not added, it must be treated as enabling something separate and additional. If the latter, it gives to the candidate the right which is claimed for him, of being present as such in any polling station and at the place of counting the votes. Whichever way this rule be read, words must be added to rules 21 and 33. The final question then is, whether words should be also added to this rule 51. Nothing can be more difficult to determine. If the candidate has this absolute right, it is a useless and barren right to him, unless it be that it will give him the power of dealing with a servant or tenant of his own, either for not coming to vote at all, or, if the servant or tenant be illiterate, or blind, or unable from physical defect to make a mark, for voting against him. Can it be that the words are to be construed so as to give him such a barren and useless or mischievous right, when all the other provisions of the statute seem to ignore or militate against such a right? With much distrust, I come to the conclusion that, whatever the real intention may have been, our duty is to stand by the ordinary and grammatical construction of the last sentence in the rule, as there is no overwhelming ground for otherwise interpreting it. This is the rule of construction which this court has before declared must be rigidly applied to statutes of this kind. Although there are strong grounds to be collected from the consideration of other parts of the statute and its schedules, for suspecting that the intention was to give only a limited right to the candidate of being present as such, at the polling stations and at the place for counting the votes, still there is nothing to make it sufficiently certain that the words ought not to be construed according to their ordinary and grammatical signification: and then they signify that the candidate may, as such, be present at any polling station, and at the place of counting the votes. The word “candidates” is the word which must be read into the exceptions in rules 21 and 33. Nothing must be read into this rule 51. All the above reasoning has been applied to a Parliamentary contested election. It was not argued that there is a difference in this matter in a municipal contest election. What is the exact effect of subsect. 6 of sect. 20, we are not at present called upon to say. I am of opinion that the rule must be made absolute. I think it right to add that Sir Henry Keating, who heard

the argument, has read this judgment, and expressed his entire concurrence in it. (a)

DENMAN, J.—I should have been perfectly content in this case to say that I entirely agree with my brother Brett’s judgment; but, inasmuch as this is a case of first impression, and also a case of some importance, and inasmuch as at the trial I ruled the other way, I think it is desirable that I should read the judgment which I have prepared, to show the way in which my mind was brought round to agree in the result at which my brothers Brett and Keating have arrived. This was an action brought by the plaintiff for an assault in causing him to be removed from a polling station during a municipal election at Ashton-under-Lyne. The plaintiff was a candidate at the election; and the defendant was the returning officer. Several pleas were pleaded; but the only one relied upon on the argument of the rule was one added at the trial, raising a defence under the Ballot Act (35 & 36 Vict. c. 33, s. 9), which authorises the removal from the polling-station, by a constable, of any person who fails to obey the lawful orders of the presiding officer. It appeared upon the trial before me, that, on the morning in question, the plaintiff went to one of the polling booths to make certain inquiries of the presiding officer. The polling booth was one of several stations placed in different parts of a school, and was called booth No. 2. While the plaintiff was inquiring for the presiding officer, the returning officer came into the booth No. 2, and inquired if he was a voter. A conversation then took place, the details of which are unimportant, inasmuch as it was admitted upon the argument that in substance it amounted to a claim on the part of the plaintiff of the right to remain in the booth at his discretion—such claim being founded upon the concluding words of the 51st clause of the schedule to the above Act; and a claim on the part of the returning officer, founded upon clause 21 of the schedule, of a right to exclude him from the booth, in the absence of any claim on his part, to remain there for any of the purposes mentioned in the earlier part of clause 51. At the trial, I entered the verdict for the defendant, with leave to the plaintiff to move to enter a verdict with 40s. and certificates, if the verdict ought so to be entered. The case entirely turns upon the proper construction to be placed upon the two clauses of the schedule, 21 and 51. Clause 21 enacts as follows:—“The returning officer shall appoint a presiding officer to preside at each station, and the officer so appointed shall keep order at his station, shall regulate the number of electors to be admitted at a time, and shall exclude all other persons except the clerks, the agents of the candidates, and the constables on duty.” Clause 51 is as follows:—“A candidate may himself undertake the duties which any agent of his if appointed might have undertaken, or may assist his agent in the performance of such duties, and may be present at any place at which his agent may in pursuance of this Act attend.” It is important to bear in mind that by clause 57 it is provided that the expression “agents of the candidates” used in relation to a polling station means agents appointed in pursuance of sect. 85 of 6 & 7 Vict. c. 18. The agents appointed under sect. 85

(a) The learned judge had resigned at the end of Hilary Term.

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of the last-mentioned Act were agents "for the more effectual detection of the personation of voters." They were to be nominated before the time fixed for the poll; and notice of their appointment was to be given to the returning officer: and the section goes on to provide that "thereupon it shall be lawful for every such agent to attend during the time of polling at the booth or booths for which he shall have been so appointed." Though the present was the case of a municipal election, I think that the agents appointed by the candidate are "personation agents," having precisely the same duties as those appointed in the case of a Parliamentary election. In support of the plaintiff's right to recover, it was urged that the concluding words of clause 51 of the schedule give the candidates an absolute right to be present; that, looking at the earlier part of the clause, it would be unreasonable to restrict that right to cases in which their minds have been made up to undertake the duties of agents themselves, as they ought to have an opportunity of judging how their agents are performing their duties at the several stations; that, looking to the nature of the duty of assisting an agent, which is reserved to them by clause 51 of the schedule, it consists merely of being present and observing the voters, and it would be absurd to suppose that the Legislature intended that the right of the candidate to be present should depend upon his answering the returning officer's inquiry as to whether he was there to assist his agent or not. Moreover, it was argued that, inasmuch as the candidate must necessarily be present in the station in order to discharge either of the duties expressly authorised by the earlier part of clause 51, the latter words would have been unmeaning and inoperative if only intended to give him a right to be present in those cases. On the other hand, the strong and imperative words of clause 21 were relied upon by the defendant, and it was contended that they were sufficient to entitle the defendant to a verdict; that the latter part of clause 51 must be read as merely empowering the candidate, for the purposes mentioned in the earlier part of the clause, to be present in a place from which he in common with all others was required to be excluded by the presiding officer under the words of clause 21; that the great object of the Act was to maintain secrecy of voting, which would be *pro tanto* impaired by allowing the candidate to enter each polling station and remain there at his discretion, and thereby to exercise more or less moral influence over the voters, especially the illiterate portion of them; that the returning officer ought at all events to have a discretionary power of removing any persons who were not present under some express provision of the Act for purposes connected with some duty or business; and that therefore, inasmuch as the plaintiff admitted that he was there claiming a discretionary right to be there, and not professing to be in the discharge of any duty or business, the defendant had a right to order him to leave the booth, and, upon his refusal, to cause him to be removed, under sect. 9 of the Act and clause 21 of the schedule. Upon a full consideration of these arguments and of the various provisions of the Act, I have come to the conclusion that the plaintiff is entitled to have the verdict entered for him according to the leave reserved. The words of clause 21 are undoubtedly strong and unquali-

fied, except so far as they are modified by the exceptions contained in the clause itself; but one of those exceptions is "the agents of candidates," who by clause 57 are defined to be the personation agents appointed under sect. 85 of 6 & 7 Vict. c. 18. These agents are persons whose duties under the 35 & 36 Vict. c. 33 can only be discharged by means of their presence in the polling station, and by their observing there the persons who come to vote, and forming a judgment as to whether they are persons really on the register or not. Their right to be present in the booth, which was secured by the concluding words of sect. 85 of 6 & 7 Vict. c. 18, is preserved by one of the exceptions in clause 21. That right I consider to have been absolute as regards the booth to which they were appointed. Then, is the right given to the candidate by clause 51 less absolute? I cannot see that it is. The words of the clause are unlimited; and it would require the insertion of other words,—such as, "for that purpose," or "for either of the purposes aforesaid"—in order to restrict their application to the two special purposes mentioned in the earlier part of the clause. This I do not feel at liberty to do, from a mere suspicion, however strong, that it might have been the intention of the Legislature that the right of the candidate should be so restricted. It may be argued that in order to put this construction upon clause 51, it is necessary to import the word "candidates" into the exceptive words in clause 21. Strictly speaking, this is so; but difficulties such as these unfortunately occur daily in the construction of Acts of Parliament; and the true solution of that which exists in the present case appears to me to be, that it is far more probable that the case of the candidate, and his powers, was not present to the mind of the draftsman when he drew the exceptions in clause 21, than that he should have used such large words as those in clause 51 intending at the time that they should be restricted, as contended for by the defendant. I think, therefore, that the very large words of clause 21 must be held to be qualified by the equally large words at the conclusion of clause 51, and that the candidate at an election has a right to be present in the polling booths, without being called upon to assign any reason as to the cause of his presence. This, of course, will not justify any misconduct on his part when in the station, for which he might be removed under sect. 9. I think that the rule should be made absolute.

Rule absolute

Attorney for plaintiff: *E. Worthington, for Sale, Shipman, Seddon, and Sale.*

Attorneys for defendant: *Johnson and Weatheralls, for George Hadfield, jun., Manchester.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 24, 1875.

(Before COCKBURN, C.J., FRAMWELL, B., MELLOR, J., BRETT, J., and POLLOCK, B.)

REG. v. GALLAGHER.

Evidence—Admissibility of co-conspirator—Conspiracy—False pretences.

Two prisoners were jointly charged in an indictment with obtaining money by conspiracy and false pretences. On being arraigned, one pleaded

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guilty and the other not guilty. On the trial of the indictment, the prisoner who had pleaded guilty, was admitted as a witness against the other although it was objected, that the evidence of a co-conspirator could not be received on the count for conspiracy. The jury found the prisoner not guilty on the count for conspiracy, but guilty on the counts for false pretences.

Held, that the co-conspirator was admissible as a witness, and that the conviction was right.

CASE stated by the Chairman of the Court of Quarter Sessions of the County of Stafford for the opinion of this Court.

This case was tried before me at the Staffordshire adjourned Epiphany Sessions, 5th March 1875.

The prisoner, Thomas Gallagher, was charged together with Frederick Fletcher upon an indictment. First. For having on 21st Nov. 1874, conspired to obtain from Hugh William Williamson and others divers sums of money. Secondly. For obtaining by false pretences from Henry Porter 9l. 6s. 8d., the property of Hugh William Williamson and others, on Nov. 21st 1874. Thirdly. For obtaining by false pretences from the said Henry Porter 6l. 13s. 4d., the property of the said Hugh William Williamson and others, on Nov. 28th 1874.

Leave was granted by the court for this indictment to be preferred against the prisoners.

Frederick Fletcher upon being arraigned pleaded guilty, and consequently was not given in charge to the jury. Thomas Gallagher pleaded not guilty and was tried, and upon his trial Fletcher was called and examined as a witness against him.

I admitted his evidence, which was corroborated in some particulars by the other witnesses, and commented upon it in summing up to the jury, leaving it to them, in case they found a verdict of guilty, to say upon which counts of the indictment. The jury found Gallagher not guilty on the count for conspiracy, but guilty on the counts for false pretences.

Counsel for the prisoner objected that the evidence of a co-conspirator could not be received on the count for conspiracy, and if such evidence were inadmissible the conviction on the counts for false pretences was not maintainable.

The questions I wish to submit to the court are: First. Was the evidence of the co-conspirator (who, on arraignment, had pleaded guilty) rightly admitted? Secondly. Was the prisoner, Thomas Gallagher, rightly convicted on the counts for false pretences, the whole of the evidence having been left to the jury?

THOMAS T. TWEMLOW, Chairman,
7th April, 1875.

No counsel appeared to argue either for the prosecution or the prisoner.

By the COURT: *Conviction affirmed.*

REG. v. G. E. FOULKES.

Embezzlement—Clerk or servant—Son assisting parent—24 & 25 Vict. c. 96 s. 68.

A. held certain local appointments, and amongst them that of clerk to the local board of W., the business of the board being transacted at his office. A.'s son, who lived with him, assisted him in his office and in conducting the business of the local board. There was no evidence that the son was paid any salary by his father, and the only evidence was that he in fact assisted him as clerk

or servant or assistant in his office. The local board had occasion to raise money on mortgage of the rates, and the prisoner managed the business of the loan for his father, and received at his father's office money from the mortgagees, and should have paid it into the bank. In two instances, having received that money, he embezzled it.

Held, that although he was not employed as clerk or servant, or in the capacity of clerk or servant to the local board, he was employed in the capacity of clerk or servant to his father, and was properly convicted on an indictment which charged him with having embezzled the moneys of A., his master.

CASE stated by Mr. Justice Quain for the opinion of this Court.

The prisoner was tried before me at the last Assizes for Shropshire for embezzlement.

The indictment on which the prisoner was tried contained four counts.

On the first count he was charged that on 22nd Sept. 1871, he was employed as clerk to the Local Board of Whitchurch and Dodington, and received 600l. on account of said local board, and did steal 100l., parcel of the said 600l., the moneys of the said Local Board, his employers.

On the second count, that on the 14th Feb. 1872, he embezzled the sum of 100l., the moneys of the said Local Board, his employers.

On the third count, that on the 22nd Sept. 1871, he embezzled the sum of 100l., parcel of a sum of 600l., the moneys of Charles Foulkes, his master.

On the fourth count, that on the 14th Feb. 1872, he embezzled the sum of 100l., the moneys of Charles Foulkes, his master.

Charles Foulkes, the father of the prisoner, was appointed clerk to the local board of Whitchurch and Dodington, at a salary of 40l. a year, and continued to hold such appointment till his death. Charles Foulkes held various other appointments. The business of the board was transacted at his office, the board paying him a rent for the use of it. The prisoner lived with his father, and assisted him in his office and in conducting the business of the local board. In the absence of his father, prisoner acted for him at the meetings of the local board, and assisted his father when present. Prisoner was not appointed or paid by the local board. There was no evidence that prisoner was paid any salary by his father. The only evidence was that he in fact assisted his father as clerk or servant, or assistant in his office as above described.

In the year 1871, and while Charles Foulkes was clerk to the local board as above mentioned, the board had occasion to raise a loan for the purpose of building a market. The money was raised on mortgages of the local rates. The prisoner managed the business of this loan for his father. He filled in the usual form of mortgage, and either he or his father obtained the proper signatures of the members of the local board. The course of business was that prisoner received at his father's office the money from the mortgagees in exchange for the mortgages, and paid it into the Whitchurch and Ellesmere Bank (who were the treasurers of the board) to an account called "the market account." In the course of this employment he embezzled and appropriated to his own use the two sums of money mentioned in the indictment.

It was objected by counsel for the prisoner that

he could not be convicted on the first two counts of the indictment as he was not a clerk or servant of the board nor employed by the board in that or any other capacity, and that he could not be convicted on the third or fourth counts, as there was no evidence that he was the clerk or servant of his father, or was employed by him in that capacity beyond the fact that he assisted his father, and that the moneys embezzled were not the monies of Charles Foulkes but of the local board.

The prisoner was convicted and sentenced, but I respite the execution of the sentence till after the decision of the Court on this case.

The question for the Court is, whether, on the above facts, the prisoner could be properly convicted on any of the counts of the indictment.

The following cases were cited before me:

Reg. v. Negus, 21 W. R. 687; 12 Cox C. C. 492;
Reg. v. Beaumont, 23 L. J. 54, M. C.; 6 Cox C. C. 269;
Reg. v. Tyrie, L. Rep. 1 C. Cas. Res. 177; 11 Cox C. C. 241;

and the 11 & 12 Vict. c. 63, s. 138, was referred to as authorising the board (the district being a non-corporate district) to allege that the property was the property of their clerk.

Rose, for the prisoner.—[COCKBURN, C. J.—All the court think that the prisoner was not a clerk or servant to the local board, and that you may address your argument to his being a clerk or servant, or in the capacity of a clerk or servant to his father.] The conviction cannot be sustained. The question is whether the relation of master and servant existed between the prisoner and his father, and it is submitted that it did not. [MELLOR, J.—The words of the statute 24 & 25 Vict. c. 96, s. 68, are "Whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle, &c."] It is submitted that there must be a contract express or implied between the person charged and his employer, in order to bring the case within the enactment. There are none of the indicia in the present case which have been relied upon in the decisions of this court to constitute the status of clerk or servant within the Act. All that the case states is, that the prisoner assisted his father in his office of clerk to the local board, and there was no evidence that he was paid any salary. The statement that he "assisted" is very indefinite; there was no proof that the assistance was continuous. It does not imply that he was subject to any control, or that he might not have refused to give his assistance at any moment. [MELLOR, J.—The case states, "The course of business was that the prisoner received at his father's office the money from the mortgagees in exchange for the mortgages, and paid it into the bank." That seems as if the prisoner was employed in the nature of a servant.] If it had not been his father, but a stranger, whom the prisoner was assisting, there clearly would have been no evidence to constitute the prisoner a clerk or servant within the meaning of the statute. If so, the fact of the prisoner living at home with his father seems to make it more difficult to imply the relationship of clerk or servant to his father. In *Rea v. Burton* (By. & Moo. C. C. R. 237), it was held that a clerk of a chapelry who receives the sacrament money, was not the servant of the minister, churchwardens, or the poor of the

chapelry, as there was no obligation on the part of the clerk. So in *Rea v. Nettleton* (By. & Moo. C. C. R. 259), the prisoner, who was schoolmaster of a school supported by voluntary contributions, and had received and misappropriated a voluntary contribution, was held not to stand in the relation of servant to the treasurer or committee of the school, although directed by the treasurer to receive the particular sum of money misappropriated. It is laid down in all the cases that a person must be under a legal obligation to make him a clerk or servant within the statute:

Reg. v. Bowers, L. Rep. 1 C. C. R. 41; 10 Cox C. C. 250;

Reg. v. Tyrie, *Reg. v. Negus*, and *Reg. v. Cullum*, 12 Cox C. C. 469;

No counsel appeared to argue for the prosecution.

COCKBURN, C. J.—I am of opinion that there was evidence in this case on which if it had been left to the jury to do so, the jury might properly have found either that the prisoner was a clerk or servant to his father, or was employed in the capacity of clerk or servant to his father. It appears that the father held certain local appointments, and among them that of Clerk to the Local Board of Whitchurch and Dodington, and the business of the board was transacted at his office, and the prisoner, his son, lived with him and assisted him in his office, and in conducting the business of the local board, and did what his father might have done or have employed a clerk to do. It is true that the relation of clerk or servant is generally founded on contract, but the relation may exist at will only. The evidence is that the prisoner did perform all those things which a clerk or servant might have done, and although he might have refused to go on doing them, yet so long as he continued to perform them he did them in the capacity of a clerk or servant to his father. Then as to the embezzlement, the prisoner received the sums as clerk or servant to his father, and was bound to account for them to his father on behalf of the local board; his father was liable for the money to the local board, and was the proper custodian of the money; and then the prisoner, having received the money, instead of paying it into the bank embezzled it. I think, therefore, there was evidence to go to the jury that the prisoner embezzled the money in the capacity of clerk or servant to his father, and that the money was received in the course of such employment.

BRAMWELL, B.—I am of the same opinion. If the prisoner had not been the son of and not living with the person alleged in the indictment as his master, there would have been abundant evidence of his being employed in the capacity of clerk or servant to that person, and in a civil action on the evidence he would have been entitled to a *quantum meruit* for his services. Then being the son of that person he assisted him in the duties of his office for the remuneration of his board and lodging. The possibility of his refusing to continue to do so does not affect the question. I think there was evidence that he was employed in the capacity of clerk or servant to his father. As to the embezzlement, it is sufficient if the prisoner receives the money in the course of his employment on account of his master or employer. If the money had been received by the father the board might have recovered it, and if the

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father had said to the son, "Son give it to me," and the son had done so, he would have received it for the board.

MELLOR, J.—The case states that the prisoner lived with his father, and assisted him in his office and in conducting the business of the local board. In the absence of his father, prisoner acted for him at the meetings of the local board, and assisted his father when present. Prisoner was not appointed or paid by the local board. There was no evidence that prisoner was paid any salary by his father. The only evidence was that he in fact assisted his father as clerk, or servant, or assistant in his office. The only difficulty in the mind of the judge, as I collect from the case, was that there was no actual evidence of a contract on the part of the son. The case finds that he did assist his father in the character of clerk, or servant, or assistant. That, I think, is sufficient. The money was received in the course of his employment in that character. I think, therefore, there was abundant evidence to support the conviction.

BRETT, J.—The prisoner undertook to do certain things for his father in the way in which a clerk does for money; and as long as he chose to do them—although it may have been voluntarily on his part—he was bound to do them honestly, as a clerk would have done them. As he did them dishonestly, I think he was liable under the circumstances for embezzlement.

POLLOCK, B.—The only doubt I have had is, whether the relationship contemplated by the statute existed. The statute contemplates, however, something beyond the mere relationship of clerk or servant to another, and includes the case where, *de facto*, a person is employed in doing the work ordinarily done by a clerk or servant. In that view of it I think that there was abundant evidence that the father employed the son, and that the son was employed here, in the capacity of clerk or servant.

Conviction affirmed.

REG. v. WILLIAM TAYLOR.

Manslaughter—Accessory—Prize fight—Stakeholder.

Two persons about to fight one another with their fists, deposited 1l. each with the prisoner, as stakeholder, who consented to hold it until after the fight, and then to pay the 2l. to the winner. The prisoner did not in any way otherwise than by holding the money promote or encourage the fight. The fight took place, and, from injuries then received, one of the men died subsequently. The prisoner was not present at the fight, but afterwards paid the 2l. to the winner of the fight. Held, that the prisoner was not an accessory before the fact to the manslaughter.

CASE reserved for the opinion of this Court by Mr. Justice Brett.

William Taylor was tried before me at the Central Criminal Court, on the 8th April 1875, on a charge that he was an accessory before the fact to the manslaughter of one Duglar by one Tubbs.

It was proved that Tubbs and Duglar had quarrelled, and had in consequence agreed to fight with their fists; that in order to bind each other so to fight upon such quarrel, each put down a sum of 1l. so that 2l. might be paid to the winner; that the money was deposited with the prisoner,

as stakeholder, and that he consented to hold it as such, until after the fight, and then to pay it to the winner.

The prisoner did not in any way, otherwise than by so consenting to hold and pay over the money, promote or encourage either the quarrel or the fight.

There was nothing then, or at any time before the fight, to lead anyone reasonably to suppose, and the prisoner did not suppose that the fight would endanger the life of either of the combatants.

Tubbs and Duglar fought on the 1st Feb. 1875. The prisoner was not present at the fight. The fight was a fair fight, in which the men used only their fists. Until near the close there was no danger of death to either of them, and no reason to apprehend such danger. Towards the end Duglar was advised to yield, but refused, and continued to fight. At last he yielded, and acknowledged that he was beaten. If Duglar had not so continued to fight, he would not have died or have been in danger of dying. By so continuing to fight, and thereby receiving further injuries from Tubbs, Duglar became exhausted, and afterwards, in consequence, died.

Tubbs was tried before me, and pleaded guilty to a charge of manslaughter and was sentenced.

After the fight the prisoner on being told that Tubbs had won the fight, but without being told or knowing of Duglar's danger, paid the 2l. to Tubbs.

I directed the jury, for the purpose of the day, that if the prisoner held the money for the purpose of handing it to the winner of the proposed fight, he was by that alone in point of law an accessory before the fact to the breach of the peace which subsequently took place, and inasmuch as that breach of the peace, ended in manslaughter, he was an accessory before the fact to that manslaughter. The jury thereupon found the prisoner guilty. I respited the sentence.

I desire the opinion of the Court of Criminal Appeal, whether such direction was correct in point of law, and whether upon such direction and the facts, the prisoner could properly be convicted of the crime of being an accessory before the fact to the crime of manslaughter.

If the Court should be of opinion that the prisoner was properly convicted on such direction and facts, the conviction is to stand; if otherwise, the conviction is to be quashed.

(Signed) W. B. BRETT.

No counsel appeared to argue for the prisoner.

Poland (Beasley with him) for the prosecution.—The conviction was right. The prisoner was an accessory before the fact, although he was not present at the fight. [BRAMWELL, B.—He was not accessory to the manslaughter. Assuming that as a stakeholder he was *causa sine qua non*, yet he was not *causa causans*. Did he abet the fight?] Yes. The combatants bound themselves to fight by depositing the money, and the prisoner bound himself to give the stakes over to the winner of the fight; he consented to hold the money until after the fight. Prisoner was an accessory to a breach of the peace before the fact. In *Reg. v. Gayler* (Dears. & B. 288; 7 Cox C. C. 253) a prisoner who procured and gave drugs to his wife that she might take them to produce abortion, was held to be guilty of manslaughter, the wife having taken them in his absence, and died from

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their effects. [MELLOR, J.—There the prisoner procured the drugs and counselled his wife to take them. POLLOCK, B.—In Russell on Crimes it is said that there cannot be any accessories before the fact in manslaughter, because it is presumed to be altogether sudden and without premeditation.] The prisoner was an accessory to a breach of the peace before the fact, and as the breach of the peace resulted in a felony, he became accessory to the felony. [MELLOR, J.—Must you not show that the person was present at the fight, or in some way abetting it? There is a difference between a man being present at a fight and encouraging it, and a man who is absent, although in some sense aiding it, for if present he might have discouraged its proceeding. Is a traffic manager of a railway an accessory before the fact for providing a special train for a party to go to a prize fight if the fight ended in the death of one of the combatants?] It is submitted that he is: (Hawk. P.C. Bk. 2 cap. 29.)

COCKBURN, C.J.—I am of opinion that the conviction cannot be supported. The defendant was indicted for being an accessory before the fact to the manslaughter of one Dugar. It appeared that Dugar fought with a person named Tubbs, and received such injuries that he afterwards died from them. The prisoner was not present at the fight, and all that he did was that he agreed to act as stakeholder, and received one sovereign from each of the combatants, and consented to hold the two sovereigns until after the fight, and then to pay them to the winner. In order to render the defendant liable to the charge there must be some active proceeding on his part; he must procure them to fight or encourage them to do so. In this case the defendant was perfectly passive, and it is enough to say that there is nothing to show such a participation in the fight on the part of the defendant as to make him an accessory before the fact to the manslaughter under the circumstances.

BRAMWELL, B.—I am of the same opinion. There is no evidence that the defendant counselled or procured the fight to take place. Abetting means giving some assistance towards the act.

MELLOR, J.—I rest my judgment on the absence of any evidence that the defendant engaged the men to fight. There is no evidence that the defendant aided, or assisted, or counselled the men to fight.

BRETT, J. and POLLOCK, B. concurred.

Conviction quashed.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

Tuesday, April 27, 1875.

TERRY v. BRIGHTON AQUARIUM COMPANY.

Entertainment or amusement—Admission by payment on Sundays—21 Geo. 3 c. 49.

The defendants' buildings consist of an aquarium, a museum, a reading room, a restaurant, a café, together with conservatories, gardens, and ornamental resting places. The fish and animals are fed at stated hours, all the buildings are open and refreshments sold to the public on Sundays as well as other days; and every Sunday evening a band performs a selection of sacred music. The attendants employed amount to twenty-seven. The

public are admitted on Sundays upon payment of sixpence a head at the door.

Held in an action for penalties under 21 Geo. 3 c. 49 that this was a place of entertainment or amusement within the meaning of the Act.

This was an action brought to recover a penalty of 200*l.* under the statute 21 Geo. 3, c. 49, s. 1.

The writ was issued on the 14th Sept. 1874, and by the consent of the parties and in pursuance of an order made under the 46th section of the Common Law Procedure Act 1852, the following special case had been stated without pleadings for the opinion of this court.

The defendants are a company and incorporated by the Brighton Aquarium and Improvements Act 1869.

The defendants have constructed a large building at Brighton called the Brighton Aquarium, which they have always kept until the present time under their own management and control.

This building consists of a range of chambers below the level of the ground approached by a flight of steps. There is also a terrace bordered with a garden laid out above the chambers. The chief part of the building is used as an aquarium fitted with glass tanks for the exhibition of marine fish and animals. There is also an entrance hall which is used as a museum and a reading room. A restaurant and a dining hall adjoin the entrance hall, and there are other parts of the building fitted up as conservatories with artificial grottoes, rock-work, and cascades. On the terrace which is supplied with seats and refreshment tables, there is a café.

The building and terrace and garden are open to the public every day in the week, payment for admission being made at the entrance. The charge for admission on all days, except Sunday and Monday and the evenings of other days, is 1*s.*, the hours of admission in the months of Aug. and Sept. 1874 being from 10 a.m. to 10 p.m. daily. In Oct., Nov., and Dec. 1874, the hours of admission have been from 10 a.m. to 10 p.m. on week days, and 11.30 a.m. to 9.30 p.m. on Sundays. The charge for admission throughout Sunday and Monday and after seven o'clock on the evenings of other days is 6*d.*

At half-past seven o'clock every Sunday evening a band of sixteen performers plays a selection of sacred music in the interior of the building.

The fish and other animals in the aquarium are publicly fed at certain stated hours of the day.

Programmes are published weekly by the defendants showing the music to be performed on each Sunday, and the times at which the feeding of the fish and animals will take place. These programmes also state the different attractions and objects of interest exhibited to the public in the interior of the building. These programmes are sold on Sundays as well as other days inside the building. A copy of such parts of one of these programmes (being the programme for the week ending Sunday, 6th Sept. 1874) as do not relate solely to the week day entertainments, accompanied and formed part of this case.

Catalogues and guide books describing the fish and other animals in the aquarium are also sold on Sundays in the building.

The restaurants and café connected with the building and the rest of the aquarium are open on Sunday; and refreshments of all kinds, including wines and spirits, are sold to all visitors during the

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hours allowed by law, and in the intervals to all who produce railway tickets as evidence of their being travellers.

Among the attractions and objects of interest provided in the building for the amusement and entertainment of visitors besides the tanks and their contents, are the following: newspapers, microscopes illuminated to allow of the examination of objects, the model of a yacht, the skeleton of a seal, a stuffed sturgeon, the cast shell of a crayfish, several statues and fourteen glass vases on stands containing seahorses, tubeworms, and anemones, &c.

The number of persons employed by the company in and about the building on Sundays including bandmen and attendants of all descriptions amounts to twenty-seven. There are also various cooks, waiters, and other attendants employed by the contractor of the refreshment department.

Advertisements have from time to time appeared in the London papers announcing that the aquarium is open daily, and notices have likewise been exhibited outside the building specifying the hours and prices of admission for Sunday and the other days of the week.

A great number of people visit the aquarium every Sunday, especially at the time of the musical performance, and the restaurant and café are in much request, and the defendants have made considerable pecuniary profits from the admission of each of the visitors.

On Sunday 16th Sept. 1874, the aquarium was opened to the public on payment as other Sundays at the hours and in the manner stated in the preceding paragraphs of the case.

The question for the opinion of the court is whether under the circumstances above stated the Brighton Aquarium or any part thereof was opened or used for public entertainment or amusement on any part of the Lord's Day, contrary to 21 Geo. 3, c. 49, s. 1.

If the court shall be of opinion in the affirmative, judgment is to be entered for the plaintiff for one penalty of 200*l*. If the court shall be of opinion in the negative, judgment is to be entered for the defendants.

Giffard, Q.C. (with him *Bosanquet*) for the plaintiff.—The proceedings of the defendants on Sunday are clearly forbidden by the words of 21 Geo. 3, c. 49. By the 1st section it is enacted "That from and after the passing of this present Act, any house, room, or other place which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place shall forfeit the sum of 200*l*. for every day that such house room or place shall be opened or used as aforesaid on the Lord's Day, to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses; and the person managing or conducting such entertainment or amusement on the Lord's Day, or acting as master of the ceremonies there, or as moderator, president or chairman of any such meeting for public debate on the Lord's Day, shall likewise for every such offence forfeit the sum of 100*l*. to such person as will sue for the same; and every door-keeper, servant, or other person who shall collect

or receive money or tickets from persons assembling at such house, room, or place on the Lord's Day, or who shall deliver out tickets for admitting persons to such house, room, or place on the Lord's Day, shall also forfeit the sum of 50*l*. to such person as will sue for the same." It cannot be contended that this place is not used for public entertainment or amusement on Sunday, and even if any technical difficulties as to the parties could be suggested they would be cured by the 2nd section, "And whereas by reason of the many subtle and crafty contrivances of persons keeping such houses, rooms, or places as aforesaid, it may often be difficult to prove who is the real owner or keeper thereof; be it enacted by the authority aforesaid that any person who shall, at any time hereafter, appear act or behave him or herself as master or mistress, or as the person having the care, government, or management of any such house, room, or place as aforesaid, shall be deemed and taken to be the keeper thereof, and shall be liable to be sued or prosecuted and punished as such, notwithstanding he or she be not in fact the real owner or keeper thereof; and whenever any such house, room, or place shall belong to or be kept by divers persons in partnership as joint-owners or joint-keepers thereof, each and every such joint owner or joint keeper of such house, room, or place shall be deemed the keeper thereof, and shall be liable to be sued or prosecuted and punished as such. And any house, room, or place at which persons shall be supplied with tea, coffee, or any other refreshments of eating and drinking on the Lord's Day, at any greater prices than the common and usual prices at which the like refreshments are commonly sold upon other days at such house, room, or place, or at coffee houses, or other houses where the same are usually sold, shall be deemed a house, room, or place to which persons are admitted by the payment of money, although money be not there taken in the name of or for admittance, or at the time when persons enter into or depart from such house, room, or place; and any house, room, or place which shall be opened or used for any public entertainment or amusement, or for public debate on the Lord's Day, at the expense of any number of subscribers or contributors to the carrying on any such entertainment, or amusement, or debate on the Lord's Day, and to which persons shall be admitted by tickets, to which the subscribers or contributors shall be entitled, shall be deemed a house, room, or place to which persons are admitted by the payment of money within the meaning of this Act." *Baxter v. Langley* (L. Rep. 4 C. P. 21) is the only recent decision on this Act, and the facts there are very different from these.

Manisty, Q.C. (with him *McMillan*) for the defendants.—This Act of 1781 was passed just after the Lord George Gordon riots, and was directed against proceedings totally different from those of the defendants. The preamble says "Whereas certain houses, rooms, or places within the cities of London or Westminster or in the neighbourhood thereof have of late frequently been opened for public entertainment or amusement, upon the evening of the Lord's Day commonly called Sunday; and at other houses, rooms, or places within the said cities or in the neighbourhood thereof, under pretence of inquiring into religious doctrines and explaining texts of Holy Scripture, debates have frequently been held on the evening of the Lord's Day, concerning divers

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texts of Holy Scripture by persons unlearned and incompetent to explain the same, to the corruption of good morals and to the great encouragement of irreligion and profaneness." The magnitude of the penalties imposed, the severity of the provisions, and the language used, all imply that this enactment could not have been directed against proceedings of the innocent nature described in this case. The place may be said rather to be set apart for enjoyment and rest than for entertainment and amusement. [BLACKBURN, J.—All that we have to decide is whether any limit to the meaning of "entertainment and amusement" can be suggested which may exclude this case from the application of the Act.] Under the 3rd section all persons advertising these programmes will be liable to a penalty of 50*l.* if the defendants can be sued in this action. It is difficult to understand how such a statute as this has not been long ago repealed.

BLACKBURN, J.—I am afraid we have no ground for believing that this Act of Parliament is not at present in force; and although I avowedly and designedly state that I am most anxious to find a hole in its provisions by which the defendants might escape, I am unable to see any. This seems to be an innocent and admirable entertainment, but it cannot be considered free from the application of this Act. It is certainly a place of entertainment and amusement opened under the circumstances expressly forbidden by the 1st section. The penalties are enormous, and the provisions are oppressive, but they seem to be the law of the land, which we have to administer. Our judgment must be for the plaintiff.

FIELD, J.—I am of the same opinion. I think those persons who are anxious to induce people to frequent public houses on Sundays less than they at present do, might greatly aid their object by obtaining the repeal of this statute and by encouraging such entertainments as these. As the law now stands the court can only enforce the penalty sued for.

Judgment for plaintiff.

Attorney for plaintiff, *Bridges, Sawtell, Heywood, and Ram.*

Attorneys for defendants, *Benham and Tindell.*

Tuesday, April 27, 1875.

WHITE v. HINDLEY LOCAL BOARD.

Non-repair of highway—Communication with sewer—Liability of Local Board—11 & 12 Vict. c. 63, ss. 43, 45, 68, 117.

Within the defendants' district, an iron grid, through which the surface water from the road ran into a sewer, was left for six months with two bars broken. The plaintiff's horse when going along the road put his leg through and was injured. The sewer was vested in the defendants under sect. 43, and the road under sect. 68 of the Public Health Act 1848.

Held that, even if this were non-repair of the highway for which the defendants could not be sued, they were, at all events, jointly liable for the state of the grid, as the sewer authority, so as to justify the verdict for the plaintiff.

APPEAL from the Wigan County Court.

This was an action brought to recover the sum of 14*l.* 9*s.* by the plaintiff, a surgeon, residing at Wigan, in the county of Lancaster, against the

defendants, a local board of health established under the provisions of the Public Health Act 1848 for the district of Hindley, in the said county of Lancaster, for injury sustained by the plaintiff's horse by reason of its putting one of its feet upon a grid which was out of repair on the highway in Hindley leading from Wigan to Leigh, and within the district and within the lighted, and paved area of the Hindley Local Board, in the month of April 1874.

The plaintiff's notice of action was admitted by the defendants to have been duly given a month before trial, and to be a sufficient notice, and was in evidence; and the amount of damage sustained by the plaintiff was also admitted.

At the trial which took place in the County Court at Wigan on the 16th Sept. 1874, the plaintiff and defendant were both represented by attorney, and the facts proved in evidence or admitted by the respective attorneys were as follow:

The highway in Hindley leading from Wigan to Leigh is, to the extent of thirteen feet in width, paved with stone sets, and the other portion ten feet four inches, is soft, being composed of cinders, used both by persons travelling on horseback and pedestrians.

At the edge of the part of the road which is paved, and within the cinder or soft part of the road, are iron grids, and one was produced in court, and is hereinafter called "the grid," about sixteen inches square on the outside and twelve inches square on the inside.

This grid and other similar grids were placed at equal distances of about 100 yards along the road for the purpose of conveying the surface water off the paved portion of the road into a sewer running under the grids. The grids were so placed in the road before the local board was established, and upon its formation the sewer and the grid became vested in and belonged to, and were entirely under the management and control of the board of health.

On the 10th April 1874, the plaintiff's son was riding the plaintiff's horse along the highway in question in the daylight, and in attempting to pass a cart which was going in the same direction as himself, he rode his horse off the paved part of the road on to the cinder or soft part, and in doing so the horse put its foot upon the grid in question, two bars of which had been previously broken, and a third bar gave way, and the horse's hind foot went through the grid, and it remained fixed to and was pulled out of its bed by the horse's leg, the horse being thereby damaged and injured. It was proved by two witnesses in evidence that the grid in question had had two bars broken for six months prior to the accident, but it did not appear that any notice of its defective state had been given to the local board; and the clerk of the said local board, the only witness called by the defendants said that he was not aware of it, and he was the proper party to be served with all notices intended for the local board. He also stated that it was the duty of the foreman of the Hindley Local Board to look after the roads at the time of the accident, and that he should consider such foreman guilty of neglect if he had allowed a grid to remain broken for six months without communicating the fact to the local board; the same witness added that he saw no objection to the plaintiff's son riding where he was when the accident occurred.

At the hearing of the case the plaintiff's attorney

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contended that one or more of the servants of the defendants had been guilty of such negligence as to make the defendants responsible in damages to the plaintiff, and relied upon the case *Foreman and Wife v. The Mayor and Corporation of Canterbury* (40 L. J. 138, Q. B., and L. Rep. 6 Q. B. 214), and the cases therein cited.

The defendant's attorney on the other hand contended that the Act complained of amounted to a nonfeasance only, for which the plaintiff had no remedy by action, but only by an indictment, and he relied upon *Gibson v. The Mayor and Corporation of Preston* (L. Rep. 5 Q. B. 218).

The Judge of the County Court reserved his decision, and on the 8th Oct. 1874, gave a verdict for the plaintiff relying principally on the judgment and direction of Blackburn, J. in *Foreman v. The Mayor of Canterbury*, but on the application of the defendants he gave leave to appeal; and the question now for the opinion of the Court of Queen's Bench was whether under the facts hereinbefore stated and agreed to by both parties, the defendants are or are not liable in an action at law for the injuries caused to the plaintiff's horse, and whether the decision of the County Court Judge ought to be set aside and a verdict entered for the defendants.

Baylis argued for defendants, the appellants.—The cases establish that mere omission is no ground of liability against a local board. *Gibson v. The Mayor, &c. of Preston* (L. Rep. 5 Q. B. 218), upon which the defendants relied before the magistrates, was a demurrer to the declaration, in which it was alleged to be the duty of the defendants, as local board of health, to level and repair a public footway, which was, for want of necessary levelling and repairing, ruinous and out of repair, and dangerous to persons lawfully using and passing along the same. And the defendants wrongfully permitted the same to be and remain so ruinous, out of repair, and dangerous, by reason whereof the plaintiff, whilst lawfully using and passing along the public footway, was thrown down and broke his leg. The court, after taking time to consider, gave judgment for the defendants, holding that an action for personal injuries sustained by one of the public, owing to the non-repair of a highway does not lie against a local board of health constituted under the Public Health Act 1848. The same thing was decided with respect to the liability of a vestry appointed under the Metropolis Local Management Act 1855, in *Parsons v. St. Matthew, Bethnal Green* (L. Rep. 3 C. P. 56). These decisions are consistent with *Foreman v. Mayor, &c. of Canterbury* (L. Rep. 6 Q. B. 214), cited as an authority for the plaintiff. There it was held that the defendants were liable as a local board to an action for negligence of their servants, which as it was argued was a misfeasance, not a mere nonfeasance. By sect. 68 of the Public Health Act 1848 (11 & 12 Vict. c. 63) "all present and future streets, being or which at any time become highways within any district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, shall vest in and be under the management and control of the said local board of health. And the said local board shall, from time to time cause all such streets to be levelled, paved, flagged, channelled, altered, and

repaired, as and when occasion may require." The board's duty and liability are more fully explained by sect. 117; "the local board of health within the limits of their district, shall, exclusively of any other person whatsoever, execute the office of and be surveyor of highways, and have all such powers, authorities, duties, and liabilities as any surveyor of highways in England is now or may hereafter, be invested with or be liable to by virtue of his office by the laws in force for the time being, except in so far as such powers, duties, or authorities are or may be inconsistent with the provisions of this Act." [BLACKBURN, J.—The real question in the case seems to be whether the duty to keep this grid in repair was imposed upon the defendants, by the vesting in them of the materials of the road by sect. 68. If it was their duty, the fact of the grid being left unrepaired for six months would surely be negligence.] Hannen, J. concludes the considered judgment of the court in *Gibson v. Mayor of Preston*, by expressing an "opinion that the Legislature did not intend by the Public Health Act 1848, to give to a person in the position of the plaintiff a right of action which did not previously exist."

Appleton, for respondent.—The question is not limited to whether this grid is vested in the defendants under the 68th section of the Public Health Act; we must also consider whether any other duty imposes this liability upon them. By the 43rd section of that Act all sewers "together with all buildings, works, materials, and things belonging or appertaining thereto, shall vest in, belong to, and be entirely under the management and control of the local board of health." And by sect. 45, "the local board shall, from time to time, repair the sewers vested in them by this Act, and may alter or close up sewers." [BLACKBURN, J.—Is this grid a part of the sewer, which the sewer authority is bound to repair?] The case finds that, upon the formation of the local board, the sewer and the grid became vested in and belonged to and were entirely under the management and control of the board of health. This grid was part of the materials and things belonging or appertaining to the sewer. At all events it belongs either to the sewer or the highway, and in either case the defendants are liable. [BLACKBURN, J.—If part of the highway, have the board done more than leave it unrepaired?] As a matter of fact the grid is found to be a part of the sewers, and it is sufficient for the plaintiff if the defendants in either of their capacities are only jointly liable.

Baylis in reply.—The object of this grid is merely to drain the surface water. [BLACKBURN, J.—It flowed into what is a "sewer" by the interpretation clause, sect. 2 of the Act of 1848.] But the grid is part of the highway.

BLACKBURN, J.—This is a case of some nicety and difficulty. I think Mr. Baylis was right in his contention that as part of the highway, the defendants would not be liable for the non-repair of this grid; and I think Mr. Appleton was right in saying that as part of the sewer they would be liable. This is sufficient for the plaintiff, and his verdict, therefore, will stand. I think the local board, whose position is that of the surveyor of highways, is not liable for injury to an individual occasioned by want of repair of the highway; it is the business of the inhabitants, as it was in the time of surveyors, and not the business of the board, to repair the highways. The two cases, one in this

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court, and one in the Common Pleas, *Gibson v. Mayor of Preston*, and *Parsons v. St. Matthew, Bethnal Green*, both decide this. Then the question is whether as owners of this grid the defendants, being the sewer authority, are responsible for the plaintiff's claim. Sects. 43 and 45 give the local board all the sewers and the duties concerning them; and it is found as a fact of the case that both the sewer and the grid are entirely under the management and control of the board of health. It is also found that the grid was placed for the purpose of conveying the surface water off the road into a sewer. This must mean that there were two objects in constructing this communication for the water from the road to the sewer. The water would have flowed through the hole without any grid being placed over it; but the grid in the first place prevents the hole from being dangerous to the use of the highway, which would render it subject to the management of the highway authority; and secondly it prevents the materials of the road being washed into the sewers, which is an advantage peculiar to the sewer authority. One may be said to be a highway purpose, and the other a sewer purpose. As owners of the sewers the defendants have at least a joint liability with themselves as owners of the highways to keep this grid in repair. It is not necessary to say whether their duty as road owners to repair this part of the highway, or to put an end to this nuisance, makes them liable in this action; the fact that they are at least jointly responsible as sewer owners for the condition of this grid, is sufficient ground for the verdict in the plaintiff's favour. Our judgment is for the respondent.

FIELD, J.—I have come to the same conclusion, and I put it on the ground only of this grid's connection with the sewer, and the defendants' joint liability at least, as owners of the materials and things belonging or appertaining thereto. It is not necessary to consider what was the defendants' duty as highway authority.

Judgment for plaintiff.

Attorneys for appellant, *Gregory, Rowcliffe, and Co. for J. F. Taylor, Wigan.*

Attorneys for respondent, *Paterson, Snow, and Burney, for Wright and Appleton, Wigan.*

Wednesday, April 28, 1875.

TOMKINSON v. WEST.

Master and Servants Act 1867 (30 & 31 Vict. c. 141).

—*Contract of service—Married woman.*

A married woman cannot enter into a contract of service within the meaning of the Master and Servant Act 1867 (30 & 31 Vict. c. 141), sect. 2 independently of her husband.

THE question for the opinion of the court in this case was whether a married woman could enter into a contract of service within the meaning of the Master and Servant Act 1867 (30 & 31 Vict. c. 141), without the consent of her husband, so as to give the justices jurisdiction to adjudicate on an information or complaint under that Act. The justices were of opinion that she could not, and dismissed the case against the respondent, a married woman, who had been summoned under sect. 4.

By 30 & 31 Vict. c. 141, s. 2, "The word 'employed' shall include any servant, workman, artificer, labourer, apprentice, or other person, whether under the age of

twenty-one years or above that age, who has entered into a contract of service with any employer. The words 'contract of service' shall include any contract, whether in writing or by parol, to serve for any period of time, or to execute any work." By sect. 3, "Nothing in this Act shall apply to any contract of service other than a contract within the meaning of the enactments described in the first schedule to this Act, or some or one of them, or to any employer or employed other than the parties to a contract of service to which this Act applies as aforesaid," &c.

By section 4, "Wherever the employer or employed shall neglect or refuse to fulfil any contract of service, or the employed shall neglect or refuse to enter or commence his service according to the contract, or shall absent himself from his service, or wherever any question, difference, or dispute shall arise as to the rights or liabilities of either of the parties, or touching any misusage, misdemeanor, misconduct, ill-treatment, or injury to the person or property of either of the parties under any contract of service, the party aggrieved may lay an information or complaint in writing before a justice," on which a summons may be issued.

By sect. 9 two justices can hear and adjudicate on the case, and make such orders as are therein provided.

By sect. 16, "Upon the hearing and determining of any information or complaint between employer and employed, and on any appeal under the provisions of this Act, the respective parties to the contract of service, their husbands or wives, shall be deemed and considered as competent witnesses for all the purposes of this Act."

The respondent did not appear.

Selfe, for the appellants.—The justices were wrong in dismissing the case. The definition of "employed" in the Act is wide enough to include a married woman, and sect. 4 shows that every person within that definition can enter into a contract within the meaning of that statute, so as to become subject to the jurisdiction given to the justices. The use of the words "Their husbands or wives," in sect. 16, shows plainly that it was contemplated by the Legislature that married women should be subject to the provisions of the Act. By the Married Women's Property Act 1870, 33 & 34 Vict. c. 93, ss. 1, 11, the wages and earnings of a married woman are made her separate property, and she is enabled to sue for them in her own name; the "word wages" implies service, and its use in that statute shows that a married woman can enter into a contract of service.

BLACKBURN, J.—In the statute before us the Legislature have not used any words enabling a married woman to enter into a contract of service. It is quite clear that the justices were right in their decision. We cannot say that a married woman is a contracting party within the meaning of the Act.

MELLOR, J., concurred.

Judgment for the respondent.

Attorneys for the appellants, *Day and Hasard, for Day, Ivins, and Co., Kidderminster.*

Wednesday, Nov. 18, 1874.

CHIDLEY (app.) v. CHURCHWARDENS OF WEST HAM (resps.)

Distillery fixtures—Machinery—Tanks and pumps—Rateability.

The premises of a distillery contained tanks which formed the roofs of rooms and houses, boiling backs and mash tuns, lying on brick piers against the walls, which formed the floors of some of the rooms and were connected by pipes to other houses, reservoirs, and other articles necessary for the process of distilling. They were all heavy and either unattached, except by the communicating

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pipes, to the walls or piers upon which they stood, or fastened only by screws for the purpose of being steadied. Each was to be bought and sold as a separate article, and if all were removed the premises might be used for other manufacturing purposes.

Held that these articles were not fixtures, and could not be properly rated in the assessment of the premises to the poor rate.

This was a case stated on appeal against a poor rate upon a distillery occupied by the appellant in the parish of West Ham, covering two and a half acres. The rateable value was 1100*l.*, made up as follows:—land, buildings, machinery, vessels, and apparatus 414*l.*; steam engines 90*l.*; steam boilers and pipes 86*l.* 10*s.*; total 590*l.* 10*s.* These were admitted by appellant to include fixtures, and to be properly rated. There were other items which the appellant contended were not fixtures and not rateable, namely, tanks forming the roofs of three houses respectively valued at 65*l.*; boiling backs, refrigerators, and water heater, valued at 65*l.*; mash tuns, pumps, under backs, wash backs, reservoir, distilling apparatus, valued at 378*l.* 10*s.*; total 508*l.* 10*s.*

The following were the paragraphs of the case which raised the points in dispute:

24. The roof of the malt crushing or meal room is formed by a cast iron tank resting on iron girders 35ft. by 16ft., which is used as a liquor back or water tank; the water is pumped into it by means of pipes connected with a force pump, hereinafter described, in the eight-horse engine-house, and the water passes from this tank to supply the boiling backs, also hereinafter mentioned, by means of pipes connecting them respectively.

25. The boiling water for the mash tuns is heated in wooden vessels called boiling backs by means of steam supplied from the large steam boilers. The boiling house contains three 2½ inch fir wood boiling backs with steam connections. Two of these will contain 20,000 gallons each, the other will contain 26,000 gallons. They stand on wooden girders which lie on brick piers built up close to the walls of the building. There is no flooring under them, but the flooring surrounds them at a distance of about two inches. They are supplied with cold water by pipes passing through the walls of the building from the water tank mentioned in paragraph 24. A pipe from the large steam boilers passes through the walls separating the boiling house from the steam boiler house over the top of each back, and thence into the water inside, through which hot steam for the purpose of boiling the water is spread by means of perforated copper branches radiating from such pipes. Another pipe is bolted on to the bottom of each boiling back which passes through the walls of the building into the tun room, and through which the boiling water is conveyed into the mash tuns; there are valves in such pipes for regulating the supply.

26. The tun room contains two cast-iron mash tuns 28 feet in diameter, with false bottoms and agitating apparatus, driven by the 60-horse steam-engine. The mash tuns are made of plates riveted together and stand upon brick piers about six feet high; they pass through the upper flooring, which surrounds them, at a distance of about two inches; each tun is supplied with hot water by the pipe coming from the boiling backs, which pipe is bolted to the bottom of the tun. The agitating or

mashing apparatus consists of an upright shaft in the middle of the mash tun with branching arms which are made to revolve within the tun by means of a shaft and wheels connected with and worked by the 60-horse engine. There are four iron pipes attached by bolts to the bottom of each mash tun through which pipes the liquid or wort is passed into the cast-iron underback; such pipes are also bolted to the underback. There is also another iron pipe bolted on to the bottom of each mash tun for the purpose of conveying the grains from the mash tun (which is done by means of pumps in the basement of the tun room); this pipe passes through the wall of the building over the top of the roofs, and discharges the grains into the cast-iron tank forming the roof of the grains house.

27. The cast-iron underback stands on the lower floor of the tun room beneath the mash tuns, and is connected with them as above mentioned. Another pipe is also bolted on to the underback through which the worts are pumped by means of another set of pumps in the basement of the tun room, which pipe passes in a similar manner to the pipe for carrying off the grains, and discharges the worts into the other portion of the cast-iron tank forming the roof of the grain house.

28. In the basement of the tun room there are the set of pumps used for pumping the grain as above mentioned from the mash tuns into the grains' receiver, which are worked by the 60-horse engine by means of a shaft or gearing, which passes through the wall dividing the engine-house from the tun room, and another set of pumps for pumping the worts as above mentioned, which are worked in like manner. There is also a single pump used for pumping water into the tank over the meal room, and a set of three pumps used for pumping the spent wash from the wash tanks into the fir wash receiver mentioned in paragraph 40. The single pump and the set of three pumps lastly mentioned are worked by mean of the 3-horse engine described as being in the basement of the tun room.

31. In the 8-horse engine-house there are also several pumps which may conveniently be described here. There is a set of three 7-inch brass barrel wash pumps worked by the 8-horse engine, and used exclusively for pumping the wash from the wash backs above-mentioned to the wash charger. Also a set of three 4-inch wash pumps also worked by the same engine, and used exclusively for the purpose of pumping the wash from the wash charger or from the wash reservoir into the distilling apparatus. They are connected with the wash charger and wash reservoirs by pipes bolted on to them respectively, and with the still by other pipes bolted on to it. There are also two hot feints' pumps worked by the same engine, and used for pumping the hot feints from the feints' receiver, to be presently mentioned, back into the top of the still. They are connected with the feints' receiver by a pipe passing through a wall of the building, and bolted on to the feints' receiver, and with the still by a pipe passing through the upper floor of the building, and bolted on to the top of the still; the lastly mentioned pumps are fastened by bolts through the wall of the building to iron plates on the other side. There is also a force pump worked by the same engine used for supplying water to the steam boilers; such pump is connected on the one side by means of a pipe passing under ground

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to a water reservoir in the grounds, and on the other by a pipe passing through the walls of the building into the steam boiler-house, and connected with the steam boilers.

32. In a tiled lean-to adjoining the 8-horse engine-house there is a fir wash charger for holding 25,000 gallons, with rouser and shafting, which is driven by the last-mentioned engine. The wash charger stands on brick piers, and is used for receiving the wash from the wash back, whence it is brought by means of the 7-inch pumps previously mentioned through the iron pipe which passes through the wall of the building, and is bolted on to the top of the wash charger. At the bottom of the wash charger a pipe is bolted to it connecting it with the wash reservoir, to which the pipe is also bolted, having a branch connected with the 4-in pumps previously described, and by means of which the wash is pumped from the charger into the distilling apparatus.

40. In the grounds there is a fir wash receiver capable of containing 10,000 gallons. A copper pipe passes from the brick wash backs mentioned to a set of pumps in the basement of the tun room, and thence into the fir wash receiver, and by means thereof the wash is pumped from the brick wash backs into the fir wash receiver, whence it is drawn off by means of pipes into casks.

41. All the vessels, machinery, and apparatus hereinbefore described, are necessarily used in the process of distilling now carried on upon the premises, and no portion thereof (except the engine and pumps in the cask store), can be disconnected from the other portions thereof without destroying the continuity of the process now carried out on the premises.

42. Although the operations carried on by the appellant are in that sense continuous from the beginning to the end, it is not essential they should be, for they are really distinct operations, and they become continuous because the product being liquid it is necessarily contained in vessels, and passes from one container or vessel to another by a pipe or conduit of some kind fixed to both containers or vessels, but the whole of the processes are necessary for the production of the raw spirit, and although the machinery, vessels, and apparatus are connected together by the pipes or shoots to the extent and in the manner hereinbefore described, yet they are capable of being easily disconnected and of being altogether removed without altering the buildings, and, in fact, some of them are occasionally taken down for the purpose of cleaning or repair.

43. Wherever in the above description the articles are spoken of as "bolted" or "fastened" together, the mode of connection intended is the ordinary iron screw bolt and nut, which passes through the two materials to be fastened, and the nut of which can be unscrewed and the bolt with drawn, leaving the articles separated. The cast-iron pipes from one room to another are in lengths of a few feet, with flanges bolted together, and the pipes either run through holes in the walls or the doorways made specially for the purpose without in either case touching the buildings in accordance with the excise regulations.

44. It is to be understood throughout the above description that except where fastenings and connections are stated, all the machinery, vessels, and apparatus in dispute are retained in their places by their own weight merely. That before being

connected as described, each of them is a separate and complete article in itself, known in the trade as such. That all of them are bought and sold as separate and complete articles, and that most of them are bought and sold second-hand as well as new.

45. The buildings and premises as they stand at the present time are fitted and of more value for carrying on the business of a distillery than any other business, and they could by removing the present machinery, vessels, and apparatus be adapted to other manufacturing purposes.

47. The court is to be at liberty to draw any inferences of fact, or in case they consider further information is required on any point to remit the case for amendment by the parties or, in case of their differing, by a barrister to be named by the court.

48. A plan showing the situation of the several buildings and machinery and the pipes connecting the same respectively had been prepared and signed by the solicitor for the appellant and respondents respectively, and might be taken and referred to as part of this case.

49. The questions for the opinion of the court were, whether the machinery, vessels, and apparatus hereinbefore described and fully enumerated and valued as in dispute, or any part of them, were liable to be rated.

50. If the court should be of opinion that the whole of such machinery was liable to be rated, then both the rates appealed against were to be confirmed by the court of quarter session.

51. If the court should be of opinion that any portion of such machinery and apparatus is not liable to be rated, then the amount agreed as the rateable value of such portion or portions is to be deducted from the said sum of 1100*l.*, and the residue after such deduction is to be taken as the rateable value of the premises for the said rate made the 3rd Jan. 1872, instead of the said rateable value of 1100*l.*, and the said rate is to be amended accordingly by the said court of quarter sessions; and if the amount of such deduction be not more than 300*l.*, in that event the said rate made the 28th June 1871, is to stand confirmed by the quarter sessions at 800*l.*

52. If the amount of such deduction be more than 300*l.*, then the residue of the 1100*l.*, after such deduction, is to be taken as the rateable value of the premises for the said rate made the 28th June 1871, instead of the said rateable value of 800*l.*, and the said last-mentioned rate is also to be amended accordingly by the said court of quarter sessions. The court is to deal with the question of the costs of and relating to the said appeals and this case, and determine by whom and in what proportions the same are to be borne.

M. Chambers, Q.C. and Beasley, for appellant, contended that none of the disputed articles were annexed to the freehold, but merely stood by their own weight, and differed in no respect from ordinary chattels in a house or warehouse, which clearly were not rateable.

E. Clarke and Banbury, for the respondents, contended that though not annexed to the freehold, still these heavy articles were part of the entire system of apparatus and machinery used in the business, and so were rateable:

R. v. Lee, 8 L. T. Rep. N.S. 437; L. Rep. 1 Q. B. 241;
R. v. Guest, 7 A. & E. 951;

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R. v. Birmingham and Staffordshire Gas-light Company, 6 A. & E. 634;
R. v. North Staffordshire Railway Company, 30 L. J. 68, M. C.

Chambers, Q.C. replied.

BLACKBURN, J.—In this case, which is perhaps not so stated as to bring out the precise point intended to be or which might have been raised, the court is asked if certain articles described are liable to be rated. There is no difficulty as to the rule of law on the subject, though there is considerable difficulty in applying the rule. Whatever is fixed to the realty so as to pass as landlord's fixtures in a demise of the premises must be taken to be part of the premises for the purpose of ascertaining its rateable value. The question what kind of fixtures comes under this description is treated at length in *Holland v. Hodgson* (26 L. T. Rep. N. S. 709; L. Rep. 7 C. P. 328). In that case it is stated that the question must depend "mainly on two circumstances, as indicating the intention, viz. the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel. See *Wiltshire v. Cottrell* (1 E. & B. 674), and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land. See *D'Eyncourt v. Gregory* (L. Rep. 3 Eq. 382). Thus blocks of stone placed one on the top of another without any mortar or cement, for the purpose of forming a dry stone wall, would become part of the land, though the same stones, if deposited in a builder's yard, and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it never was intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the ship-owner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels; and that on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas delivered by Maule, J. in *Wilde v. Waters* (16 C. B. 637). This, however, only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy the onus. In some cases, such as the anchor of the ship or the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shows it is only

fastened as a chattel temporarily, and not affixed permanently, as part of the land. But ordinary trade or tenant fixtures which are put up with the intention that they should be removed by the tenant (and so are put up for a purpose in one sense only temporary and certainly not for the purpose of improving the reversionary interest of the landlord) have always been considered as part of the land though severable by the tenant. In most, if not all, of such cases the reason why the articles are considered fixtures is probably that indicated by Wood, V.C. in *Boyd v. Shorrocks* (17 L. T. Rep. N. S. 197; L. Rep. 5 Eq. 72), that the tenant indicates by the mode in which he puts them up that he regards them as attached to the property during his interest in the property." Now I am not prepared to say that the various articles described in the present case may not be taken into account as enhancing the value of the premises, but that question is not asked, and we are only to say whether the things are rateable. That depends, as is stated in *Holland v. Hodgson* (*ubi sup.*), on whether they are annexed to the freehold, and if they are annexed in a certain sense, with what intent they were so annexed. Applying these rules it appears by the case that all the articles are chattels, well known in the trade, and sold separately both as new and as second hand. They are not attached to the premises except in the sense that the weight of the article keeps it steady, and though one or two are screwed down and some attached to pipes, which again are attached to steam-engines, or to what are clearly fixtures, this alone will not make them fixtures. I thought at first that the two pumps were annexed to the freehold, but with some hesitation I now think they are not so annexed as to come within the rule. They are bought as independent chattels, and though screwed down while used, still they can easily be unscrewed and again sold as chattels; and as the rest of the court clearly hold they are not annexed to the freehold, I agree with them. All the items thus are nothing more than chattels which rest and steady themselves by their own weight or with the slight assistance of a screw, and are not fixtures, and not rateable as part of the premises. Our judgment must, therefore, be for the appellant.

LUSH, J.—I am of the same opinion. These cases are always difficult, owing to the things being often almost and yet not entirely fixtures. Still I think that none of those here described are fixtures. Looking at the 44th paragraph of the case, it is admitted that these things are chattels, and are capable of being severed and sold again as chattels. I do not think from the description given of the works that they are so annexed as to become part of the soil. As to the pump, I think it is not fixed, and that as it is capable of being sold again, and is fixed merely to steady it, it cannot be treated as a fixture. As to the tanks on the roof, they are not fixtures, and though it is said they form the roof itself of the buildings, still all that this means is that, while they are there, no other roof is required. That circumstance does not make them so annexed as to cease to be chattels. On all the other points I agree.

QUAIN, J. and ARCHIBALD, J., concurred.

Judgment for appellant.

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LEWIS (app.) v. ARNOLD (resp.).

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Saturday, May 1, 1875.

LEWIS (app.) v. ARNOLD (resp.).

Owner of lands and buildings—Occupier of land—Haystack—Expense of fire engine—The Towns Police Clauses Act 1847 (10 & 11 Vict. c. 89), s. 33.

The respondent was owner of a haystack, which caught on fire and was entirely consumed. During the burning a fire engine was sent from the neighbouring town, and played upon the fire until the water supply was exhausted.

Held, that the respondent was liable for the expense of the engine's attendance, as "the owner of the lands and buildings where such fire shall have happened," under 10 & 11 Vict. c. 89, s. 33, if he was occupier of the land on which the haystack stood; but not if he was merely permitted to keep the haystack on the ground where he had lately purchased it.

This was a case stated by two of her Majesty's justices of the peace in and for the county of Kent, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on a question of law which arose as hereinafter stated.

At a petty session holden at Tunbridge Wells, in the said county, on the 29th Dec. 1873, a complaint was heard, which was preferred by the said Thomas Lewis, as clerk to the local board of health for the town of Tunbridge Wells, being a district to which the Public Health Act 1848, and the Local Government Act 1858, have been duly applied (hereinafter called the appellant), against the said George Arnold (hereinafter called the respondent) under sect. 129 of the Public Health Act 1848, charging that on the 9th Aug. then last, the commissioners of the said local board did send, or cause to be sent (pursuant to sect. 83 of the Towns Police Clauses Act 1847) to a haystack in the parish of Tonbridge in the said county, and of which said haystack the said respondent was the owner, a certain fire engine, with its appurtenances and firemen, for the purpose of extinguishing a fire there. That in so sending the said engine, with its appurtenances and firemen, the said commissioners had incurred certain costs, charges, and expenses, amounting together to the sum of 12l. 7s. And that a difference had arisen between the said commissioners and the said respondent as to the liability of the said respondent to pay the said costs, charges, and expenses, as well as to the propriety of sending the said engine and firemen as aforesaid.

On the hearing of the said complaint the appellant appeared in person and the respondent by his attorney, and having heard the evidence adduced by the appellant, and the respondent's defence thereto, the justices dismissed the said complaint.

And whereas the appellant, being dissatisfied with this determination upon the hearing of the said complaint, as being erroneous in point of law, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to the justices in writing to state and sign a case setting forth the facts and the grounds of such determination as aforesaid, for the opinion of this court, and duly entered into a recognisance, as required by the said statute in that behalf.

Therefore the said justices, in compliance with the said application and the provisions of the said statute, stated and signed the following case:

It was proved that on the 9th Aug. 1873, an order was received at the police station at Tun-

bridge Wells, from a labourer in the respondent's service, but having no direct authority from the respondent for that purpose, that the town fire engine was to go to Southborough, which is outside the limits of the town of Tunbridge Wells, to extinguish a fire caused by the burning of a haystack belonging to the respondent. The engine, with its appurtenances and firemen, was at once despatched to Southborough, was set to work, and played upon the haystack until the water supply was exhausted, when the engine and firemen returned to Tunbridge Wells, leaving the stack to burn itself out.

It was also proved and admitted by both the appellant and respondent that the respondent was the occupier only of the land on which the haystack was standing, and that there were no buildings of which he was either owner or occupier in danger of taking fire.

An account of the charges made by the local board for the use of the engine, for the attendance of the firemen, and of the actual expenses which the board had incurred in so sending the engine and firemen, was made and delivered to the respondent, who refused to pay them, and this complaint was accordingly made.

The respondent, by his attorney, objected that the justices had no jurisdiction in the case, as the 33rd section of the Towns Police Clauses Act 1847, which is incorporated with the Local Government Act 1858, whilst authorising the commissioners to send their fire engine beyond the limits of the town, enacts that "the owner of the land or buildings where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred," &c., and that, as the respondent was not the owner of the land on which the stack was standing, but only the owner of the stack itself, he was not within the terms of the Act, as a haystack could not be held to be a building.

The justices were of opinion that the engine and firemen had been properly sent to the fire, and that the charges made for the use of the engine, for the attendance of the firemen, and for the expenses incurred, were fair and reasonable.

They were further of opinion that the word "building," in the Towns Police Clauses Act, could not be so construed as to include a stack of hay, and as it appeared to them, therefore, that the respondent was not "the owner of the lands or buildings" where the fire happened, they dismissed the case.

The question of law arising on the above statement was, whether, under the true construction of the 33rd section of the Towns Police Clauses Act 1847, the local board were entitled to recover from the respondent upon the information and complaint the charge for the attendance of the engine.

And the court was humbly solicited, according to the power vested in the court by the said statute 20 & 21 Vict. c. 43, to remit the case to the said justices, with the opinion of the court thereon, or such other order as to the court might seem fit.

H. Matthews, Q.C., argued for the appellant, the complainant.—The Town Police Clauses Act 1847 (10 & 11 Vict. c. 89), s. 32, gives power to commissioners to provide fire engines, firemen, horses, and necessary buildings; and by sect. 33: "The commissioners may send such engines with their

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appurtenances, and the said firemen, beyond the limits of the special Act, for extinguishing fire in the neighbourhood of the said limits; and the owner of the lands or buildings, where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred, and shall also pay to the commissioners a reasonable charge for the use of such engines with their appurtenances, and for the attendance of such firemen; and in case of any difference between the commissioners and the owner of the said lands or buildings, the amount of the said expenses and charge, as well as the propriety of sending the said engines and firemen as aforesaid for extinguishing such fire (if the propriety thereof be disputed), shall be determined by two justices, whose decision shall be final; and the amount of the said expenses and charge shall be recovered by the commissioners as damages." The word "owner" is not defined in that statute, and it should be taken to apply to anyone benefited by the extinction of the fire; at all events, the occupier of the land, as the respondent is found by the case to be, is sufficiently within the meaning of the word "owner" to be liable under this section. He might also be liable as the owner of a building.

F. H. Scott, for the respondent.—A haystack cannot be a building, and the only occupation of the land which the respondent had was a license to leave this stack which he had purchased where it was until he could carry it away. [MELLOR, J.—That does not appear in the case.] If the case be remitted to the justices it can be proved.

Matthews, Q.C., in reply.

MELLOR, J.—We must take the case as it stands, although the nature of the respondent's occupation is not clearly stated. We will express our construction of the section, so that the justices may determine the liability upon the facts which they may further find when the case is remitted to them. The respondent certainly is not the owner of a building; but we consider that if he occupied the land on which the haystack was standing, he was sufficiently the owner of the land to be liable for the appellant's claim, under the 33rd section of 10 & 11 Vict. c. 89, and ought to have been so treated by the justices. If, however, he had merely purchased the stack as it stood, and it was burnt during the time he had the vendor's licence to leave it on his land, he could not be either an occupier or an owner of the land. The case will be remitted, as requested by the justices.

LUSH and QUAIN, JJ., concurred.

Attorneys for appellant, *Carr, Bannister, Davidson, and Morris*.

Attorneys for respondent, *Brady and Scott*.

Thursday, May 27, 1875.

FITTON (app.) v. WOOD (resp.).

Occupier of a workshop—Employer of a child—Sub-contract—The Workshops Regulation Act 1867 (30 & 31 Vict. c. 146), s. 16.

Respondent was the occupier of and rated for a brickyard, and had sole control over the sale of the bricks. He received a sum per annum for the use of the yard from a contractor, who gave his exclusive services in making bricks at a certain price per thousand; the respondent found the coal, but exercised no control over the manage-

ment of the brickyard or of the manufacturing process, nor was he party or privy to any contract with any other person employed in the yard. Held, upon a case stated by justices, that the respondent was not liable, as an occupier of a workshop who has employed a child, for neglecting the provisions of sect. 16 of the Workshops Regulation Act 1867, with respect to a child employed by the contractor.

THIS was a case stated by two justices of the peace in the county of Worcester, under 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them as hereinafter stated.

At a petty sessions holden at the Shire Hall, Worcester, in and for the Worcester division of the county of Worcester, on the 4th Aug. 1874, an information was laid by Edward Brown Fitton, sub-inspector of factories (hereinafter called the appellant) against Joseph Sharman Wood (hereinafter called the respondent), under sect. 16 of 30 & 31 Vict. c. 146, charging "for that he the said Joseph Sharman Wood, on the 11th July 1874, at Grimley, in the county of Worcester, being then and there the occupier of a certain brickmaking workshop (the same being a workshop within the true intent and meaning of the Workshops Regulation Act 1867), did unlawfully employ one Henry Hooper, a child under the age of thirteen years, for a longer period than fourteen days without having on Monday in every week during the employment of such child obtained from the principal teacher of some school a certificate that the said child so employed as aforesaid had in manner required by the said Act attended school during the preceding week, whereby the said Joseph Sharman Wood had forfeited for the said offence a penalty of not more than 3*l.*," and was heard and determined by the said justices, the said parties respectively being then present, and upon such hearing the justices dismissed the said information.

The justices, in compliance with the application of the appellant and the provisions of the said statute, stated and signed the following case:

Upon the hearing of the information, it was admitted on the part of the respondent that he was the occupier of a brickyard at Grimley in the information mentioned, in which the said Henry Hooper was employed as hereinafter stated, and was duly rated to the poor rate for the same, and that the bricks were made for him, and that he had the sole control over the sale of them.

It was proved that the respondent received from one Adam Callow 18*l.* per annum for the use of the brickyard, and that the said Adam Callow contracted with him to give his exclusive services in brick making, and to make bricks therein at certain prices per 1000, according to the class of bricks, the respondent finding coal for burning the said bricks.

That the respondent exercised no control over the management of the said brickyard or of the manufacturing process carried on therein, which were under the exclusive control of the said Adam Callow, and the respondent was not party or privy to any contract with any person employed in the said brickyard other than the said Adam Callow, nor did the said Henry Hooper work thereby his request.

That the said Adam Callow employed one Wm. Callow to assist him in manufacturing bricks in the said brickyard, which was not divided inter-

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nally, but for the convenience of trade the said Adam Callow and William Callow manufactured the bricks made by them respectively in separate and distinct parts of the said brickyard. The said Adam Callow and William Callow respectively engaged, paid, and dismissed the respective persons whom they respectively required to assist them in the manufacturing process. The said Henry Hooper was so engaged by the said William Callow, who paid him his wages and with whom he worked in that part of the brickyard used by him.

That the said Henry Hooper was so working for one month previously to the 11th June 1874, during all which time he was under the age of thirteen years, and had not attended any school whatsoever within the hours required by the statute, nor had any such certificate as is mentioned in the information been obtained by or from any person whatsoever.

The justices dismissed the information on the following grounds:

1. That under the circumstances above stated the word "workshop" must be taken to mean that part of the brickyard in which the said Henry Hooper actually worked exclusively of the rest, and did not apply to the whole brickyard; and that the respondent was not the "occupier" of that part of the brickyard within the meaning of the statute.

2. That in order to constitute the person summoned "an employer" of a child under the statute, the child employed must work at his request or under some contract to which he is party or privy. But the said Henry Hooper did not work at the request of the respondent or under any contract to which he was party or privy.

The opinion of this honourable court is humbly prayed as to whether the justices were right or not in point of law.

Bowen (with him *McKellar*) argued for the appellant, the informant.—With regard to the second ground of their decision, the justices seem to have misconceived the effect of the Workshops Regulation Act 1867 (30 & 31 Vict. c. 146). It contains nothing requiring a formal contract on the child's part, as was recognised by this court in *Beadon v. Parrott* (L. Rep. 6 Q. B. 718); there a child under the age of eight years was sent to the respondent to be taught to make straw plait and to read. The child's mother provided straw and paid the respondent 3d. a week. The mother received and sold all the plait made by the child; it was held, notwithstanding, that the respondent had employed the child, in breach of sect. 6, sub-sect. 1, of the Act. The following definitions appear in sect. 4: "Parent shall mean parent, guardian, or person having the custody of or control over" any child or young person. "Employed shall mean occupied in any handicraft, whether for wages or not, under a master or under a parent, as herein defined." "Workshop shall mean any room or place whatever, whether in the open air or under cover, in which any handicraft is carried on by any child, young person, or woman, and to which and over which the person by whom such child, young person, or woman is employed, has the right of access and control." By sect. 7: "If any child, young person, or woman, is employed in contravention of this Act, the following consequences shall ensue: First, the occupier of the workshop in which such child, young person, or woman is employed, shall

be liable to a penalty of not more than 3l.; second, the parent of or the person deriving any direct benefit from the labour of, or having the control over the child, young person, or woman, shall be liable to a penalty of not more than 20s., unless it appears to the court before whom the complaint is heard that the offence has been committed without the consent, connivance, or wilful default of the parent or person so benefited or having such control." Sect. 14 enacts that, "The following regulations shall be made (subject to the provisions hereinafter mentioned) respecting the education of children employed in workshops: (1) Every child who is employed in a workshop shall attend school for at least ten hours in every week during the whole of which he is so employed." (2) [This clause and the provisos are not material]. Sect. 15 enacts that, "The parent of every child employed in a workshop shall cause that child to attend school in manner required by this Act." By the 16th section: "Every occupier of a workshop who has employed a child for any time amounting in the whole to not less than fourteen days, shall, on Monday in every week during the employment of such child, obtain from the principal teacher of some school a certificate that the child so employed has, in manner required by this Act, attended school during the preceding week, if attendance at school was so required during that week. . . . The employer shall keep the said certificate for one month, and shall produce the same to any inspector or sub-inspector of factories whenever required by him during that period. Every person who acts in contravention of this section shall be liable to a penalty of not more than 3l." [BLACKBURN, J.—No doubt this was a workshop within the meaning of the Act, but how can the respondent be the occupier who has employed this child?] The general idea of the Act is, that the occupier shall be responsible for all employment on his premises. Here the respondent is admittedly the occupier of the brickyard. [MELLOR, J.—It seems that the respondent had the control over the bricks when made, but that he had none over the management of the brickyard.] If the respondent be not liable under this 16th section, who in this case can be? Callow was not the occupier of the workshop, and therefore comes neither within the 7th nor 16th sections. [BLACKBURN, J.—If a woman lived in a lodging and employed her children in contravention of this section, it would be hard if the landlord could be convicted.] The woman in that case would be sufficiently an occupier, but that cannot be said of Callow here. The Legislature could not have intended that a sub-contract should prevent the application of this section; and this does not differ from any contract by piecework. [MELLOR, J.—Why cannot Callow be occupier for the purposes of this section?] If so, it will be very difficult to enforce its provisions. According to the definition of "workshop," the employer is the person who has the right of access and control to and over the place where the handicraft is carried on; and the justices, although they find that the respondent has no control over the management of the brickyard, do not exclude him from the words of the definition. Under sect. 7, the occupier is responsible for all the children, young persons, and women on his premises, by whomsoever employed. [BLACKBURN, J.—Sect. 16, however, imposes this duty only upon the occupier who employs a child.] The

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employment may be said to be under the respondent.

Holl appeared for the respondent, but was not heard.

BLACKBURN, J.—As the Act stands, there can be no doubt the justices were right. The respondent, even if the occupier of a workshop within the meaning of the Act, cannot be said to have employed this child, when he has had nothing at all to do with the employment.

MELLOR and QUAIN, JJ., concurred.

Judgment for the respondent.

Attorney for the appellant, *The Solicitor to the Treasury*.

Attorneys for the respondent, *Ellis and Co.*, for *F. Bentley*, Worcester.

Thursday, May 27, 1875.

REG. v. THE VESTRY OF THE PARISH OF SAINT MATTHEW, BETHNAL GREEN.

Public Libraries Act 1855 (18 & 19 Vict. c. 70)—Meeting of ratepayers—Right to demand a poll.

Where the question is put to a meeting of ratepayers held under the Public Libraries Act 1855 (18 & 19 Vict. c. 70), s. 8, whether the Act shall be adopted for the parish, a poll can be demanded as of right.

At a meeting so held a resolution was proposed that the Act be adopted. The chairman put the question, and declared the resolution carried by show of hands. Certain ratepayers demanded a poll, which the chairman refused. At a subsequent meeting the vestry declared the resolution invalid in consequence of such refusal, and declined to act upon it.

Held, that a poll was demandable of right, and a rule for a mandamus to compel the vestry to carry out the resolution discharged.

A RULE had been obtained calling on the vestry of the parish of St. Matthew, Bethnal Green, to show cause why a writ of *mandamus* should not issue commanding them to do all things necessary to carry out the resolution passed at the meeting of ratepayers of the said parish held 7th Dec. 1874, for the purpose of determining whether The Public Libraries Act 1855 should be adopted for the said parish.

By The Public Libraries Act 1855 (18 & 19 Vict. c. 70), s. 8, "Upon the requisition in writing of at least ten ratepayers of any parish having such a population as aforesaid (5000), the overseers of the poor shall appoint a time, not less than ten days nor more than twenty days from the time of receiving such requisition, for a public meeting of the ratepayers, in order to determine whether this Act shall be adopted for the parish. . . . And if at such meeting two-thirds (now more than one half, 29 & 30 Vict. c. 114, s. 5) of the ratepayers then present shall determine that this Act ought to be adopted for such parish, the same shall come into operation in such parish. . . . Provided always, that in any parish where there shall not be a greater population than eight thousand inhabitants by the then last census, it shall be lawful for any ten ratepayers to deliver a requisition by them signed, and describing their place of residence, to the overseers or one of the overseers of the said parish, requiring the votes of the ratepayers at such meeting to be taken, according to the provi-

sions of the Act passed in the fifty-eighth year of the reign of King George the third, chapter sixty-nine, and the votes at such meeting shall thereupon be taken according to the provisions of the said last-mentioned Act of Parliament, and not otherwise."

The Act there cited (Sturges Bourne's Act) is an Act for the regulation of parish vestries, and provides for the manner of voting in vestries.

There were about 17,000 ratepayers in this parish.

On 19th Nov. 1874, a requisition was received by the overseers of the poor signed by thirteen ratepayers of the parish, requiring a public meeting of the ratepayers to be called in order to determine whether the Act should be adopted for the parish. The meeting was duly held on the 7th Dec., and a resolution was proposed for the adoption of the Act. This resolution was put to the meeting, and on a show of hands the chairman, who was the rector of the parish, declared that it was carried. A poll was demanded by nine ratepayers, but was refused by the chairman. At a meeting which took place on the 17th Dec., the vestry, by the advice of the vestry clerk, passed a resolution declaring the resolution passed at the meeting of the 7th Dec. invalid, on the ground of the chairman's refusal to grant a poll, and declining to act on it.

Poland (Dixon with him) showed cause.—The resolution of the 7th Dec. is void, because of the chairman's refusal to grant a poll. Under Sturges Bourne's Act (58 Geo. 3 c. 69), s. 3, it is clear from numerous authorities that the proper way of taking the vote at a vestry meeting is by a poll, and that a poll is demandable as of right. The object of the provisions of the section now in question is to obtain the true sense of the persons interested, which can only be done by a poll, especially in a parish where there are such a large number of ratepayers. The words "two-thirds of the ratepayers then present" do not affect the right to demand a poll, for under the Highway Act (5 & 6 Will. 4, c. 50), s. 18, where the words are "it shall be determined by a majority of two-thirds of the votes of the vestrymen present at such meeting as aforesaid," it has been held that a poll is demandable.

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[COCKBURN, C.J.—It is clear, as a general proposition, that a poll can be demanded, but the question is, does the latter part of this section override the general rule? There are no express words to that effect.

The court called on *C. Bowen* and *C. Crompton* in support of the rule.—The cases relied on by the other side are generally cases of vestry meetings proper, but this is not a vestry meeting, but a special meeting created by a particular Act of Parliament for a particular purpose. The intention of the Act is that the persons who heard the discussion should decide the question. In *Reg. v. The Vestrymen and Churchwardens of St. Pancras* (11 A. & E. 15) the court appears to have been of opinion that on the nomination of inspectors to act in the election of vestrymen under 1 and 2 Will. 4, c. 60, the right course for the chairman to adopt, on receiving a requisition to take steps for ascertaining the numbers who had voted on each side, was to divide the meeting, and not to take a poll. [COCKBURN, C.J.—Does the present section admit of any other construction than that it does not exclude the common law right to demand a poll?]

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The intention to exclude a poll is shown by 29 & 30 Vict. 114, an Act to amend this Act, for the preamble recites that it is expedient to assimilate the laws relating to public libraries in England and Scotland, and by sect. 7 "so much of sect. 6 of the Public Libraries Act (Scotland) 1854 (17 & 18 Vict. c. 64) as authorises the demanding of a poll," is repealed. This shows that the Legislature considered that a poll was not demandable in England. [COCKBURN, C.J.—That may only show that the draughtsman did not properly interpret the English Act.] An earlier Act, 13 & 14 Vict. c. 65, which provided for taking the votes by means of voting papers, is repealed by the present Act; this alteration shows that it is no longer intended that the whole of the ratepayers shall have the opportunity of voting.

COCKBURN, C.J.—I am of opinion that the rule ought to be discharged. Generally speaking, wherever a decision is come to by a public body on a matter of public interest, and where the right of voting turns on a question of qualification, the rule, which has been established by a series of decisions, and which is entirely in accordance with common sense, is that a poll is demandable as of right by any person entitled to vote, who is dissatisfied with the conclusion arrived at by the president of the meeting. The law is thus stated by Tindal, C.J. in delivering the judgment of the Court of Exchequer Chamber in *Campbell v. Maud* (5 A. & E. at page 879). "We think such right" that is, the right to demand a poll, "is, in point of law, a necessary incident or consequence to the mode of election by show of hands, wherever it is not by special custom excluded. Independently of any authority upon the subject, the recourse to a poll where the population of the parish is large, appears to be the only mode of ascertaining with precision the numbers of those who vote on each side and the right of each elector to vote. Again, it is under the same circumstances the only mode by which each individual elector can have the power of expressing his opinion at all; for in the case of populous parishes no vestry room can be large enough to contain the whole body. Still further, where the election is carried on with any warmth of popular feeling, it is the only mode by which a large portion of the community can express their opinion with freedom and security." He then goes on to cite the following passage from *Anthony v. Seger* (1 Hag. Cas. Cons. Court 13). "Where a poll is demanded the election commences with it as being the regular mode of popular elections; the show of hands being only a rude and imperfect declaration of the sentiments of the electors. It often happens that on the show of hands a person has a majority which on a poll, is lost in a minority; and if parties could afterwards recur to the show of hands there would be no certainty or regularity in elections. I am of opinion, therefore, that when a poll is demanded it is an abandonment of what has been done before; and that everything anterior is not of the substance of the election, nor to be so received." It is true that Sir William Scott is there speaking of the election of churchwardens, but the same general principles, and the same reasons founded on expediency, apply equally to such a case as the present. The general law being so, the question which we have to decide is whether the right to demand a poll is excluded by the provisions of the statute. This right had been declared to exist in

a series of cases, among which were the cases I have already referred to, and *R. v. D'Oyley* and *R. v. Hedger* (12 A. & E. 139), all of them anterior in point of date to this Act, and I think that the Legislature cannot have intended to exclude it, but that the effect of the Act was to leave the general law on the subject as it was before. The cases which have been decided as to vestries show that on the words of the section now in question only one construction can be put, which is that any ratepayer, who is dissatisfied with the decision of the chairman may ask for a poll, and is entitled to it as of right. We have been pressed with the subsequent Act (29 & 30 Vict. c. 114), passed, as is stated in the preamble, to assimilate the law of Scotland and England on this subject, and it is said that the provisions of this Act show that the construction which we think ought to be put on the earlier Act is not what the Legislature considered the correct one; but a parliamentary exposition of the meaning of a statute is not conclusive on this court, unless it is embodied in a declaratory Act. In the present case the Act which we have to interpret admits of only one exposition; it is true that whoever framed the subsequent Act appears to have thought that the Scotch Act gave the right to demand a poll, but that under the English Act this right did not exist, but this was clearly a mistake. There is nothing to lead us to the conclusion that we ought to put that construction on the Act of 1855, so we cannot make the rule absolute, nor say that the vestry must give effect to what took place at the meeting of the 7th Dec.

LUSH and FIELD, JJ. concurred.

Rule discharged without costs.

Attorneys for the prosecution, *Shaen, Roscoe, and Massey*.

Attorney for the vestry, *R. Voss*.

COURT OF COMMON PLEAS.

Reported by ETHERINGTON SMITH and J. M. LELY, Esqrs.
Barristers-at-Law.

Jan. 18 and 25, and April 15, 1875.

WALSH v. THE BISHOP OF LINCOLN.

Quare impedit—*Simony*—12 Anne, Stat. 2, c. 12, s. 2—Purchase of an estate, *pur autre vie*, in an advowson—Next presentation—Presentation of himself by patron.

A purchase of an estate for life in an advowson is not a purchase of the next avoidance of, or presentation to, any benefice or cure of souls within sect. 2 of 12 Anne, Stat. 2, c. 12, so as to render the presentation of himself by the purchaser (being in other respects idoneus) void by that statute, or the contract simoniacal.

The first, even if it be manifestly the only exercise of his right by the purchaser of an advowson, whether *pur autre vie* or in fee, is not a next presentation within the above statute.

At common law, the purchaser of an estate *pur autre vie* in an advowson, may, no less than the purchaser of an advowson in fee, offer himself to the ordinary, and pray to be admitted on a vacancy occurring; and the bishop, provided only if he be a fit and proper person in holy orders, is bound to institute him, and has no discretion to refuse.

The plaintiff, a clerk in holy orders, purchased from the tenant for life his life estate in the advowson

of a rectory in 1859. In May 1873, during the lifetime of the tenant for life, the incumbent died, and in June 1873 the tenant for life died. The plaintiff, within the proper time presented or offered himself to the bishop for institution to the living, but the bishop (the defendant) refused to admit, on the grounds (1) that the vacancy caused by the death of the incumbent was the next and only avoidance which accrued to the plaintiff after the purchase of his advowson, and that therefore his presentation of himself was void by 12 Anne, Stat. 2, c. 12, s. 2; and (2) that as a patron cannot present himself, but can only offer himself and pray to be admitted, the bishop has a discretion whether he will admit him or not.

Held on demurrers to pleas raising these points, that (1) the contract between the plaintiff and the tenant for life was not a simoniacal contract within the statute, and (2) there was no objection to the plaintiff presenting himself for institution, and the defendant upon his so offering himself was bound to admit him.

The declaration, dated the 29th Jan. 1874, was as follows:

Lincolnshire to wit.—William Walsh (a priest in holy orders), by John Symons Bockett, his attorney, sues the Right Reverend Christopher, Lord Bishop of Lincoln, for that whereas heretofore and on the 1st day Jan. A.D. 1821, Sir Richard Sutton, baronet, was seized as of fee tail of and in the manor of Great Coates, in the County of Lincoln, and the advowson of the rectory of the parish church of Great Coates, thereto belonging, and for that afterwards, to wit, on the 1st Feb. A.D. 1820, by an indenture of bargain and sale then made between the said Sir Richard Sutton, and Dame Mary Elizabeth, his wife, of the first part, William Bainbrigg of the second part, Alexander Henderson Macdougall, Esq., of the third part, Francis Chaplin, Esq., and Thomas Burch Watson, Esq., of the fourth part, and William Fitzwilliam Burton, Esq. of the fifth part, and afterwards enrolled in Chancery the said Sir Richard Sutton for the purpose of barring the estate tail of him the said Sir Richard Sutton therein granted, bargained, sold, and confirmed unto the said William Bainbrigg, his heirs and assigns, certain manors, advowsons, and other hereditaments in the County of Lincoln, including the said manor and advowson of Great Coates, to hold the same unto and to the use of the said William Bainbrigg, his heirs and assigns, to the intent that the said William Bainbrigg might become perfect tenant of the freehold in order that common recoveries might be suffered, wherein the said Alexander Henderson Macdougall should be demandant, the said William Bainbrigg tenant, and the said Sir Richard Sutton vouches, who should vouch over the common vouches; and in the said indenture was a declaration that the said recoveries should enure to the use of the said Sir Richard Sutton and his assigns for the term of his life, and subject thereto to the use of the first son of the body of the said Sir Richard Sutton on the body of the said Dame Mary Elizabeth, his wife, to be begotten, and the heirs male of the body of such first son issuing, and subject thereto to certain other uses therein mentioned, and for that afterwards, to wit, in Hilary Term 1820, a common recovery in due form of law was accordingly suffered of the said manors and advowsons and hereditaments, including the said manor and advowson of Great Coates in pursuance of the said indenture wherein the said parties were so respectively demandant, tenant, and vouches as aforesaid, and the said vouches vouched over the common vouches; and a writ of seizing was thereupon awarded to the said Alexander Henderson Macdougall, as by the record and proceedings thereof remaining in this court of our Lady the Queen of the Bench here more fully appears; and thereby and by virtue thereof, and of the said indenture, and of the statutes for transferring uses into possession, the said Sir Richard Sutton became and was seized for the term of his natural life, of the said manor of Great Coates, in the county of Lincoln, with its appurtenances, and of the said advowson of the rectory of the parish church of Great Coates; and being so seized thereof, he afterwards, to wit, on the 4th Dec. A.D. 1820, presented to the said

church then being vacant, one Henry Houson, the younger, his clerk, who on the presentation of the said Sir Richard Sutton, was admitted, instituted, and inducted into the same in the time of peace in the time of our Sovereign Lord George IV., King of Great Britain. And for that afterwards, to wit, on the 17th Dec. A.D. 1844, by an indenture then made between the said Sir Richard Sutton, of the first part, John Sutton, therein described as being and who in fact was the first and eldest son of the said Sir Richard Sutton, by Dame Mary Elizabeth Sutton, his late wife, then deceased of the second part, and the Rev. Joseph Bankes Wright, and John Tidd Pratt, of the third part, the said Sir Richard Sutton, and the said John Sutton, for the purpose of barring and discharging the estate tail of the said John Sutton, therein did grant, bargain, sell, release, and confirm unto the said Joseph Bankes Wright, and John Tidd Pratt, their heirs and assigns (amongst other lands and hereditaments), the said advowson of the rectory of the parish church of Great Coates, to hold the same freed from such estate tail to the use of the said Sir Richard Sutton and his assigns during his life, and subject thereto to the use of the said John Sutton and his assigns during his life, with certain remainders in the said indenture mentioned, whereby the said Sir Richard Sutton became seized of the said manor and advowson for the term of his natural life, and subject thereto the said John Sutton became entitled to the same for the term of his natural life; and further that afterwards and on the 14th Nov. 1855, the said Sir Richard Sutton died so seized as aforesaid, upon whose death the said manor and advowson vested in the said John Sutton (who then became Sir John Sutton, baronet), and he became and was seized thereof for an estate in possession for the term of his natural life; and being so seized thereof for life as aforesaid, he the said Sir John Sutton, by an indenture dated the 21st Dec. A.D. 1859, and then made between the said Sir John Sutton of the one part, and the plaintiff of the other part, for the consideration of 3000*l.* paid by the plaintiff, granted and confirmed to the plaintiff and his assigns the advowson of the rectory of the church aforesaid, and the right of patronage and presentation thereto during the life of the said Sir John Sutton, by virtue whereof the said plaintiff became and was seized of the said advowson as in gross by itself as of right for the term of the natural life of the said Sir John Sutton; and the said plaintiff being so seized thereof, the said church afterwards and during the continuance of the natural life of the said Sir John Sutton, to wit, on the 30th May, A.D. 1873, became vacant by the death of the said Henry Houson, whereby it then and there belonged and still belongs to the said plaintiff to present or otherwise legally require institution for a fit clerk to the said church, being so vacant as aforesaid; but the defendant, the said bishop, will not permit him, but unjustly hinders him, wherefore the plaintiff says he is injured and hath sustained damages to the value of 10,000*l.*, and therefore brings suit, &c.

To this declaration the defendant, on the 5th Feb. 1874, pleaded, first, that the said church in the declaration mentioned is within his diocese of Lincoln, and is a benefice with cure of souls, and that he hath not and doth not claim to have anything in the said church, except the admission, institution, and induction of parsons to the said church, and such other things as belong to the ordinary of the place as ordinary; and the defendant further says that the plaintiff purchased at the date and for the consideration in the declaration stated the advowson of the rectory of the said church, and the right of patronage and presentation thereto during the life of Sir John Sutton as in the declaration stated, and was seized of the said advowson for the term of the natural life of the said Sir John Sutton, as in the declaration stated, and did not purchase nor was seized of the said advowson for any other or greater estate; and that the said church having become vacant by the death of Henry Houson, as in the declaration stated, afterwards, and whilst the same continued

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vacant, the plaintiff being so seised as aforesaid, to wit, on the 12th Nov. 1873, by a writing under his hand bearing date, to wit, the day and year last aforesaid, presented himself to the defendant as being such ordinary as aforesaid for admission to the said church, and requested the defendant, as such ordinary, to institute and induct him to the said church. And the defendant further says that the said vacancy caused by the death of the said Henry Houson was the next and only avoidance of the said church which happened or accrued to the plaintiff after his purchase of the said advowson for the term aforesaid, and that the said Sir John Sutton died on the 5th June 1873. And the defendant further says that by virtue of an Act made and passed in the 13th year of the reign of Queen Anne, cap. 11, intituled "An Act for the better maintenance of Curates within the Church of England, and for preventing any such persons from buying the next avoidance of any church preferment," such presentation of himself by the plaintiff, as aforesaid, became and was utterly void, frustrate, and of no effect in law; and any admission or institution of the plaintiff thereon would have been utterly void, frustrate, and of no effect in law; and the defendant, by reason thereof, could not admit and institute the plaintiff to the said church by virtue of his presentation of himself, as aforesaid, and refused to admit and institute the plaintiff thereto, and that the hindrance of the plaintiff's right, in the declaration stated, is the said refusal of the defendant and no other. In the second plea the defendant similarly disclaimed except as ordinary, the allegation being that the plaintiff offered himself to the defendant as being such ordinary as aforesaid for admission to the said church, and prayed the defendant, as such ordinary, to admit and institute him thereto. The plea then continued: And the defendant afterwards, to wit, on the 20th Nov. 1873, refused, as he lawfully might, to admit and institute the plaintiff to the said church; but the defendant was always then and henceforth until and including the 30th Nov. 1873, ready and willing to admit and institute a fit clerk other than the plaintiff himself, upon the presentation of the plaintiff, of which the plaintiff had notice, and that the hindrance of the plaintiff's right in the declaration stated is the said refusal of the defendant to admit and institute the plaintiff as aforesaid, and no other.

Demurrers to both pleas and joinder in demurrer.

B. Shaw (A. J. Stephens, Q. C., with him) in support of the demurrers.—The plaintiff here, having bought the advowson from the tenant for life, is not within the statute of Anne, which deals only with the purchase of the next presentation. Upon the first plea the question, therefore, is, Can a man who so buys the advowson be said to purchase the next presentation to, or avoidance of, a benefice within that statute. The distinction between an advowson and a presentation is most clear, the one being realty, the other personalty; and though this is not an advowson in fee, it is not treated in the books as making any difference, for advowson in fee is not mentioned, but advowson simply, which would therefore include this. *Fearn's* opinion, quoted in *Bythewood's Conveyancing*, vol. 1, 568, is, "I do not apprehend that statute at all affects the case of a purchase of the perpetuity of the advowson, or affects the right of presentation in

that case." In *Prideaux's Conveyancing*, vol. 1, p. 346, it is stated, "If, however, the church be not vacant at the date of the purchase, the purchaser of an advowson in fee, if he is a clergyman, may present himself on the next vacancy." Lord St. Leonards, in his *Handy Book on Real Property Law*, 8th edit., p. 122, says: "A clergyman is prohibited from buying a presentation for his own preferment, but he may purchase the advowson itself, and upon a vacancy cause himself to be presented." The words here are quite general, and these authorities show what is the recognised state of the law in the construction of the statute. The second plea is bad on the face of it, as no reason is assigned for the refusal to admit the plaintiff. It is also concluded by the case of

Marshall v. The Bishop of Exeter, 18 L. T. Rep. N. S. 376; L. Rep. 3 H. L. 17.

The court then called on

W. G. F. Phillimore, for the defendant.—The two pleas raise two distinct defences: first the transaction was simony within the statute of Anne. That statute, I say, forbids, in the case of the purchase of the advowson in fee, of the presentation of himself by the patron on the first vacancy. This is even a stronger instance of the mischief against which the statute was directed, for the plaintiff practically bought only one presentation. The title of the Act is important; it is for preventing any ecclesiastical persons from buying the next presentation to any preferment. That being the object, it makes no difference if persons buy the next, plus a definite or indefinite number of presentations. Equally are they forbidden to present themselves on the first avoidance. As to the construction of penal statutes, he cited *The Gauntlet* (26 L. T. Rep. N. S. 45; L. Rep. 4 P. C. at p. 191.) Though advowson is not mentioned in the statute, the words "take, procure, or accept the next presentation to, or avoidance of a benefice," show what was meant. Neither directly nor indirectly was the next avoidance to be procured. [Lord COLERIDGE, C. J.—You have here two admittedly different things—personal and real property. There are penal consequences on purchasing the one; how can we import into the Act the same on purchasing the other?] As to the opinion of textbook writers, I may set off *Dart's Vendors and Purchasers*, vol. 1, p. 225, against those cited on the other side. On the second branch of the argument upon the statute, assuming the court not to hold that a first presentation of himself by the purchaser of the advowson is within it, does not this case come within it clearly because of the death of Sir John Sutton, the tenant for life, before presentation? At the time of presentation, the plaintiff, therefore, knows that it is the only as well as the next avoidance. It is the act of presentation after purchase that makes the matter simoniacal: an advowson is only an indefinite succession of presentations, and here the man knows at the time he presents himself that he has bought only one presentation; his doing so makes, therefore, the purchase simoniacal. If this be not so, the statute is useless; for a man will buy an advowson in fee, or *pur autre vie*, and sell all but the next presentation, and present himself. On the second plea the defence is this: A patron cannot present himself, he can only offer himself and pray to be admitted, and the ordinary has a discretion whether he will admit him or not. The plea raises this defence, for it shows that the only institution re-

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fused is that of the plaintiff himself, who appears on the record to be the patron. There has been no presentation, only a prayer for admission, and the ordinary has a right to refuse that. A presentation must be in writing (see Hodgson's Instructions, p. 28), but a tender of himself by a patron is a well-known and distinct form in practice. The bishop would have no option but to refuse on presentation; but there are other words in the declaration—"or otherwise legally require institution"—which are quite new, and show that this case is an experiment, and are so wide as to make it difficult to know what to meet. To establish the proposition that no man may present himself, see Phill. Eccles. Law, p. 403, citing *Heckar's case* in the Year Book, 13 Hen. 8, 2. [Lord COLERIDGE, C.J.—Have you any case which is not that of a corporation?] Yes, but throughout *Heckar's case* it will be seen that the assumption was that a man cannot present himself, and the question really raised was whether the presentation of the provost by the college was such a presentation. The case of the *Bishop of Ossory* in Davy's Rep. 76, *Le Case de Commenda*, is to the effect that a man must show that he is presented by some one to fill the church, otherwise there is no plenarty. Again, in *Potter v. Chapman* (Ambler 98), Lord Hardwicke says: "It was made a doubt whether in case of the death of Dr. Paul, the defendant would not be incapable of any of these options, for he could not present himself, and after the death of the incumbent he cannot assign the trust. It was said in answer that he may offer himself; but in Watson's Complete Incumbent (a very well wrote book) the reason why he cannot present himself is said to be because it would not create a plenarty. I have no doubt of it; never was clearer in my opinion." The passage in Watson whom Lord Hardwicke thus praises is cap. 20, p. 222. In *Heckar's case* it is said distinctly that, though the corporation cannot present its head, it can one of the fellows (per Brooke, J., p. 13). [Lord COLERIDGE, C.J.—*Heckar's case* is decided on the ground that the same person cannot fill two capacities. The plaintiff does not do that here. You are trying to turn the highly technical rule into a substantial reason why he should not have the living.] I say that the plaintiff being obliged to pray institution, it is in the bishop's discretion whether he grants it or no. [GROVE, J.—Is there any case of refusal by the bishop? has he ever exercised his discretion against the applicant?] I do not know of one, but in Gibson, 2nd ed. 794, the discretion is implied. [Lord COLERIDGE, C.J.—When Gibson states a thing on his own authority it could hardly be stated on less, so Sir Michael Foster said. His authority was certainly set aside in *Marshall v. The Bishop of Exeter*.] In Ayliffe's Parergon, 412, the statement is explicit: "And thus the patron is not at the bishop's beck, whether he will admit him or not, as in the former case." That is when the patron prays the ordinary to admit him. See Rogers' Eccles. Law, page 543, and Cripps, 565. Mallory on Quare Impedit, p. 76, says: "If three be seized of a manor to which an advowson is appendant, and two of the three present the third grantee being a clerk, that is a good presentment, though all three were joint tenants, and only two of them joined in the presentment, because the third person cannot present himself." (*Sir Godfrey*

Fuljambe's case, Moore 4.) This precarious system is not authorised except by the practice laid down in the books, and therefore the statements with reference to it must be taken in their entirety. As to the canon law, the only way in which we can tell whether it has been in any points adopted into the common law or not, is by observing whether its principles have been acted on. In *Heckar's case* on this point it seems to have been recognised. If the prayer for institution were a mere form, surely there would be some case to show it, or some text writers would have so laid it down; but in the absence of either authority, is this clearly not a first experiment to question the discretion which the bishop has always exercised?

B. Shaw in reply.—This is, I contend, the first occasion on which a bishop has claimed a right of discretion. He cited

Storis v. The Bishop of Winchester, 9 C. B. 62;
Bunting v. Lepingwell, 2 Coke, 355.

There is the analogy of copyholds, where the law dispenses with that which in the nature of things cannot exist. The plea disclaims except as ordinary; but how can the ordinary, as ordinary, refuse a fit person? See Hobart 317, Godolphin 255. Is not this analogous to counter-pleading the patron's title, which he may not do? That which I contend is the law, and has always been the practice, may be supported also on the ground of public convenience, and a hard and dry rule which touches only the form ought not to be stretched so as to prevail against the plaintiff's right, which has been taken away by no statute, and is recognised as existing in all the cases cited.

Cur. adv. vult.

The judgment of the court, Lord Coleridge, C.J., Keating, Grove, and Denman, JJ., was delivered by

Lord COLERIDGE, C.J.—This was an action in the nature of a *quare impedit* brought by the plaintiff, a clerk in holy orders, against the Bishop of Lincoln. The material facts as disclosed by the pleadings, were as follows: Sir John Sutton became, under certain family settlements, seised for an estate for his own life, in amongst other things the advowson of the Rectory of Great Coates in the County of Lincoln. This advowson Sir John Sutton conveyed by deed in and during his own life for the sum of 3000*l.* to the plaintiff, who thereupon became seised of the advowson as in gross by itself as of right for the term of the natural life of Sir John Sutton. During the lifetime of Sir John Sutton the incumbent died, "whereby" (in the words of the declaration which it becomes here important to set out) "it then and there belonged, and still belongs, to the said plaintiff to present or otherwise legally require institution for a fit clerk to the said church, being so vacant as aforesaid. But the defendant the said bishop will not permit him, but unjustly hinders him." The defendant has pleaded two pleas. In the first he states the facts of the purchase by the plaintiff as already mentioned, and goes on to say that the vacancy caused by the death of the last incumbent was the next and only avoidance of the church, which happened or accrued to the plaintiff after his purchase of the said advowson for the term aforesaid. He further says that by the 13th of Anne (I presume he means the Act which stands in the statute book as the 12th Anne, Stat. II. c. 12), such presentation of himself by the

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plaintiff as aforesaid, became and was utterly void, frustrate, and of no effect in law, and any admission or institution of the plaintiff thereon, would have been utterly void, frustrate, and of no effect in law, and that therefore he could not institute the plaintiff, and refused to do so. The second plea is, we are inclined to think, insufficient as it stands, because it omits to state with clearness and precision the grounds of the bishop's refusal. But it is not material to discuss this point. It was held in this court, in *Marshall v. The Bishop of Exeter* (*ubi sup.*), that the provisions of the Common Law Procedure Acts apply to *quare impedit*, and as both parties here are agreed that the broad point intended to be raised is whether any patron can lawfully present himself, we should have amended the plea if necessary to raise that point, and we proceed to deal with it on the assumption that it does raise it, and that it states that, for the simple reason that the owner of the advowson presented himself, the bishop refused to institute him. Now these pleadings raise, and were intended to raise, two points. First. Whether there had been by the plaintiff in this case the purchase of a next presentation, so as to make the contract between Sir John Sutton and the plaintiff a simoniacal contract within the 12th clause stat. II. c. 12 s. 2, and to be followed by the consequences pointed out in that statute. And secondly, whether what had been done by the plaintiff was a presentation of himself to the bishop so as to make it a bad and void presentation. As to the first point it was not argued before us at any great length. In truth, it seems to us untenable. The statute of Anne is pointed at a specific evil, and uses words apt for the prevention of the evil which it is intended to prevent. The title, which is no part of the statute, but which often throws light upon it, describes the act as one *inter alia* "for preventing any ecclesiastical persons from buying the next avoidance of any church preferment." The statute is one of a number passed *in parimateriâ*, and in several of them (*e.g.*, 1 Eliz. c. 6.) both next presentations and advowsons are mentioned and distinguished from one another. It is a penal statute, and the rule that penal statutes are to be strictly construed, and that there must be a clear case to make a man subject to a penalty is, I apprehend, in full force; and certainly, if it is a right rule in any class of statutes, it is right in those which relate to simony, for it cannot be said that the law upon this subject is in a state at all satisfactory to common sense or right feeling. There may no doubt be cases of simony in which the moral baseness is obvious enough. But there may be cases—there have been, probably, in everyone's experience—in which, though the laws against simony have been technically transgressed, the transgressors have been men of high character and pure motives, and the transgression itself, but for the law, has been an act free from any taint of moral evil. In such a subject matter, therefore, it would be contrary to principle to extend the words of a highly penal statute which uses terms of art to cases not included within the terms so used. Now the statute enacts that "if any person shall for any sum of money—and so forth—take, procure, or accept the next avoidance of or presentation to any benefice with cure of souls, &c., then every such presentation or collation, and every admission, institution, investiture,

and induction upon the same shall be utterly void, frustrate, and of no effect in law, and such agreement shall be deemed and taken to be a simoniacal contract," and then the section proceeds to set out the penalties. Now this, for the reasons already given, is the purchase of an advowson, and not of a next presentation, and is not therefore within the words of the statute. But it is said, though not within the words, this case is within the spirit. In such a statute as this the words are the spirit, and the interest purchased was a freehold interest, and the number of presentations which might in fact take place under the purchase was wholly uncertain and unascertained. Advowsons are one thing, real property descending to the heir; next presentations are another, personal property, and passing to the executors and administrators. *Bennell v. The Bishop of Lincoln* (8 Burgh. 550). The statute of Anne uses the term next presentation, and avoids the use of the term advowson, and the purchase of an advowson is therefore not within it. No case was cited to us in which the point had been decided, but it is not denied that the general practice and the general understanding is against the defendant. The opinions of Mr. Fearn and Lord St. Leonards are as high authority as men's opinions can be, and they are with the plaintiff. It was argued, however, as an advowson contained in it the right of next presentation, that for the plaintiff to use an advowson for an object which he could not have purchased from the owner of the advowson brings him within the words of the statute. An ingenious but untenable argument, for, as has been pointed out, advowsons and presentations are well known to the Legislature, and the first exercise of his right by the purchaser of an advowson must always be, in one sense, and as far as the purchaser is concerned, a next presentation; and yet such a next presentation is, if not intentionally, yet clearly omitted from the provisions of the statute. The first point, therefore, fails the defendant, and there must be judgment against him upon the demurrer to the first plea. The second point is, on a first view, more tenable, for it is apparently supported by the authority of text writers, and decided cases are appealed to as warranting the statements of the text books. The passage on the subject in Burn's Ecclesiastical Law, title, "Benefice, Presentation to," is copied with scarcely the change of a word from earlier authorities, and is as follows: "No person may present himself, and this is according to the rule of the canon law. But the books of common law say that, although a patron cannot present himself in form, yet he may offer himself to the ordinary and pray to be admitted, and that such admission may be good. But the more legal and regular way is to make over the right to some other before the avoidance." The passage then goes on to state how the law is where the right of presentation is vested in more persons than one, and this connection is important when we come to examine the reasons given for the rule. We need not discuss the canon law. By that law no doubt a multitude of restrictions, and this amongst them, were placed upon the rights of patrons. But if not recognised by the courts of law as part of the law of England, such canonical restrictions cannot be binding upon patrons of livings when seeking to enforce their common law rights. "In the law of the realm it (*i.e.*, the canon) bindeth not," says the doctor to

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the student, p. 229. When, therefore, we come to examine what objections have been allowed to presentations of themselves by patrons and upon what grounds, we find that the course which has been pursued in this case avoids the objections which have been allowed, and has never in itself been held open to objection in courts of law. The authorities cited by Burn for the general proposition are copied, like the proposition itself, from earlier books. And they are really reducible to the case which is cited as *Heckar's case*, a case to be found reported in this court in the Year Book of 13 Hen. 8, and in the Court of Error in the Year Book of the following year. Brooke's Abridgment, Corporations 34, is also cited; but this, when looked at, turns out to be only an abstract of the case just mentioned in the Year Books. The authority of the case is, no doubt, recognised by Lord Hardwicke in *Potter v. Chapman* (Ambler 98), and by the various text writers, who, both before and since his time, have laid down the proposition in the same terms and supported it by the same authorities. I may observe in passing that the great authority of Sir John Davis, to which we were referred by Mr. Phillimore, is not one of these. In the case of the Bishop of Ossory the arguments are reported, and Sir John Davis expressly says (p. 83), that no judgment was ever given in the case. Thus the sole authority for the proposition, as far as the common law courts are concerned, is the case in the Year Book of Henry 8, and when that is examined the decision turns upon a technical point; that the same person cannot be donor and donee, and therefore, when a corporation presents to a living it can indeed present any of its members except its head, but that the head (in *Heckar's case* the master of an incorporated hospital), as he is necessarily mentioned in the description of the patron, cannot also be the presentee. It is on this ground a technical though sufficient one, and one entirely beside the canonical restriction, that the courts of law have admitted the rule of which *Heckar's case* is but an example. But here, as the defendant's plea shows, there has been no presentation strictly so called. The patron has, in the very words of the text books, offered himself to the ordinary and prayed to be admitted. To such a proceeding the technical objection against presentation does not apply, and there is none of substance. It is admitted that this is the first occasion on which a bishop has refused to institute on this ground. It is admitted that the understanding of lawyers and the unbroken practice is the other way. Yet it is contended that in the case of a patron to whom an advowson has descended as part of an ancestral property, and who is himself a clerk of unquestionable fitness for the living, if the patron offers himself and prays to be admitted, it is in the absolute discretion of the bishop, without assigning any reason, to admit or to reject him. For such a proposition there is no shadow of authority; it is contrary to the principles on which the rights of patrons have always been upheld in these courts; and we are certainly not prepared to make a precedent which would seem to us to be entirely anomalous. We may observe that, by the admission of the defendant's counsel, the objection of the bishop is one of the merest form. If the plaintiff had conveyed the advowson to a trustee in trust to present a clerk on his the plaintiff's nomination, and if the

plaintiff had nominated himself, the trustee would have been bound to present the plaintiff and the bishop to institute him. The substance of the transaction would have been exactly the same, and the practical importance, therefore, of the bishop's contention, even if in this particular case he could have succeeded, has, if it exists, altogether escaped our view. But with this we are not concerned; our duty is simply to declare the law, as, after the best inquiry and consideration, we find it to be. And we think that the second plea, like the first, fails the defendant, and that there must upon the demurrers to both pleas be judgment for the plaintiff.

Judgment for the plaintiff.

Attorneys for the plaintiff, *Bockett and Sons.*

Attorneys for the defendant, *Walters, Young, Walters and Deverell.*

BAIL COURT.

Reported by R. A. KINGLAKE, Esq., Barrister-at-Law.

Wednesday, May 5, 1875.

LEICESTER WATERWORKS COMPANY v. OVERSEERS AND CHURCHWARDENS OF PARISH OF CROPTONE.

Poor rate — Reference to arbitration — Refusal to abide by award — Replevin bond.

An assessment committee made a poor rate upon the plaintiff's property in excess of the amount which the plaintiffs considered to be the rateable value. The plaintiffs gave notice of appeal. Both parties then agreed to refer the matter to arbitration, and to be bound by the decision of the umpire. The umpire did not make his award for three years, during which time the plaintiffs were compulsorily obliged to pay the poor rate. The umpire made his award and declared that the plaintiffs were overrated and that the defendants should repay to them the sums in excess which they had been obliged to pay under compulsion. The defendants refused to consider the award as valid, and when the next rate was made distrained upon the plaintiff company under a magistrate's warrant. The company replevied, and afterwards moved that the replevin bond might be delivered up.

Held, that the proceedings of the defendants were against good faith, they having agreed to be bound by the award, and that the replevin bond might be given up at the plaintiffs' instance. London and North Western Railway v. Bedford (17 Q. B. 978), followed.

RULES calling upon the defendants to show cause why all proceedings should not be stayed, and why a replevin bond should not be delivered up to the plaintiffs or their attorneys. The facts were as follow:—

The Leicester Waterworks Company having completed a reservoir and mains at Barrow-upon-Soar, the overseers of the parishes in which the company had erected works, forwarded to the assessment committee a supplemental valuation list in which the company was assessed for poor law purposes at certain rates, which were considered by the company to be too high. The company having given notice of appeal, the case came on for hearing on the 21st Nov. 1871, when it was resolved to employ a competent valuer to make a valuation of the works and mains. On the 12th March 1872, the waterworks company not being able to come to a satisfactory arrange-

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ment with the assessment committee, gave notice of appeal to the quarter sessions. The appeals were accordingly duly entered for hearing at the next general quarter sessions, and were respited. A meeting was afterwards held on the 8th June 1872 at the offices of the company to prevent, if possible, further litigation, and it was then resolved that all questions in relation to the rating of the company's works and mains passing through the several parishes of the union, should be submitted to two arbitrators with a view to their adjusting the matters in dispute, and, in case of their failing so to do, with power to appoint an umpire whose decision should be final. On the 29th June 1872, an agreement of reference was accordingly entered into between the company and the assessment committee on behalf of the guardians, granting power to the arbitrators to call in an umpire in case of their disagreement, whose decision should be final; and it was also therein agreed that the parties thereto would severally observe, fulfil, perform, and keep the certificate or award of the arbitrators or umpire of and concerning the premises and matters referred to therein, and also it was agreed that the submission to arbitration should not be revocable by either party, and that it should be made a rule of court. The arbitrators accordingly entered upon the reference, and being unable to agree called in an umpire.

The umpire did not make his award until the 31st Jan. 1874, during which time the appeals were respited from session to session. In the meantime the company had invariably refused to pay the rates, and on each occasion the overseers were compelled to summon the company, when, an order having been made by the justices, the company paid the poor rate and took a special receipt.

By the award of the umpire dated the 31st Jan. 1874, he decided that the value of the premises of the company as then standing in the rate books should be reduced, and he gave directions that the rate books of the parishes should be altered accordingly to make the rateable value correspond with the amounts awarded; and also he further determined that the company should be repaid by the overseers out of the next effective rate, the differences between the rates as assessed upon the amounts so awarded by him and the rates as assessed upon the amounts of rateable value heretofore entered in the rate book.

The next rate was made and published on 2nd May 1874, upon the reduced amount, and the overseers refusing to be bound by the award, or to repay the money due to the company as directed, issued a summons before the justices, and obtained a warrant of distress against the waterworks company. The goods having been seized, the company gave notice that they intended to replevy the same, and proposed in lieu of a replevin bond with sureties to deposit such amount as the Registrar of the County Court should deem sufficient to cover the rate and damage, and the probable costs of an action, on condition that they should at once commence an action in the Court of Queen's Bench against the overseers of the poor. A writ was accordingly issued, to which the defendants appeared; upon which the above motion to stay the action and deliver up the replevin bond was made last term by *Alfred Wills*, Q.C., against which

Joseph Brown, Q.C. with him *W. Willis* showed cause.—The umpire has exceeded his authority.

The question is whether the overseers are to give credit for sums of money overpaid before the award is made.

A. Wills, Q.C.—There is a case on all fours with this one, but curiously it is not referred to in the digests, nor could I find it in the text books. I refer to the *London and North Western Railway Company v. Bedford* (17 Q.B. 978).

BLACKBURN, J.—The defendants have agreed to lay by on the faith of an award, and then when they find it is against them they refuse to act upon it. When parties hold out that they will abide by an award, it is only just and equitable they should do so. The rule must be made absolute.

MELLOR, J.—Without expressing any opinion on the conduct of the defendants in not abiding by the award after their submission to an arbitration, I am of opinion that this case is governed by the case of the *London and North Western Railway Company v. Bedford* (17 Q.B. 978).

Rule absolute.

Attorneys for the plaintiff: *J. B. Hawby*, Leicester.

Attorneys for the defendant: *Sadler* for *Goole*, Loughborough.

CROWN CASES RESERVED.

Reported by *JOHN THOMPSON*, Esq., Barrister-at-Law.

Saturday, May 29, 1875.

(Before *KELLY*, C.B., *BLACKBURN* and *BRETT*, J.J., *CLEASBY*, B., and *ARCHIBALD*, J.)

REG. v. BURTON.

Vexatious Indictment Act (22 & 23 Vict. c. 17), s. 1.—Offence upon which committed—*Misdemeanor*—*Aider and abettor*.

B. was summoned before justices for aiding and abetting S. to obtain money by false pretences, and both S. and B. were committed to take their trial, S. on the charge of attempting to obtain money by false pretences, and B. on the charge of aiding and abetting S. to commit that offence.

At the sessions, an indictment against S. and B. for jointly attempting to obtain money by false pretences was preferred, without the leave required by the Vexatious Indictment Act, and found by the grand jury, upon which S. and B. were tried jointly, and S. acquitted and B. found guilty.

At the trial the objection was taken and overruled, that the indictment having been preferred against B. for an offence upon which he had not been committed for trial, the indictment should be quashed; and after verdict, another objection was taken and overruled that S., the principal, having been acquitted, B., an aider and abettor, could not be found guilty:

Held, by this court, that the Vexatious Indictment Act (22 & 23 Vict. c. 17), s. 1, was inapplicable, as that applied only to the offence of "obtaining money or other property by false pretences," and not to the offence of "attempting to obtain money or other property by false pretences."

Held, also, that the second objection was untenable, as in misdemeanor all were principals.

CASE stated by *John Peter Mulcaster*, barrister-at-law, for the opinion of the Court of Crown Cases Reserved.

George Summers and *George Burton* were tried before me, sitting as deputy recorder at the Easter

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Quarter Sessions of the Peace holden in and for the borough and county of Newcastle-upon-Tyne, on the 9th April 1875, upon an indictment, of which the following is a copy :

The jurors for our lady the Queen upon their oath present that George Summers and George Burton, on the 2nd Feb. 1875, unlawfully and knowingly did falsely pretend to Joseph Cabry that the said George Summers, on the 29th Jan. 1875, had taken, paid for, and received from the North-Eastern Railway Company at Newbiggin-by-the-Sea, a certain first class passenger return ticket between Newbiggin-by-the-Sea and Newcastle-upon-Tyne, No. 569, and by means of one-half of such first class return ticket, No. 569, he the said George Summers had travelled by the said North-Eastern Railway Company's railway from Newbiggin-by-the-Sea to Newcastle-upon-Tyne, and on the night of the said 29th Jan. in the year aforesaid, he the said George Summers, having in his possession the remaining half of the said first class return ticket No. 569, had been turned out of a first class carriage at the Newcastle Station of the said North-Eastern Railway, and in consequence thereof, having lost the train, he the said George Summers had been compelled to hire a conveyance to convey him, the said George Summers, to Newbiggin-by-the-Sea at an expense of 2*l.*, by which said false pretences they the said George Summers and George Burton then unlawfully did attempt to obtain from the said North-Eastern Railway Company the sum of 2*l.*, with intent to defraud. Whereas in truth and in fact the said George Summers, on the said 29th Jan. 1875, had not taken nor paid for, nor received from the North-Eastern Railway Company at Newbiggin-by-the-Sea a certain 1st class passenger return ticket between Newbiggin-by-the-Sea and Newcastle-upon-Tyne, No. 569, nor did he the said George Summers on the said day and year, by means of one-half of such first class return ticket, No. 569, travel by the North-Eastern Railway Company's railway from Newbiggin-by-the-Sea to Newcastle-upon-Tyne, and the said George Summers had not on the night of the said 29th Jan. in the year aforesaid, the remaining half of the said first class return ticket, No. 569, and the said George Summers was not whilst in the possession of the said remaining half of the said first class return ticket, No. 569, turned out of a first class carriage at the Newcastle Station of the North-Eastern Railway, nor did he the said George Summers, in consequence of being so turned out of a first class carriage, lose the train, nor was he after being so turned out whilst in possession of the said remaining half of the said first class return ticket, No. 569, compelled to hire a conveyance to convey him the said George Summers to Newbiggin-by-the-Sea at an expense of 2*l.*, as they the said George Summers and George Burton did then falsely pretend to the said Joseph Cabry, and the said George Summers and George Burton at the time they so falsely pretended as aforesaid, well knew the said pretences to be false against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.

The summons which was issued against Burton, and on which he appeared before the magistrates, and on which he was committed for trial, was, so far as it is material, in the words and figures following, that is to say :

Borough and county of Newcastle-on-Tyne, to wit.—To George Burton, of Bedlington, in the county of Northumberland, station master. Whereas, information hath this day been laid before me, the undersigned, one of her Majesty's justices of the peace in and for the borough and county of Newcastle-upon-Tyne, by John Sutcliffe, of Headlam-street, in the said borough and county, railway policeman, for that you, between the 29th Jan. and the 2nd Feb. 1875, at the parish of St. Nicholas, in the borough and county aforesaid, unlawfully did aid, abet, counsel, and procure the commission of a certain misdemeanor by one George Summers, by him then committed, that is to say, to unlawfully attempt and endeavour unlawfully and knowingly, by certain false pretences, to obtain of and from the North-Eastern Railway Company the sum of 2*l.* in money, the moneys of the said North-Eastern Railway Company, with intent to cheat and defraud, contrary to the form of the statute in such case made and provided, &c., &c.

The defendants were committed for trial upon a warrant, which was put in evidence, and of which the following is a copy :

Warrant of commitment.

Sessions. Borough and county of Newcastle-upon-Tyne, to wit.—To all sergeants at mace and constables of the borough and county of Newcastle-upon-Tyne, and to the keeper of the common gaol at Newcastle-upon-Tyne, in the said borough and county :

Whereas, George Summers and George Burton were this day charged before me, the undersigned, one of her Majesty's justices of the peace in and for the borough and county of Newcastle-upon-Tyne, on the oath of Daniel James, of Leazes-lane, in the said borough and county, sergeant of police, and others, for that he, the said George Summers, on the 2nd Feb. 1875, at the parish of St. Nicholas, in the said borough and county, unlawfully did attempt and endeavour unlawfully and knowingly, by certain false pretences, to obtain of and from the North-Eastern Railway Company the sum of 2*l.* in money, the moneys of the said North-Eastern Railway Company, with intent to cheat and defraud contrary to the form of the statute in such case made and provided; and for that he the said George Burton, between the 29th Jan. and the said 2nd Feb. 1875, at the parish and borough and county aforesaid, unlawfully did aid, abet, counsel, and procure the commission of a certain misdemeanor by the said George Summers, by him then committed, that is to say, for that he the said George Summers, on the said 2nd Feb. 1875, at the parish of St. Nicholas, in the said borough and county of Newcastle-upon-Tyne, unlawfully did attempt and endeavour unlawfully and knowingly, by certain false pretences, to obtain of and from the North-Eastern Railway Company the sum of 2*l.* in money, the moneys of the said North-Eastern Railway Company, with intent to cheat and defraud, contrary to the form of the statute in such case made and provided.

These are, therefore, to command you the said sergeants at mace and constables, some or one of you, to take the said George Summers and George Burton, and them safely to convey to the said common gaol at Newcastle-upon-Tyne aforesaid, and there to deliver them to the keeper thereof, together with this precept; and I do hereby command you, the said keeper of the said common gaol, to receive the said George Summers and George Burton into your custody in the said common gaol, and there safely keep them until they shall be thence delivered by due course of law.

Given under my hand and seal, at the police court in the said borough and county, this 13th March 1875.

JOHN J. HUNTER.

It was objected on behalf of the defendants, in the first instance, that the provisions of the Vexatious Indictment Act (22 & 23 Vict. c. 13) had not been complied with, and that the indictment was not cured by 30 & 31 Vict. c. 35. It was a fact that the prosecutor had not been bound to prosecute or give evidence against the defendants on any other charge than that which is set out in the commitment, and the defendants had not been committed or been bound by recognisance to appear to answer to an indictment to be preferred against them for any offence other than that set forth in the said commitment, and the indictment had not been preferred by the direction or with the consent in writing of a judge of one of the Superior Courts of Law at Westminster, or of her Majesty's Attorney-General or Solicitor-General for England, and my consent as deputy recorder had not been procured to the presentment of the said bill of indictment to the grand jury.

The counsel in this prosecution cited the 24 & 25 Vict. c. 94, s. 8, which enacts, "that an aidor and abettor of a misdemeanour may be tried, indicted, and punished as a principal offender."

I overruled the objection. (The case then proceeded to state the evidence upon which several points were reserved, but which it is not necessary

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to report.) The jury found Summers not guilty, and Burton guilty.

The case for the prosecution had been that Summers and Burton were principals, and on the finding of the jury I was requested on behalf of Burton to enter a verdict of not guilty on his part, on the ground that as he had been committed and tried as an accomplice, although indicted as a principal, he could not be convicted when the principal was acquitted.

I directed the verdict of guilty to be entered.

Burton has not been sentenced, and has been admitted to bail until the decision of this honourable court has been obtained on the points of law raised.

The points submitted to this honourable Court are: First, whether or no, having regard to the charge on which Burton was committed to take his trial, leave to prefer the above-mentioned indictment should have been obtained under the Vexatious Indictment Act; secondly, whether or no the jury, having acquitted the principal Summers, it was competent for the jury to convict Burton. If the court is of opinion that, under the circumstances, Burton was properly tried on the above indictment, and was under the circumstances properly convicted, the verdict of guilty is to stand; otherwise a verdict of not guilty is to be entered, or the conviction is to be quashed.

(Signed) JOHN P. MULCASTER,
Deputy Recorder.

No counsel was instructed to argue for the prosecution.

John Edge, for the prisoner Burton.—The prisoner was not properly tried upon this indictment. The Vexatious Indictment Act (22 & 23 Vict. c. 17), s. 1, enacts, "that no bill of indictment 'for obtaining money or other property by false pretences' shall be presented to or found by a grand jury unless the prosecutor or other person presenting such indictments has been bound by recognisance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to, or detained in custody, or has been bound by recognisance to appear to answer to an indictment to be preferred against him for such offence," &c. Burton was summoned to appear before the magistrate on the charge of aiding and abetting the commission of the misdemeanor by Summers of attempting by false pretences to obtain the sum of 2l. from the North-Eastern Railway Company, and he was committed for trial upon that charge. Burton could only, therefore, be indicted upon that charge by virtue of the above Act, unless leave had been obtained to indict him as a principal, which leave was not obtained. This indictment is one for attempting to obtain money or other property by false pretences, and though not expressly named in sect. 1 of the above Act, it must be considered to be included by implication in the words "for obtaining money or other property by false pretences," which would include the offence of attempting to obtain money or other property by false pretences. [KELLY, C.B.—That is not so. The Act specifies certain offences, and the one in the present indictment is not among them. BLACKBURN, J.—It seems to me that this is not a case within the Vexatious Indictment Act. Where do you find any authority that by implication you can bring this within the enactment?] There is no authority on the point. Another ob-

jection is, that the jury having acquitted the principal, Summers, the conviction cannot be sustained against Burton, who was an accessory only. [BLACKBURN, J.—Is there such a person as an accessory in point of law in a misdemeanor? Both Summers and Burton were principals in this charge, and properly indicted as such.]

By the COURT,

Conviction affirmed.

ARCHES COURT OF CANTERBURY.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Aug. 6, Nov. 26, 27, and Dec. 7, 1874.

MARTIN v. MACKONOCHE.

(SECOND SUIT.)

Ecclesiastical law—Rites and ceremonies of Church—Lighted candles—Hymn during communion—Sign of cross—Practice—Personal answer—Re-argument of points decided by Court of Appeal.

It is unlawful for a clergyman of the Church of England, first, to use lighted candles on the communion table, or on a ledge above the same, during morning prayer, when such candles are not necessary for giving light; secondly, to cause the hymn called the "Agnus" to be sung after the prayer of consecration, before the reception of the elements by the people; thirdly, to do any act of private devotion which either conflicts with a direct order of the rubric, or introduces any new rite or ceremony to the congregation. But to cross himself as an act of private devotion does not fall under either of these categories, and is not an ecclesiastical offence.

The law of evidence as formerly administered in the Court of Arches is modified by 18 & 19 Vict. c. 41.

It is competent for the judge of a court of first instance, in his discretion, to have points decided by a court of appeal reargued before him, when the judgment of such court has been delivered on the hearing of an ex parte case, is founded on a mistake of fact, and is irreconcilable with other decisions.

THIS was a proceeding under the Church Discipline Act (3 & 4 Vict. c. 86) against the Rev. A. H. Mackonochie, the incumbent of St. Alban's, Holborn, in the diocese of London. There had been former proceedings against him at the instance of the same promoter. (See L. Rep. 2 A. & E. 116; 2 P. C. 365; 18 L. T. Rep. N. S. 245; 19 L. T. Rep. N. S. 503).

The articles, omitting those which were merely formal, alleged:

4. The use of lighted candles on the communion table, or a ledge above the same, during morning prayer, when not wanted for the purpose of giving light;
5. Processions round the interior of the church, with candles, a crucifix, and banners;
6. Unauthorised elevation of the paten and cup during the communion service;
7. The wearing of unlawful vestments, namely, an alb, cope, chasuble, amice, maniple, stole, and girdle;
8. Standing on the west side of the communion table, with his back to the people, during the prayer of consecration;
9. The use of wafer bread at the communion;
10. Causing a hymn called "The Agnus" to be sung after the prayer of consecration in the communion service;
11. Making the sign of the cross;
12. Kissing the Prayer-book.

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The defendant pleaded a responsive plea, that the churchwardens had never made any complaint against him to the bishop or archdeacon; that the bishop had never ordered or admonished him not to do any of the acts charged against him; that the present suit was promoted against him contrary to the wish and desire of the churchwardens, parishioners, and congregation of St. Albans; that the promoter was not a parishioner, but was proceeding at the instigation and cost of a society called the Church Association, and was a violator of the peace and unity of the Church.

Aug. 6 1874.—*W. G. F. Phillimore*, for the defendant, moved the court to direct the promoter to file his personal answers to the responsive plea. He cited:

Farnall v. Craig (5 No. Ca., 557; 6 No. Ca., 682);
Bishop of Norwich v. Berney (36 L. J. 8, Eccl.).

B. Shaw, for the promoter, opposed the motion on the ground that the old practice with regard to personal answers was modified by the introduction of *vivâ voce* evidence, under the 18 & 19 Vict. c. 41.

Sir R. PHILLIMORE.—I am of opinion that the 18 & 19 Vict., c. 41, does do away with a good deal of the law of evidence as formerly administered in this court, and it may be a question of doubt how far the old practice of the Ecclesiastical Courts in the matter of personal answers has been modified by recent legislation; but it is not necessary to express any opinion on this question until I have considered whether I ought to exercise my discretion in the promoter's favour. On consideration of all the circumstances, I am of opinion that I should refuse to grant the motion.

Nov. 26.—The case came on for hearing. Witnesses were examined both for the promoter and the defendant. The counsel for the defendant proposed to put in evidence a memorial addressed to the Bishop of London by the congregation of St. Alban's, but the court held that it was inadmissible.

A. J. Stephens, Q.C., and *B. Shaw*, for the promoter, urged that the acts charged had been expressly or implicitly decided to be illegal by the decisions in

Sumner v. Wiz, L. Rep. 3, A. & E. 58; 21 L. T. Rep. N. S. 766;

Martin v. Mackonochie, first suit, *ubi sup.*;

Hebbert v. Purchas, L. Rep. 3 P. C. 605;

Elphinstone v. Purchas, 23 L. T. Rep. N. S. 446; L. Rep. 3, A. & E. 66.

A. Charles, Jeune, and *W. G. F. Phillimore*, for the defendant, argued that as to some of the acts no decision had yet been given, and that as to the others the decision in *Hebbert v. Purchas* having been *ex parte*, and irreconcilable with *Westerton v. Liddell* (Moore's Special Report, 1857), and *Martin v. Mackonochie* (first suit), the Court ought not to decide against the defendant without hearing an argument. They cited

Peck v. Gurney, 25 L. T. Rep. N. S. 446; L. Rep.

H. L. 377;

Collins v. Lewis, L. Rep. 8 Eq. 708;

Dugdale v. Dugdale, L. Rep. 14 Eq. 234; 27 L. Rep. N. S. 705.

Stephens, Q.C., in reply on this point.

Nov. 27.—Sir ROBERT PHILLIMORE.—The 7th, 8th, and 9th articles of charge relate to the use of certain vestments or ornaments, the position of the celebrant, and the use of wafer-bread. On former occasions this Court has upon these subjects pronounced judgments favourable to the defendant, but the Judicial Committee of the

Privy Council has overruled them. In this state of things an application is now made to me to hear an argument to show that the decisions of this court were right, and that those of the appellate court were wrong. The application is admitted to be unusual, but is said not to be unprecedented, and cases were referred to in support of it. It was urged, with considerable force, that the case came within the principle of these precedents because the judgments of the appellate court were delivered upon the hearing of an *ex parte* case, and have been conflicting and irreconcilable, and can be shown to be founded on mistakes of fact as well as of law. In these circumstances it would be competent, I think, to this court to allow these questions to be re-argued before it; but I am satisfied that such a course would, on the whole, be inexpedient. All these points may be re-argued before the Privy Council, and, if there has been any miscarriage of justice, it is fully competent to it to rectify its errors. I think it is more consistent with the usual practice, and more proper, that the argument which it is now sought to address to this court should be addressed to the Privy Council. I therefore decline to hear it.

Stephens, Q.C., and *Shaw* were then heard in reply upon the whole case. *Our adv. nult.*

Dec. 7.—Sir ROBERT PHILLIMORE.—In this case the office of judge is promoted by letters of request from the Lord Bishop of London, presented by Mr. Martin, of 2, New-square, Lincoln's-inn, against Mr. Mackonochie, the incumbent of St. Alban's, Holborn, in the diocese of London. The defence set up for the practice charged in the fourth article was that these lights were not part of any ceremony, and were symbolical of nothing, but merely a permissible decoration constituting no ecclesiastical offence. I am unable to justify the legality of their use on this ground; they seem to me to fall within the general principle either of ceremonies additional to those ordered by the Book of Common Prayer, or of ornaments not ordered, and not subsidiary to those that are ordered. I must pronounce this practice illegal, and this article proved. Two witnesses were examined on the 6th article by the prosecution, but upon the whole I am of opinion that the charge laid is not substantiated by adequate evidence, and I pronounce that it is not proved. The wearing of a biretta, as charged in the 5th article, was not illegal, but it was properly admitted by the counsel for the defendant that the whole ceremony, as laid in the article, and proved by the evidence, had been pronounced by me in Mr. Purchas's case to be illegal. I retain the opinion which I then expressed. I pronounce this article proved. The evidence proves that the hymn charged in the 10th article was sung after the consecration of the elements, but not during the reception of them by the communicants. It was contended that the singing of this hymn might be put on the same footing as the ordinary singing of a hymn before and after the sermon, or the singing of the "Gloria" before reading the Gospel. But looking to the history of the Prayer Book, and to the fact that this hymn is appointed to be said or sung in a later part of the Communion Service, I am not of this opinion, nor do I see any reason to alter the decision upon this subject which I have already delivered in *Elphinstone v. Purchas* (*ubi sup.*). I pronounce this article to be proved. It was properly admitted by the counsel for

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the defendant, that upon the subjects of the 11th and 12th articles generally I had given judgment in the case of *Elphinstone v. Purchas*, pronouncing the kissing the book and the making the sign of the cross to the congregation illegal. The evidence upon the 11th article went beyond this, and further proved that the defendant crossed himself during the performance of divine service. This latter act was said not to be illegal, as not being any part of the service performed by the minister as minister, but an act done by him in his individual capacity as one of the congregation. The adverse contention seems to be that the officiating minister is not allowed to divest himself during the whole time of performing divine service of his ministerial character; and, therefore, that an act which it would be competent to him as a member of the congregation to perform, is not permitted to him while officiating as minister. This proposition seems to me too wide. The more limited proposition would be that it is not competent to him to do any act of private devotion which either conflicts with a direct order of the rubric, or which introduces a new rite or ceremony to the congregation. But the minister crossing himself as a matter of private devotion does not seem to me to fall under either of these categories, but rather to be of the same character as covering the face with the hands during prayer, or crossing the hands over the breast, or spreading them out, or lifting them up, which could not reasonably be contended to be an ecclesiastical offence. I am of opinion that the legal offence is proved so far only as making the sign of the cross to the congregation is concerned. As to the 7th, 8th, and 9th articles, I have already during the course of this trial given my reasons for refusing to hear an argument from the counsel for the defendant as to the lawfulness of this position, the use of this bread, and the wearing of these vestments. To these reasons I now, without recapitulating them, refer. They must be taken as part of my judgment. I pronounce that the charges laid in these articles are proved.

His Lordship then proceeded to sentence the defendant to suspension *ab officio* for six weeks, and condemned him in all costs of the suit except those incident to the 6th article, which he had pronounced not to be proved. He also admonished him to desist from the practices mentioned in the articles proved.

[N.B.—Notice of appeal to the Privy Council was given on behalf of the defendant, and a case was prepared and lodged; but it was withdrawn shortly before the appeal would have come on for hearing.]

Proctors for the promoter, *Moore and Currey*.

Proctor for the defendant, *Brooks*.

COURT OF APPEAL IN CHANCERY

Reported by E. STEWART ROCHE and H. PEAT, Esqrs.,
Barristers-at-Law.

Tuesday, March 23, 1875.

(Before the LORDS JUSTICES).

FISHER v. THE APOLLINARIS COMPANY (LIMITED).

Compromise of misdemeanor—Duress—Libel—Repeated publication.

Where an offence is of such a nature that the person injured may obtain either a civil or a criminal remedy, there is nothing unlawful in a compromise of criminal proceedings taken against the offender.

The defendant company indicted the plaintiff for a misdemeanor under the 3rd section of the Merchandise Marks Act 1862 (25 & 26 Vict. c. 88), but upon his undertaking to give an apology they allowed a verdict of not guilty to be entered. The plaintiff accordingly signed a letter of apology, authorising the defendant company to make such use of it as they might think necessary. The defendant company having published the apology as an advertisement every day for nearly two months, the plaintiff filed his bill to restrain them from continuing to do so:

Held, that the agreement to give the apology was not void as made under duress, that the compromise of the criminal proceedings was not unlawful, and that the defendant company could not be restrained from continuing to publish the apology.

Demurrer for want of equity accordingly allowed.

Decision of Malins, V.C. reversed.

THIS was an appeal from a decision of Malins, V.C., overruling a demurrer.

The bill was filed by E. Fisher and Co. (Limited) and Eugene Fisher, a manufacturer of aerated waters for the purchase of whose business the limited company of E. Fisher and Co had been formed, against the Apollinaris Company (Limited), praying for an injunction to restrain the defendant company from continuing to publish an apology given them by the plaintiff, Eugene Fisher.

The bill contained the following allegations:

On the 27th Oct. 1874, the Apollinaris Company (Limited) instituted a prosecution under the 3rd section of the Merchandise Marks Act 1862 (25 & 26 Vict. c. 88) against the plaintiff, Eugene Fisher, for a misdemeanor for having, on the 8th Sept. 1874, unlawfully enclosed a certain article, to wit, mineral water, in certain bottles having thereon the trade mark of the Apollinaris Company (Limited).

After a great deal of evidence had been heard in support of the charge, and also on behalf of the plaintiff, Eugene Fisher, the magistrate committed the plaintiff, Eugene Fisher, for trial at the Surrey Sessions, and required him to enter into his own recognizances in 50*l.* to take his trial. At the trial no evidence was offered against Eugene Fisher, and a verdict of not guilty was accordingly returned, and in pursuance of an agreement in that behalf, but as the bill alleged under duress of the criminal proceedings, the plaintiff Eugene Fisher signed and gave to the Apollinaris Company (Limited) on the 14th Dec. 1874, an apology in writing in the following words:

To the Apollinaris Company Limited.

Gentlemen,—You having instituted a prosecution for misdemeanor against me for having sold as Apollinaris water, water which was artificially manufactured in this country in imitation of that which you import from the

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Apollinaris Brunnen, Neuenahr, Ahrweiler, and of which you have the exclusive agency, and having been committed to take my trial for that offence, I hereby beg to assure you that I sold the water in question without any knowledge that the same had been improperly manufactured. I, however, desire to express to you my deep sorrow that I should under such circumstances have been induced to sell or dispose of such aerated water, and I hereby offer the fullest apology to you in my power, and trust that you will not further continue proceedings against me. I authorise you to make such use of this apology as you may think necessary.

The bill further alleged that the plaintiff Eugene Fisher, under duress of the said criminal proceedings, agreed to authorise, and did in fact authorise the Apollinaris Company (Limited) to make such use of the said apology as they might think proper, and that the defendant company had ever since continued to publish the apology in some of the London daily papers, and that such publication was very injurious to the plaintiff, Eugene Fisher, and to the plaintiff company.

The bill charged that the defendant company continued to advertise the apology knowing that it would damage the plaintiffs' business, and with the fraudulent intent that it should do so, and that the agreement authorising the defendant company to make such use of the apology as it thought necessary was entered into by the plaintiff Eugene Fisher under duress of the criminal proceedings and was void, and that the authority was revocable, and had been revoked, and the bill prayed for an injunction to restrain the defendant company from continuing to advertise the apology.

The defendant company demurred for want of equity.

The Vice-Chancellor overruled the demurrer. In delivering judgment his Honour said: This is a demurrer to a bill filed by Fisher and Co. Limited, and Eugene Fisher. I am not called upon to decide whether the plaintiffs may ultimately obtain any relief, I am only called upon to decide whether it is so perfectly clear that they cannot obtain any relief that the demurrer ought to be allowed. [The Vice-Chancellor then stated the facts of the case and continued:] Now I think it is perfectly clear, upon the face of the document, that it was the intention of Mr. Fisher that the apology should be made use of as the defendant company thought fit, and I have no doubt whatever that he contemplated that they would advertise it as an apology for the offence which he had admitted himself to have committed. But I am bound to say it must have been implied from the very nature of the transaction that a reasonable use should be made of the document, and that it was not to be made a means of persecuting the plaintiff, and holding him up to contempt every day of his life. Therefore, I think the defendant company were bound to make a reasonable use of this apology. They proceeded to advertise it, and, as the bill alleges, it "appears daily in one or more of the said newspapers." The effect of the extensive and continuous publication or insertion of the said advertisement has been most prejudicial both to the plaintiff Eugene Fisher and to the plaintiff company, by deterring the public from applying for shares in the plaintiff company and thus preventing the plaintiff company from being in a position to carry out the said agreement or contract, and also by injuring the said trade or business which the plaintiff company has so contracted or agreed to purchase from the plaintiff Eugene Fisher as aforesaid, and such extensive and con-

tinuous publication or insertion of the said advertisement will, if persisted in, have the effect of totally destroying the said trade or business of the plaintiff Eugene Fisher which the plaintiff company has been formed and has contracted to purchase, and of necessitating the winding-up of the plaintiff company." Therefore, according to the allegations of the bill, which are admitted to be true, the conduct of the defendant company deprives the plaintiff Eugene Fisher of the opportunity of selling his business, and it deprives the company who would buy it of the opportunity of making any gain by it. Now this publication of the apology having been continued from the 14th Dec. to the 19th Jan., when I certainly think that the defendant company might well have considered that enough had been done to vindicate their property in this Apollinaris water, a correspondence is opened by a letter from Mr. Copp, the plaintiffs' solicitor, of a perfectly conciliatory character, so conciliatory that I repeat the surprise I have expressed in the course of the argument that the directors of the defendant company did not answer at once. "We think that enough has been done and that the request which is made is so reasonable that we will comply with it and the advertisement shall appear no longer." [His Honour read the correspondence, and observed upon the slightness of the offence committed by the plaintiff Eugene Fisher. He then read the prayer of the bill and continued:] Now there is in the bill an allegation that the continuing to publish these advertisements will be ruinous to the plaintiffs in their business, and that is admitted to be true. Does justice require that these advertisements should be allowed to continue as long as this company exists (for I have not heard that they ever intend to discontinue it) and as long as Fisher lives? Are they to be at liberty to parade him before the public every day of his life as having committed an offence of this very small character, for which they have elected to prosecute him criminally? I quite agree that they were at liberty to advertise the apology several times in order to inform the public that Apollinaris water of a spurious character was sold, in order thus to have some protection in their trade. But are they to be at liberty to repeat this every day of this man's life, and to parade this in the public papers, and make his life a burden to him? I think that this power which he gave them to advertise ought to be exercised in a reasonable and proper manner. A reasonable and proper manner would have been to issue four or five advertisements at the interval of a week if they thought fit; but to continue, as I am satisfied they intend to continue, this course as long as this man lives, to insult him every day by reminding the public that he has been prosecuted criminally is, in my opinion, a most unreasonable and improper use of the apology, and one which I think, as far as I can see at present, this court would be fully justified in preventing, and would be called upon to prevent. Now, with regard to the principles of law applicable to the case, I do not think there is much difficulty, because I take it on the broad ground that supposing this man had gone to trial and supposing he had been convicted of this offence (which I do not believe possible, if there is any truth in his statements, it is perfectly clear he must have been acquitted)—but if he had been convicted of a misdemeanor would they have been justified in inserting an advertisement every day of the man's life stating to the public that on

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a certain day he was so convicted? A man expiates his offence by undergoing the sentence which the tribunals of his country impose upon him, and when he has undergone the sentence, whatever it may be, whether the payment of a fine or imprisonment, nothing, in my opinion, can be more improper than that he should have it thrown in his face every day that he had been so convicted; and nothing can be more improper than that those who accept an apology should think it justifiable to use it for such a purpose. I am very much inclined to think that upon the law of the subject the decision in the case of *Williams v. Bayley* (14 L. T. Rep. N. S. 802; L. Rep. 1 H. L. 200) is applicable to this case. In that case a son had committed a forgery in endorsing a great number of bills with the name of his father, and certain bankers, in the belief of the genuineness of the endorsement, had discounted the bills to the amount of some 6000*l.* or 7000*l.*, and the bankers got the father into their bank parlour and there coerced him into giving a security for the 6000*l.* or 7000*l.* which they had paid on the bills. The father was attended by his solicitor, who protested that it was an improper proceeding. The bankers, hungry after their money, persisted in forcing this contract upon him. Ultimately the solicitor got dissatisfied and said he would have nothing more to do with the matter, and after that the bankers obtained from the father security for the whole sum due on the bills. The father being advised that this was an improper proceeding filed a bill begging Vice-Chancellor Stuart to set aside the security. The Vice-Chancellor did so; then there was an appeal to the House of Lords and the decision of the Vice-Chancellor was affirmed. Now the observations made in the judgment no doubt referred to the particular case then before the House of Lords, viz., compounding a felony. That was a felony; this was a misdemeanor. The defendant company in this case have thought fit to compound a misdemeanor, and I am by no means satisfied that there is any justification for the course they have pursued. If they choose to compound a misdemeanor, I am inclined to think that the argument is very well founded that they are not at liberty to avail themselves of the compounding of a misdemeanor to turn it to their profit, and certainly not to turn it to the destruction of the man from whom they have obtained such an apology. Now it is clear that in that case Lord Westbury did not intend to limit his observations to compounding a felony, because he says (14 L. T. Rep. N. S. 807; L. Rep. 1 H. L. 220): "Now, such being the nature of the transaction, my Lords, I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that is the position in which these bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves by getting the security of the father. Now that is the principle of the law and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would

be committed." He says that is wholly unjustifiable. Now therefore, in this case, proceeding on these grounds, first that this apology having been accepted the defendants were bound to use it in a proper and reasonable and not in an oppressive manner, they were not justified, in my opinion, in using it in such a manner as to destroy the commercial character of the plaintiff Eugene Fisher, and render it impossible, as he has alleged, for him to carry on his trade with any advantage. The continued publication of this apology day after day is, in my opinion, a most unreasonable and improper use to make of the apology which was given, and I think also that inasmuch as they thought fit, instead of taking him to trial, to compound with him, they cannot turn that compounding to their own advantage. And I also think that the course adopted by the defendant company is improper upon this ground, that they knew very well that the offence was so purely accidental and so trivial that if they had gone to trial, the man would unquestionably, in my opinion, have been acquitted. The case comes before me on demurrer, and I must take it that the defendants admit the allegation in the bill that the conduct of the plaintiff Eugene Fisher arose from a pure accident, in which he was imposed upon, as he might, in my opinion, have been easily imposed upon, seeing that the water was in the bottles of the defendant company. On every ground, therefore, the demurrer must be overruled. The defendant company appealed.

Glassey, Q.C. and *Horace Davey*, for the appellant. —The real ground on which the Vice-Chancellor's decision proceeds is that the publication of this apology is a libel, the ground upon which his own decision in *Dixon v. Holden* (20 L. T. Rep. N. S. 357; L. Rep. 7 Eq. 488) proceeded, but that decision has been overruled by the Court of Appeal in the *Prudential Assurance Company v. Knott* (31 L. T. Rep. N. S. 866; L. Rep. 10 Ch. 142) where it was held that this court has no jurisdiction to restrain the publication of a libel as such. The plaintiff Eugene Fisher has no ground of complaint, for he gave us authority to publish the apology. If he wished to limit the number of times we should publish it, he ought to have stipulated for that. [They were stopped by the court.]

John Outler (with him *Higgins, Q.C.*) in support of the Vice-Chancellor's order. —The agreement authorising the defendant company to make what use they pleased of the apology was obtained by duress, and, therefore, it is not binding on us. It is also invalid, as one of the terms upon which an alleged misdemeanor was compounded for. The publication of the apology from day to day is a continuous attempt to injure us in our business, and is an unlawful conspiracy. In *The Springhead Spinning Company v. Riley* (19 L. T. Rep. N. S. 64; L. Rep. 6 Eq. 551), where the defendants, who were officers of a trades union, gave notice to workmen by means of placards and advertisements that they were not to hire themselves to the plaintiffs pending a dispute between the union and the plaintiffs, it was held that the court would interfere by injunction to restrain such acts, as they amounted to crime and also tended to the destruction or deterioration of property. That an agreement entered into in order to stifle a prosecution is invalid is clear from the decision of the House of Lords in *Williams v. Bayley* (14 L. T. Rep. N. S. 802; L. Rep. 1 H. L. 200). He also referred to

Stephen's Commentaries, 6th edit. vol. 4, p. 321.

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Without calling for a reply,

Lord Justice JAMES said: I am of opinion that the order of the Vice-Chancellor in this case must be discharged, and an order allowing the demurrer must be made with the usual consequences. The case is a very simple one. The plaintiff Eugene Fisher was found selling water, which was not Apollinaris water, in bottles bearing the trade mark of the Apollinaris Company. That was not made, as it might have been, the subject of an action at law or of a suit in this court, but the company adopted a more speedy remedy, and proceeded against Fisher before a magistrate under the Merchandise Marks Act (25 & 26 Vict. c. 88). The question to be decided was whether Fisher had sold the water with a guilty knowledge that it was not genuine. There was evidence on both sides and the magistrate came to the conclusion that there was a case to go to a jury, and accordingly he committed Fisher for trial, taking his own recognisances for his appearance. At the trial no evidence was given, and a verdict of not guilty was entered. It is not alleged at what time the agreement was made, but in pursuance of an agreement with the defendant company, Fisher signed and gave to them a written apology, and no doubt it was part of the arrangement under which the prosecution was abandoned. [His Lordship referred to the allegations of the bill, and read the apology, and then continued:] It is contended that the whole of this transaction was an offence against public morality, and that the defendant company had made an improper use of criminal proceedings to obtain this apology. No principle or authority was cited in support of that contention. The agreement is just such a one as might have been made if proceedings had been taken in this court or at law. The case was one in which the company had a choice between a civil and a criminal remedy. It is no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance, or an indictment against a parish for neglecting to repair a highway or a bridge, on the terms of the defendants agreeing to remove the nuisance or to repair the highway or bridge. Offences of this kind are indictable, but it is not against the policy of the law to allow the person preferring the indictment to accept a compromise. Fisher's case was that he bought the water inadvertently. The prosecutors were at liberty to accept an apology and abandon the prosecution. The apology was given, and the company were authorised by Fisher to use it as they pleased. That was the bargain which was made by Fisher with full knowledge of his position, and of what he was doing: and the defendant company have simply done what he authorised them to do. Under such circumstances the publication of the apology can hardly be a libel, and, even if it were, it has been settled by authority which ought not to be questioned either here or before a Vice-Chancellor, that this court has no jurisdiction to restrain the publication of a libel merely because it is a libel. But the plaintiffs further complain that the defendant company are using the apology in a manner which will do them material damage. I am not aware of any principle or authority upon which this court can interpose to limit the publication of this apology. I do not see how we can say whether it shall be published a hundred times or once. At the trial, Fisher obtained the benefit of the apology

by being relieved from the necessity of defending himself, and I cannot see on what ground of equity the bill rests. It is said that the repeated publication of the apology damages Fisher's character, and, therefore, indirectly damages the property of the company which has bought his business. The act complained of was authorised by Fisher himself, and it is a wild suggestion that Fisher and Co. can have any remedy for damages in respect of that act. The allegation as to damages really amounts to nothing but this, that the publication is a libel. That is the only ground on which the case can be put, and it has been settled that that is not a ground on which relief can be obtained in this court. The bill, therefore, cannot be sustained, and the demurrer ought to have been, and must now be, allowed with costs. There will be no costs of the appeal.

Lord Justice MELLISH.—I am of the same opinion. The question to be determined is whether on the face of the bill there appear any grounds upon which this court can restrain the publication of this apology. The most plausible ground alleged is that the apology was obtained under duress of criminal proceedings. But, in the first place, the bill does not allege that the apology was given previously to the acquittal. I understand the allegations in the bill to mean that the agreement to give the apology was made before the acquittal, but that the apology itself was written afterwards, so that the agreement only appears to have been made under duress. I do not, however, wish to rest the case on that ground. Even if the apology was given before the acquittal, I am of opinion that that would be no ground for restraining the publication. If it was any ground for restraining the publication at all, it would have been a ground for restraining the publication in the first instance. But, in my opinion, there is no objection to the compromise of a charge of this kind on such terms. The complaint was that Fisher had used the trade mark of the defendant company, by selling water in bottles bearing their trade mark. Now, previously to the Merchandise Marks Act (25 & 26 Vict. c. 88) the sole remedy for the wrong of which the defendant company complained, would have been by action at law or suit in equity, but the Merchandise Marks Act enabled criminal proceedings to be taken for this class of offences in certain cases. There is no authority for saying that it was wrong in the prosecutors to abandon their prosecution in a case of this kind. They allowed the person charged with the offence to state that his offence was not wilful, and they accepted an apology. Whether they were convinced of his guilt or not, there was nothing wrong in their acting in that way. Such compromises are made every day before the magistrates, and before the Criminal Courts themselves, in cases of assault or libel. In some cases there is a payment of money; in other cases, no payment at all; and it has never been considered that there is anything wrong in such compromises. Of course it would be a different matter if there was any case alleged of extorting money under threats, but no money was extorted in this case. I am, therefore, clearly of opinion that the first publication of this apology could not have been restrained. On what ground, then, can the further publication of it be restrained? The publication is not a libel, and, if it were, that would be no ground for restraining it. Therefore, the only possible ground on which further publication could

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be restrained, would be some special agreement limiting the number of times the apology should be published. No such agreement is alleged, and the defendant company were positively authorised by Fisher to make such use of the apology as they might think proper. The defendant company have been guilty of no legal wrong; they have not violated any legal right of Fisher, and still less have they violated any legal right of the company which bought his business. And I cannot see that they are not entitled to publish this apology, merely because it affects Fisher's character. There is, therefore, no ground upon which the bill can be sustained.

Demurrer accordingly allowed with costs.

Solicitor for the appellants, *W. M. Hacon.*
Solicitor for the respondents *A. E. Copp.*

COURT OF QUEEN'S BENCH.

Reported by J. SMYTH and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Tuesday, June 8, 1875.

HARGREAVES (app.) v. DIDDAMS (resp.)

Justices' jurisdiction—Right of public to fish—Stream rendered navigable by statutes.

The appellant was convicted under 24 & 25 Vict. c. 96, s. 24, of fishing in the daytime, in water which was private property. He proved that the water was part of a stream rendered navigable by Acts of Parliament, which, however, did not in any way alter the possession of the soil; and that for many years the public had fished in this particular place. He claimed, on these grounds, his right as one of the public to fish on the soil of the complainant, and to oust the justices' jurisdiction. Held, upon a case stated, that under the circumstances, no such right could exist, and that the justices had jurisdiction.

The following was a case stated by two of the justices of the county of Southampton under the Act 20 & 21 Vict. c. 43.

At a petty session holden at Southampton on the 14th Aug. 1874, the appellant, by his counsel, appeared before the justices on a summons issued to answer an information, dated the 20th July 1874, by the respondent George Diddams, of Bambridge, in the parish of Otterbourne, in the said county, gamekeeper and fisherman, whereby he alleged that the appellant Thomas Hargreaves, of the parish of Bishopstoke, in the said county, gentleman, on the 8th July 1874, at the parish of South Stoneham, in the said county, by angling in the day time, to wit, about the hour of three in the afternoon of the same day, unlawfully and wilfully did attempt to take certain fish called trout in certain water there, wherein Thomas Chamberlayne, of the parish of Hursley in the said county, esquire, then had a private right of fishery, and not running through or being in any land adjoining or belonging to the dwelling house of any person being the owner of such water or having a right of fishery therein.

The facts were as follows:

The water mentioned in the information is a part of the ancient channel of the river Itchen, in the county of Southampton, which was, however, made navigable originally by a private company only, and afterwards by the public on payment of

tolls to the company, under certain Acts of Parliament hereinafter mentioned or referred to.

In the month of March 1874 the said Thomas Chamberlayne caused to be erected, on the towing path running along the western bank of the river Itchen, near Bishopstoke, and upon land of the said Thomas Chamberlayne, at or near the place where the appellant subsequently fished, as hereinafter mentioned, some boards with notices on them to the following effect:

The fishing in this water, being private property, is now strictly preserved; any person found fishing therein, without permission from the proprietor, will be proceeded against according to law.

LEE AND BEST,

Solicitors for the said proprietor.

Winchester, 4th March 1874.

On the 1st July 1874 the appellant, who resides on the opposite bank of the river, caused to be sent, by his solicitor, a letter to the said Messrs. Lee and Best, stating his intention to fish in the said river on the 8th of that month, at the place where the said boards were erected, and also notifying that his solicitor would accept service of process if any action were brought against him for so fishing. In reply to the said letter, Messrs. Lee and Best wrote to the effect that any person fishing at the place above referred to would be treated as a trespasser.

The appellant, on the 8th July 1874, fished with rod and line in the daytime, in the said part of the river Itchen mentioned in his notice. That part of the river is above the flow of the tide, but was made navigable, as already mentioned.

It was proved that the soil of the adjacent bank, and of that part of the river where the appellant fished as aforesaid, was the private property of the said Thomas Chamberlayne, but that for many years the public had fished in the river at the same place where the appellant fished, openly and in the daytime, without applying for permission from anyone, and without being prevented or interrupted by the keepers of the said Thomas Chamberlayne or anyone, and in the belief that the public had a right to fish there. The witnesses called on behalf of the appellant were unable to show any documentary legal origin of such right.

The appellant put in evidence an Act of Parliament of 16 & 17 Car. 2, c. 24, entitled, "An Act for making divers rivers navigable, or otherwise passable for boats, barges, and other vessels, whereby, among other things, certain persons were empowered to do divers acts for the making navigable the said river Itchen from Alresford, through Winchester, to the sea." And also the Act of 42 Geo. 3, c. 111, in which it was recited, among other things, that it would be advantageous to the public that the said river Itchen should be navigated, used, and enjoyed as a public navigable river, and by which it was enacted that all persons whosever should, under stated restrictions, and on payment of tolls and duties to the persons or company above referred to, have, use, and lawfully enjoy the free passage upon the said river with and for boats, barges, and other vessels, and should also have and use the towing or hauling path, wharfs, quays, and all other necessary powers for navigating the same and carrying on the commerce of the said river for the benefit of the public.

Copies of these Acts accompanied and formed part of this case.

It was contended on behalf of the appellant that

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the river Itchen, being a public navigable river as aforesaid, and the public having for many years fished in it as of right at the place in question, and the claim of the appellant to have the right to fish there as one of the public being made *bonâ fide* and with the view of having the question tried by an action at law, the jurisdiction of the justices was ousted.

On behalf of the respondent, it was contended that the right of fishing claimed by the appellant as one of the public, whether by prescription or otherwise, was a right which it was impossible to acquire at law, and that therefore the jurisdiction of the justices was not ousted. And, further, that the river Itchen in the part in question was not a public navigable river in the ordinary acceptation of that term, and that the Acts of Parliament above referred to had created an easement or right of locomotion only, and had not otherwise affected the rights of the riparian owners, and that the fishing by the public at the place in question was a gratuitous concession by the said Thomas Chamberlayne, which he was at liberty to put an end to at any time without notice.

The justices decided that their jurisdiction was not ousted, and convicted the appellant in the penalty of 1s. and costs, and granted a case for the opinion of this court.

The question for the opinion of the court is, whether the appellant, under the above circumstances, was legally and properly convicted of the offence charged in the information.

Manisty, Q.C. (with him *Witt*), argued for the appellant.—The information was laid under 24 & 25 Vict. c. 96, s. 24, by which, "Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanor; and whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy any fish in any water not being such as hereinafter mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding 5*l.*, as to the justice shall seem meet: Provided that nothing hereinbefore contained shall extend to any person angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset; but whosoever shall, by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, unlawfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall on conviction before a justice of the peace, forfeit and pay any sum not exceeding 5*l.*, and if in any such water as last mentioned he shall on the like conviction forfeit and pay any sum not exceeding 2*l.*, as to the justice shall seem meet." Under this and under all statutes giving summary remedy at petty sessions, the jurisdiction of justices is ousted upon a *bonâ fide* claim of right; this is a general principle of law, upon which has been engrafted an exception in cases of malicious injury, not applicable to this matter. Here an action might have been brought, and the facts of the case are very similar to those of *Reg. v. Burrow* (34 Justice of the Peace, 53), decided by the Court

of Queen's Bench on the 29th May 1869. That was a rule to quash a conviction upon this same section, and the defendant had employed a solicitor to attend at petty sessions and set up his right as a member of the public to fish, as being the occupier of a cottage on the bank of a navigable lake, which was the *locus in quo*, or otherwise having the right, and offered to defend any action in a Superior Court. The prosecutor contended that it was impossible the public could have a right to fish in such lake, which was not tidal, nor was the river running out of it tidal. It was held that as the defendant *bonâ fide* claimed the right, and did all he could to prove such *bonâ fides*, and the point was not yet entirely settled by authority, the justices ought to have stayed their hands, and not convicted. No doubt this differs from that case, in that here the water had been rendered navigable artificially, but it cannot be said to be entirely settled by authority that there may not be a public right to fish in a stream so rendered navigable; at all events, it is a very different case from *Hudson v. MacRae* (4 B. & S. 585), where the river was non-navigable. *White v. Feast* (L. Rep. 7 Q. B. 353) decided that 24 & 25 Vict. c. 97, s. 52, over-ruled the general principle of law; but that was only with respect to malicious damage to property, and does not touch this case.

Kingdon, Q.C. (with him *Warry*), for the respondent.—It has been decided by authority that the right claimed by the appellant could not exist. The Court of Common Pleas in Ireland held, in *Murphy v. Ryan* (2 Ir. Rep. Com. Law, 143), that the public cannot acquire by immemorial usage any right of fishing in a river in which, though it be navigable, the tide does not ebb and flow. This case, therefore, is within the decision of this court in *Hudson v. MacRae*, where it was held that an accused at petty sessions justifying himself under the *bonâ fide* though mistaken notion of a right which could not exist in law, did not make such a claim of right as ousted the jurisdiction of the justices. This is nothing but a canal, the soil of which and its banks are reserved to the previous proprietors.

Manisty, Q.C., in reply.—It is said in Mr. Paterson's Fishery Laws, at p. 129, that "it may happen that after a number of years user by the public promiscuously of the angling in a particular water or river, the public may begin to claim as a right what at first was merely a licence;" and "if no case of interruption on his (the owner's) part can be proved for a series of years, then dedication may be presumed against him." [LUSH, J.—How can that be with respect to a profit *a prendre*?] At all events, it is sufficient for me that the question of right has not been so positively settled that it can be said to be free from all doubt, in which case *Reg. v. Burrow* is an authority distinctly in point.

LUSH, J.—I am of opinion that this conviction was right. The stream in which the appellant was fishing had been made navigable by two Acts of Parliament, which did not in any way alter the possession of the soil; the soil still remains in the proprietors. The respondent claims and has established his right of possession to the fishing at this spot, but the appellant has no greater right than the public. I admit that the case cited from the Justice of the Peace was well decided, if the point of law raised by the defendant had not been clearly settled by authority. Here the point is settled by *Hudson v. MacRae*, which is a conclusive authority

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upon the point raised here. The conviction was therefore right.

QUAIN, J.—I am of the same opinion. This is clearly not a navigable river, in the ordinary sense. It has been made navigable by two Acts of Parliament, which, however, do not interfere with the previous rights of fishery. Mr. Manisty has cited no authority upon which the public can claim a right to fish in such a stream as this, therefore *Hudson v. MacBae* is in point.

Judgment for respondent.

Attorneys for appellant, *Bedford and Metcalfe*.
Attorneys for respondent, *Lee and Best*.

Jan. 27, and May 7, 1875.

REG. (on the prosecution of JAMES ODAMS) (app.)
v. THE CHURCHWARDENS AND OVERSEERS OF THE
PARISH OF WHADDON, AND THE GUARDIANS OF THE
POOR OF ROYSTON UNION (resp.).

Poor rate—Land used for digging coprolites—
Shifting occupation.

The appellant had, by agreement with the owner, the exclusive privilege of occupying certain lands for the purpose of digging for and getting coprolites. He paid 115l. per acre dug, and was bound to dig enough to pay the landowner 1000l. a year, or, if he did not dig enough, still to pay that amount. He was not entitled to use the land for any agricultural purpose, and was bound to replace and level the soil. He was always in possession of ten acres during at least one whole year, but only about two-and-a-half acres were dug over in each quarter, and one acre was always used for mills and tramways. He did not necessarily occupy the same ten acres during all the year, nor during the whole of any quarter, but his occupation was a shifting one, and fresh land was constantly being taken on at one end, and that which had been levelled relinquished at the other. The value for raising coprolites was 115l. per acre, but this was realisable once only. Each acre was occupied for getting the coprolites for three months, and the land was not levelled and restored to the agricultural tenant until after a period of from one to two years, during which time the occupation was valueless. The rates were made quarterly.

Held, by Mellor, Lush, and Archibald, J.J. (Cockburn, C.J. dissenting), that the appellant was liable to the rate in respect of ten acres at the coprolite value.

In an appeal by James Odams against a poor rate for the parish of Whaddon, of the 29th April 1872, to the Cambridgeshire Quarter Sessions, the sessions amended the rate, subject to a case.

1. The appellant was rated in respect of ten acres of coprolite land at a gross rental of 840l., and a rateable value of 630l.

3. The poor rates of the parish of Whaddon are usually made quarterly, and the rate in question was estimated to meet all expenses which might be incurred for the purposes of the rate until the quarter day then next ensuing, viz., 24th June 1872.

4. The appellant is the managing director of the Patent Nitro-Phosphate or Blood Manure Company (Limited). By an agreement made 18th Dec. 1863, between the Earl of Hardwicke on the one part, and the company of the other part, certain powers were conferred upon that

company for the purposes of digging out and removing the coprolites under land in the parish, of which agreement the following are the material parts:—

1. The Earl, being owner of lands in the parish of Whaddon, a portion of which are known to contain, at some depth from their surface, certain fossil stones usually called "coprolites," does hereby for himself, &c., authorise and empower the company, their successors and assigns, to the exclusion of all other persons, to enter upon, hold, and use such lands on the conditions expressly named herein and subscribed to by the company, for the purpose of erecting such machinery as may be necessary, sinking wells, digging the ground, raising and carting away for their own use the coprolites, levelling the soil, and other purposes specified herein.

2. The company hereby consent to pay to the Earl the sum of 115l. sterling for every acre, and so in proportion for every part of an acre, that may be dug over by them for the purpose of raising the coprolites from any field or part of a field which may be set out by the Earl, &c., or his agent. The land is to be dug for coprolites to the depth of 13ft., measuring from the surface of the soil. . . . In case the company shall be desirous of digging land and raising the coprolites from a greater depth than 13ft., it shall be lawful for them to do so, paying 115l. per acre.

3. The company consent to dig over and raise coprolites from sufficient land in accordance with the conditions, to pay the Earl the sum of 100l. sterling per annum at the least, such sum to be paid quarterly at the usual quarter days, the first instalment of 250l. to become due on 25th March 1864; and in case the company shall dig land for the purpose of raising coprolites in excess of what may be required to pay the 1000l. per annum, then the excess shall be paid to the Earl on 25th December in each year. But in case the company shall not dig over sufficient land to amount at the rate named per acre to 1000l. per annum, the company nevertheless consent to pay to the Earl such amount on the days named. . . .

4. The company consent from time to time to enter upon such fields or parts of the same as the Earl may require, in which the coprolites may be proved to be, and to continue to raise them from such field until they are proved to be worked out, before they shall be entitled to require the Earl to set out another field. Provided that in setting out such field a proper regard be paid to the convenience of the company in carrying on their works, and to the running of a proper outflow of water therefrom. . . .

5. The utmost extent of land that the company shall be entitled to lay claim to in any year ending 25th Dec., for the purpose of digging and raising coprolites shall be ten acres, except by arrangement to be come to between the Earl and the company.

6. After the company have entered upon a field, they shall work it out so that it may be restored to the level with as little delay as is compatible with the due execution of the work.

7. It is agreed that the company shall have no claim to use any part of a field upon which they enter for any agricultural purpose, but that with the exception of the field or fields which the company may be actually digging, the whole of the land shall be considered to be for the use of the tenant of the farm, and be given up by a portion or portions only as the company shall require for the purpose of digging and raising the coprolites. . . .

10. The company shall be at liberty, as soon as they enter upon any field, or part of the same, to dig such well or wells, and to erect such mill or mills, as may be necessary for the washing of the coprolites, filling up the holes and replacing the soil after the work is finished.

11. The company agree that in the digging of the land on any field the company will carefully remove, set apart, and preserve all the top soil to the depth of 16in. at the least, or more should the mould prove to be beyond that depth, and shall from time to time after the field or part of the same shall have been dug over, and the sub-soil shall have become sufficiently dry, distribute all the dead or subsoil which shall have been excavated so as to form a level surface fit and convenient for agricultural purposes, and shall then spread thereon such preserved topsoil, and of an even layer as nearly as may be. . . .

14. It is agreed that all arrangements with tenants necessary to the effectual prosecution of these presents, and the compensation to the tenants for the temporary

occupation of the lands by the company shall be made by the earl, who also agrees to reimburse the tenants for the discharge of all rates and taxes that may be chargeable upon the surface occupation of the land during the same period.

15. The company not to remove stones, &c., or anything but coprolites.

16. In case the company shall be desirous of terminating this agreement before the lands of the earl in Whaddon Parish that might be proved to contain coprolites shall have been dug over, the Earl agrees to allow the company to do so upon giving three months' notice, on any of the quarter days, and paying at the end of three months 500*l.* as compensation for the breach of agreement."

5. The following facts were agreed upon by the parties and found by the sessions:—The sum payable for the exclusive privilege of digging and carrying away these coprolites by the company is 115*l.* per acre, and that sum is to be taken as the sum which an hypothetical tenant would pay for the right of digging and removing the coprolites under each acre of the land.

6. In the process of digging coprolites the following things are necessarily done:—As soon as a fresh field has been pointed out by the owner or his agent to the person licensed to dig coprolites, he commences operations at the point most convenient to himself, irrespective of any crops which may be growing on the land, and continues them in regular course until all the land containing coprolites in that field has been dug over. Wash-mills are put down, a trench is then opened from 3ft. to 6ft. wide, and of a convenient length; the surface soil is carefully put aside, and the subsoil is dug out until the coprolites are reached. The coprolites are then raised and washed in the mills, which are worked by means of portable steam engines. When the coprolites lying under the trench first opened have been raised, a fresh trench is opened parallel to the former, the surface soil removed and put aside, and the subsoil thrown into the trench first made; and this process is repeated and continued until all the land containing coprolites in that field has been dug over. As soon as a sufficient quantity of land has been dug to afford room for the operation, parallel mounds are raised of a portion of the subsoil on that part of the land already dug, the tops of these mounds are flattened, and the surface soil barrowed upon them, and so much of the water in which the coprolites have been washed as has not been drained, and which, from the quantity of soil adhering to the coprolites, forms a thick substance called slurry, is run off into the spaces between these mounds, called slurry pans, and is there evaporated or absorbed into the earth. As soon as the slurry has become sufficiently firm to support the surface soil, a portion of that soil is taken from the before-mentioned mounds and placed upon the dried slurry, and thus the whole of the ground from which the coprolites have been taken is levelled by the appellant, and the land becomes once more fit for cultivation, and is then restored by the appellant to the owner, or to his agricultural tenant. The period from the time when the coprolites have been raised, the mounds covered with surface soil, and the slurry pans filled, until the time when the land is ready to be levelled, varies from one to two years, but is never less than one year.

7. The company are not under the agreement entitled to, nor do they, in fact, use any part of the land taken by them under the agreement as agricultural land, nor for any other purpose than that

of raising and washing the coprolites. From the time when the mounds have been completed and the spaces between them, or slurry pans, filled with slurry, all the coprolites having been dug out, no other beneficial use is or can be made either by the appellant or agricultural tenant of the land which has been dug until the appellant finally levels it. The only use (if any) made of the land in the interim is by the labourers in the employment of the agricultural tenant, who, without authorised permission grow potatoes on mounds on which the surface soil has been placed. Whenever a sufficient quantity of land dug over has become fit to be levelled and restored to cultivation, the appellant levels and restores it, which he is bound to do when required by the landowner, without regard to any potatoes which may have been so planted. The time occupied by the appellant to level one acre is about a week.

8. In the process of carrying on their works the company employ two portable steam engines which are capable of washing the coprolites obtained from ten acres in the course of one year, and the company do in fact dig at least ten acres in the course of one year, at an average rate of two-and-a-half acres per quarter.

9. The appellant is in possession of ten acres of land during at least one whole year, but of this ten acres, only about one-fourth is dug over by him and exhausted in each quarter, and an additional area of at least one acre is always occupied by him for mills and tramways. The greatest quantity used by him at any one time for coprolite purposes (inclusive of the mills and tramways) is three-and-a-half acres. There are always, during the continuance of the operations, six-and-a-half acres of land from which the coprolites have been raised, lying in the shape of mounds and slurry pans, making, together with the before-mentioned three-and-a-half acres, the total quantity of ten acres not restored to the tenant, being the ten acres the appellant is charged for in the rate appealed against. But the appellant is not necessarily in the occupation of the same ten acres of land during all the year, nor indeed during the whole of any quarter of a year, his occupation being a perpetually shifting one, and he taking on from time to time, and yard by yard, fresh land at one end of his occupation, and relinquishing it as and when levelled, at the other end.

10. The total value of the occupation of each acre of land for the purpose of raising coprolites is 115*l.*, and the hypothetical yearly tenant would give that sum. This enhanced or coprolite value is realisable once and once only. Till the land is dug for coprolites it remains at its ordinary agricultural value, and after the coprolites have been raised, it reverts to that value as soon as the operation of levelling has been performed, but till then it is nearly valueless. The time of occupation of each acre necessary for actually raising the coprolites therefrom is at most three months, and that is, in fact, the time actually taken for that purpose by the appellant.

11. The appellant, in the rate appealed against, was assessed as being in the actual occupation of the entire quantity of ten acres at the enhanced or coprolite value, and he contended that he ought not to be rated in respect of the whole ten acres at such enhanced value; first, because that was a larger quantity of land than he occupied at any one time; and, secondly, because before the rate was

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made he had dug and removed the coprolites from a large part of the land for which he was so rated; and, thirdly, because he was rated for a larger quantity of land than he would dig during the period for which the money raised by the rate was estimated to last; and that inasmuch as at most not more than one third of the ten acres was used by him at one time, or would be used by him within the last-mentioned period, he ought not to be rated for more than one third of the ten acres at such enhanced value.

12. The respondents contended that the appellant ought to be rated in each rate upon the annual rateable value of the whole ten acres as coprolite land, without reference to the mode in which he worked the land, or the times at which he received the profits.

13. The sessions were of opinion that the appellant ought not to be rated in each rate upon the rateable value of the whole of the ten acres, as if it were of the enhanced value of coprolite land, but that he ought to be rated for 3s. 1r. 13p., at such enhanced value, making a rateable value in the whole of 210l., and for the remainder of the ten acres, viz., for 6s. 2r. 27p., upon a nominal value of 1s. per acre, and they amended the rate accordingly. If the court should be of opinion that the decision of the sessions was right, then the rate was to stand as amended by the sessions, but if the court should be of the contrary opinion, then the order of sessions amending the rate was to be quashed, and the original rate to stand or be amended on such principle as the court might direct.

Jan. 27.—*Philbrick, Q.C. (Horace Brown with him)* for the appellant.—The order of sessions reducing the rate was right. Although the company are entitled to use ten acres in a year for the purposes of getting coprolites, yet they never are actually in beneficial occupation of more than three acres and a half. Paragraph 9 of the case finds that that is the greatest quantity used at any one time for coprolite purposes, and clauses 6 and 7 of the agreement show that they are not entitled to use the land in any other way which would make the occupation beneficial to them, nor to prolong the period of their occupation beyond the time actually necessary for the execution of the work. After the coprolites have been dug the occupation, which is only continued for the purpose of restoring the land, is burdensome, not beneficial. A person who occupies for a part only of the period for which a rate is made is only liable to so much of the rate as is proportionate to the time of his occupation, 32 & 33 Vict. c. 41, s. 16. According to this principle the land would become rateable at a coprolite value from the time when it was occupied for coprolite purposes, and would cease to be so rateable as soon as it was exhausted.

Bulwer, Q.C. (Mayd, Heathcote, and Loyd with him) for the respondents.—The rate was rightly made, and the sessions were wrong in reducing it. It is shown by paragraph 9 of the case that at any given time after the commencement of the second year after the making of the agreement, the appellant is in the occupation of ten acres of land, and the case of *Roads v. The Overseers of Trumpington* (23 L. T. Rep. N. S. 821; L. Rep. 6 Q.B. 56-40; L. J. 35, M.C.) shows that he is in the exclusive occupation of it. The fact that it is a shifting occupation is immaterial. The appellant is not

exempt because he realises all the profit which he is able to get out of the land at some particular time, any more than an agricultural tenant is exempt because he gathers in his harvest, and so realises all his profit, at a certain season.

Reg. v. Westbrook, and *Reg. v. Everist*, 10 Q. B., 178; 16 L. J. 87, M.C.

Philbrick, Q.C., in reply, referred to

The Metropolitan Board of Works v. West Ham, 23 L. T. Rep. N. S. 490; L. Rep. 6 Q. B. 193; 40 L. J. 30, M.C.

Cur. adv. vult.

May 7.—*COCKBURN, C.J.*—The facts of this case were as follows: By an agreement between the Earl of Hardwicke and the company of which the appellant is the manager, the Earl being the owner of certain lands in the respondent's parish containing coprolites, empowers the company to enter upon, hold, and use such lands for the purpose of raising and carrying away the coprolites, and erecting thereupon the machinery necessary for their operations in preparing the coprolites for use. The company, on the other hand, are to dig up the land, which is to be set out to them for that purpose, and get the coprolite, paying for the same at the rate of 115l. for every acre they dig up; and they are bound to take into use for the foregoing purpose a sufficient quantity of land to pay to the Earl 1000l. a year, or if they shall fail to do so, at all events to pay to him that amount yearly. But they are to take the land only as they require it for the purpose of getting the coprolites, and actually commence their operations upon it for that purpose, until which time it is to remain in the hands of the owner or his agricultural tenant. Having extracted the coprolites from the soil, to effect which it is necessary that the soil to a considerable depth shall be dug up and removed, the company are bound to restore the soil, which by the process has been rendered wholly unfit for agricultural purposes, and level it, so as to render it again fit for such purposes, which done, they are to restore it to the owner. In point of fact the company excavate and operate upon about two-and-a-half acres in each quarter, in other words, about ten acres in each year. But not more than two-and-a-half acres are being dug up and operated upon at any one time; to which, however, must be added an acre required for the purpose of mills used in their operations, and of tramways. Although the company are in fact never in the actual use of more than three-and-a-half acres for the purpose of getting the coprolites, yet, owing to the time required in restoring the land to its former condition, it results that the Company are at all times in the occupation of about ten acres, of which, however, only about one third is available for coprolite purposes, and is, consequently, by its occupation, beneficial to the company. The occupation of the rest being only for the purpose of fulfilling their obligation to restore the land to its original condition, is simply onerous. It is to be observed that, though there is a constant occupation of ten acres, the occupation is a perpetually shifting one, the company as they extend their operations acre by acre in the one direction, abandoning the land, and restoring it to the owner in the other. Under these circumstances a difficulty arises as to rating the company in respect of the land so occupied. The parish authorities, on the ground that the company are in the course of each year in the occupa-

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tion of land for which they pay on the average 1150*l.* to the owner, proceeded to rate them accordingly. Against the rate so made the company appealed, alleging that though it was true they paid that amount in the whole for the portions of land successively occupied by them, yet they never were at any one time in occupation of more than three-and-a-half acres of land which was beneficial to them, or in fact, of any value at all. Adopting this view the Court of Quarter Sessions allowed the appeal, and, while they maintained the rate in respect of the three-and-a-half acres in use for the purpose of getting coprolite, reduced it to a nominal amount as to the rest. The question for our judgment is whether the Court of Quarter Sessions were right in so deciding. In my opinion they were. An occupier can only be rated according to the value of the property occupied, of which value, however, the rent which he actually pays, or which it may be taken that a supposed tenant would be prepared to pay, may be assumed to afford a fair estimate. Here it is clear that at the time the rate is made the value of the six-and-a-half acres to the company as the occupiers of it is *nil*. When it is said that being in possession of ten acres, which in the course of the year have been capable of producing profit by reason of the coprolite contained therein, the company are liable to be rated in respect of the value which each part of the land may have been of during any part of the year, the answer as it appears to me is that the assessment must be made with reference to present, or, at all events, to prospective, not to past value. If indeed the company at any time took possession of ten acres as a whole, with a view to working it by degrees, I should agree that so long as any of the land remained unworked they might properly be held to be assessable in respect of the whole on its value as coprolite producing land, just as a farmer is assessable in respect of his entire farm though part of it lies fallow and unproductive. But when the facts are more carefully looked at the analogy between the two cases fails. Here the company do not, as appears to be assumed, take ten acres and work it out in the course of the year, though it is no doubt true that by the end of the year they have worked out that extent of land. Here the company take possession of the land bit by bit, acre by acre, as they require it; and as they take fresh ground the land behind becomes unprofitable and valueless to them, nor would they retain it but for the obligation to replace the soil. When it is said that the company have themselves fixed the value of their occupation by agreeing to pay a minimum rent of 1000*l.* a year, a serious fallacy appears to me to be involved in this argument. The 1000*l.* is not agreed to be paid by way of rent, nor is rent agreed to be paid in respect of any ten acres collectively. The rent—if indeed it can properly be called rent, and is not rather in the nature of a royalty—is payable in respect of each individual acre as taken. The only purpose of the stipulation as to the 1000*l.*, is to insure that a given quantity of land shall be worked in each year. No rent is paid for any ten acres occupied simultaneously, but, as I have already pointed out, the rent is paid for a single acre, and no more. The test of what the hypothetical tenant of the Assessment Act would give by way of rent cannot here avail the respondents, but the contrary. A tenant

would not agree to give 115*l.* for the right to take fresh land into working if he were to be saddled with the serious cost of restoring six and a half acres of land already worked out by someone else. All that he would do would be to give that price if placed in the same position as the appellants were in when they first began their operations on entering on the first acre. The consideration for the right of working each acre is the amount agreed to be paid, plus the engagement to restore the soil. The consideration for which the company agree to restore the soil is that of first extracting the coprolite. A fresh tenant would not undertake the profitless task of restoring land which he had not had the opportunity of working. I come back, therefore, to the position I first took,—namely, that the appellant, while occupying ten acres at the time of making the rate, occupied only three and a half acres assessable at the higher value, and consequently that the court of quarter sessions were right in reducing the rate in respect of the residue. I regret to arrive at that conclusion, because I think that in justice and equity each acre should pay according to its increased value, but the case appears to me an anomalous one, and one which the existing law cannot reach without being strained in a manner in which we ought not to strain it. I think, therefore, that the court of quarter sessions were right, but as my learned brothers think otherwise, the order made on the appeal must be reversed.

MELLOR, J.—My brothers Lush and Archibald concur in the judgment which I am about to deliver: The Earl of Hardwicke is the owner of lands in the parish of Whaddon, which contain a considerable depth of fossil stones called coprolites, and as such owner agreed to authorise and empower the appellant, to the exclusion of all other persons, to enter upon, hold, and use certain of such lands, and to dig, raise, and cart away the coprolites contained in such lands for his own use, the appellant levelling the ground and restoring it in manner and upon the terms contained in the agreement. On an appeal to the sessions against the rate made upon the appellant in respect of such land, the Court of Quarter Sessions amended and reduced the rate, subject to a case to be stated for the opinion of this court. From such case it appears that the appellant employs two portable steam engines, which are capable of washing the coprolites obtained from ten acres in the course of one year, and does, in fact, dig at least ten acres in the course of one year at an average rate of two-and-a-half acres per quarter. The appellant is in possession of ten acres of land during at least one whole year, but of this ten acres only about one fourth is dug over by him and exhausted in each quarter, and an additional area of at least one acre is always occupied by him for mills and tramways. The greatest quantity used by him at any one time for coprolite purposes, inclusive of mills, &c., is three-and-a-half acres. There are always during the continuance of the operations six-and-a-half acres, from which the coprolites have been raised, lying in the shape of mounds and slurry-pans, making, together with the before-mentioned three-and-a-half acres, the total quantity of ten acres not restored to the tenant from whose farm the same is taken. The appellant is not necessarily in the occupation of the same ten acres of land during all the year, nor indeed during the whole

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of any quarter of a year, his occupation being a perpetually shifting one, and he taking on from time to time, and yard by yard, fresh land at one end of his occupation, and relinquishing it, as and when levelled, at the other end. The total value of the occupation of each acre of land for the purpose of raising coprolites, is 115*l.*, and the hypothetical yearly tenant would give that sum for it. This coprolite value is realisable once and once only. It appears by the agreement, which is made part of the case, that the field or fields to be dug are set out by the agent of the owner, and the appellant is bound to dig sufficient land for coprolites, so as to realise and pay to the proprietor the sum of 1000*l.* sterling per annum at least, payable quarterly; and in case of the failure of the appellant to dig sufficient land to realise that amount, he is nevertheless bound to pay that sum to the owner, and in like manner the appellant is to pay rateably for any excess of land dug in any year. The rates for the relief of the poor are made quarterly in the parish of Whaddon. It was not contended that there was not a rateable occupation by the appellant, the land itself being convertible into a source of profit (*Roads v. The Overseers of Trumpington (ubi sup.)*; *B. v. Alberbury*, 1 East, 533). But it was said that inasmuch as the appellant only actually used two-and-a-half acres in any one quarter for the profitable purpose of getting the coprolites, and one acre for placing the machinery necessary to get them, he was only rateable at a coprolite value in any one quarter in respect of the land so actually used, and for which the hypothetical tenant would give the rent of 115*l.* per acre, and that the sessions were right in amending the rate on that basis. On the part of the respondents it was contended that, the appellant being in the exclusive occupation during the year of ten acres of land capable of producing and actually producing coprolites during the year of the value of 115*l.* per acre, at an annual payment to the owner of at least 1000*l.* sterling per annum, payable quarterly, and which rent or payment the hypothetical tenant would give for the use and occupation of such ten acres, with the privileges attached thereto of getting coprolites during the year, it was not material that the actual profitable user of ten acres did not extend beyond three-and-a-half acres in any one quarter of a year, or that the actual user and occupation was constantly shifting as the coprolites were worked out, and that the overseers were justified in rating the appellant upon the whole ten acres, as land capable of yielding during the year from the getting of the coprolites the annual sum of 1000*l.* at the rate of 115*l.* per acre. I am of opinion that the contention of the respondents is correct. The appellant is found by the case to have the exclusive possession during the year of ten acres of land, the area of which is constantly shifting as the work progresses, and the appellant does in the course of a year dig the entire ten acres and obtains therefrom a valuable property in the shape of coprolites, and for which he is bound to pay 1000*l.* per annum at least to the owner, payable quarterly. I cannot see how the fact that by the course of his working he only actually uses three-and-a-half acres during any one quarter makes any difference in the mode or extent of his liability to be assessed to the poor rate. The annual value of his occupation is the same, although by the course of his working he

only actually uses three-and-a-half acres out of ten acres during any one quarter of a year, the fact being that during the year over which his occupation extends, he actually does work the entire ten acres, and produces the profit which enables him to pay the stipulated rent or payment of 1000*l.* per annum to Lord Hardwicke, and for which the hypothetical tenant would pay at the rate of 115*l.* per acre. The rate must be made on the net annual value of the several hereditaments rated thereunto, and therefore it cannot be made upon the net quarterly value of the hereditaments liable to the rate, and it appears to me that the net annual value of the hereditament is the same whether the profit is earned wholly in one quarter of a year or spread over the year. I cannot distinguish the present case upon this point from an ordinary agricultural farm, in which the net annual value is the same, although the one part of the farm may lie fallow, or be a source of expense at one period and of profit at another, notwithstanding which the rate must be made upon the farm in respect of its net annual value. The contention of the appellant would produce this result, that although in the course of the year the profit earned from the whole ten acres would amount to ten times 115*l.*, or 1150*l.*, the rate would be made in each quarter, not upon the net annual value which the hypothetical tenant would give for the occupation of the ten acres for a year with the privilege of getting the coprolites, but upon an arbitrary division of the ten acres into four portions of two-and-a-half acres each, which alone, by the arrangement between the parties, could be profitably worked during any quarter of a year by the lessee, so that ten acres of land yielding coprolites of the value of 115*l.* an acre throughout the whole year, and thereby realising the yearly payment of 1000*l.* per annum at least, and otherwise properly rateable to the poor rate at that annual value, are, by the effect of a particular mode of converting the ten acres, to be rated, not upon the annual value, but upon some arbitrary value by the quarter. I cannot but think that is a mode of rating in direct violation of the Parochial Assessment Act, which requires every rate to be made upon the annual value of the hereditaments rated thereto. The case in the argument for the appellants was treated as if by the agreement a mere licence to dig coprolites at a royalty was granted, and as if there was no exclusive occupation of more than two-and-a-half acres of land, either for the purpose of getting the coprolites, or for the use and occupation of at least an acre during the year as the site of the mills and tramways. In truth the tenant had the exclusive occupation during the year of ten acres of land with the privilege of digging it for coprolites at a yearly rent or payment of 1000*l.* per annum at least, and it being admitted that a yearly tenant would give that rent or annual payment for it, I cannot see why the parish should lose the benefit of an area of ten acres, each of equal value, and together realising a rent or sum of 1000*l.* during the year for the purpose of rating to the poor rate, because the parties by an ingenious arrangement as to the mode of working make only one-fourth of it profitable during any one quarter of a year, and the other six-and-a-half acres out of which the coprolites have been got during the year, either unprofitable or a source of expense. I think that, inasmuch as the lessee had the benefit

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of the actual and exclusive occupation of ten acres during the year, and realised out of each acre the proportion of the agreed annual rent or payment, he can set up no claim to reduce the annual value of the whole, because in realising the profit out of the ten acres he has reduced six-and-a-half acres to a condition either unprofitable or a source of expense. I am, therefore, of opinion that the sessions were wrong in reducing the rate, and that the respondents are entitled to judgment.

Order of sessions amending the rate quashed; original rate affirmed.

Attorneys for appellant, *Walters and Gush*, for *W. H. Carver*, Royston.

Attorneys for respondents, *Church and Clarke*, for *Thurnall and Nash*, Royston.

COURT OF COMMON PLEAS.

Reported by *ETHELBURTON SMITH* and *J. M. LELY*, Esqrs.
Barristers-at-Law.

April 22 and May 8, 1875.

NORTHCOTE (pet.) v. PULSFORD AND GUPPY (resps.).

BARNSTAPLE MUNICIPAL ELECTION PETITION.

Municipal election petition—Double nomination—One nomination good and another bad—Double entry of candidate's name on ballot paper—Municipal Corporation Act 1859 (22 Vict. c. 35), s. 5—Ballot Act 1872 (35 & 36 Vict. c. 33), ss. 13, 20, and rule 22.

The double entry of a candidate's name upon a ballot paper does not of itself avoid his election.

By the Municipal Corporation Act 1859, s. 5, seven days before the election of councillors the town clerk is to publish a notice to the effect inter alia that "every nomination must be in writing, and must state the Christian names and surnames of the persons nominated, with their respective places of abode and descriptions."

By sect. 20 of the Ballot Act 1872 the poll at municipal elections is to be conducted in the same manner as at parliamentary elections, and such provisions of the Ballot Act and schedules as relate to a poll are applied to municipal elections. By rule 22 of the Ballot Act "every ballot paper shall contain a list of the candidates described as in their respective nomination papers, and arranged alphabetically in the order of their surnames, and (if there are two or more candidates with the same surname) of their other names." By sect. 13 of the Ballot Act "no election shall be declared invalid by reason of a non-compliance with the rules, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of the Act."

The petitioner and the respondent P. were both candidates for the office of councillors. The petitioner's name appeared twice on the burgess roll (there being no other person of the same names on such roll) under two different descriptions, and he was nominated under both such descriptions, first with his consent, as C. E. N., of B. street, Barnstaple, gentleman, and afterwards without his consent as C. E. N., of S. street, Bishops Tawton, land agent.

The respondent G. being the returning officer, entered the name of the petitioner twice in the ballot papers, once in respect of each nomination; 71 voters put marks against his name under the one nomination, and 301 voters put marks against his name in the other. By adding the two sets of votes together the petitioner had a majority over the respondent P., otherwise not.

Held, that there had not been such non-compliance with the rules of the Ballot Act as to invalidate the election of the petitioner, and that the petitioner was entitled to be returned.

Such provisions of the Ballot Act as confine objections to the nomination paper to a period preceding the taking of the poll do not apply to municipal elections, which are to be conducted, as respects nomination, according to the Municipal Election Acts.

Case stated under the Corrupt Practices (Municipal Elections) Act 1872.

1. The election to which this petition relates is an election of three councillors for the North Ward of the borough of Barnstaple, which took place on the 2nd of Nov. 1874, when Thomas Clifford, James Harris, Henry Hortop, Thomas May, Charles Edward Northcote (the petitioner) and John Pulsford (one of the respondents) were candidates, and the said James Harris, Thomas May, and John Pulsford have been in the usual manner declared to be duly elected.

2. The respondent, T. W. M. W. Guppy, was the presiding alderman at the said election.

3. [Petition presented 11th November 1874, and be taken as part of case.]

4. The name of the petitioner appears twice upon the burgess roll of the said borough of Barnstaple, as follows:—

In the North Ward as

Parish.	Name.	Property.	Street, Lane, &c.
Barnstaple	Northcote, Charles Edward	Office Buildings	Boutport-street

In the South Ward as

Parish.	Name.	Property.	Street, Lane, &c.
Bishops Tawton	Northcote, Charles Edward	House	South-street

5. There is no other person named Charles Edward Northcote upon the said burgess roll.

6. The petitioner was duly nominated as a candidate at the said election by the name and description of "Northcote, Charles Edward, South-street, Bishops Tawton, land agent."

7. The petitioner was afterwards and without his knowledge or consent, also nominated in writing by one of the burgesses of the said North Ward by the name and description of "Northcote, Charles Edward, Boutport-street, Barnstaple, gentleman."

This nomination paper was in the words and figures following:

Borough of Barnstaple.

Election for councillors for the North Ward of the borough of Barnstaple, to be held on 2nd Nov. 1874.

Nomination Paper.

I, the undersigned, William Priest, of Pilton-street, in the North Ward of the borough of Barnstaple, being a person entitled to vote for the North Ward in the said

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borough of Barnstaple, do hereby nominate the following person as a proper person to serve as councillor for the said North Ward.

Surname.	Other names.	Abode.	Rank, Profession, or Occupation.
Northcote	Charles Edward	Boutport-st., Barnstaple	Gentleman

Dated the 28th Oct., in the year of Our Lord one thousand eight hundred and seventy-four.
(Signed) WILLIAM PRIEST.

At the time when the Burgess roll aforesaid was made up, and from that time to the present, the premises in Boutport-street were and have been an office only, where the petitioner carried on his business as a land agent, but neither he nor any of his family, during the time aforesaid, slept or lived upon those premises; but he and his family, during the time aforesaid, slept and lived in the house in South-street, in Bishops Tawton, aforesaid, which is in the South Ward, within the borough of Barnstaple.

8. The following is the form of the ballot paper used at the said election:

1	CLIFFORD. Thomas Clifford, of Buck-yard, Barnstaple, butcher and cattle dealer.
2	HARRIS. James Harris, of Gay-street, Barnstaple, seed merchant.
3	HORTOP. Henry Hortop, of High-street, Barnstaple, draper and accountant.
4	MAY. Thomas May, Boutport-street, hotel proprietor.
5	NORTHCOTE. Charles Edward Northcote, of Boutport-street, Barnstaple, gentleman.
6	NORTHCOTE. Charles Edward Northcote, of South-street, Bishops Tawton, land agent.
7	PULSFORD. John Pulsford, of Ebberly-terrace, Barnstaple, statutory.

9. It appeared at the counting of votes at the said election—

- That 71 electors had marked a cross upon their respective ballot papers opposite to the name of Northcote, No. 5.
- That 301 electors had marked a cross upon their respective ballot papers opposite to the name of Northcote, No. 6.
- That of the said 71 and 301 electors eight only had marked crosses opposite to both names, Northcote No. 5, and Northcote No. 6.
- That the remaining candidates had received the following numbers of votes: Clifford, 8; Harris, 508; Hortop, 14; May, 372; Pulsford, 339.

10. The petitioner claimed to be entitled to be declared elected, together with the said James Harris and Thomas May, instead of the said John Pulsford.

The respondent, T. W. M. W. Guppy, declared the said James Harris, Thomas May, and the respondent, John Pulsford, to be duly elected.

The question for the opinion of the court was whether the petitioner or the respondent Pulsford ought to be declared duly elected as councillor for the North Ward of the borough of Barnstaple.

Gorst (G. Lewis with him), for the petitioner.

Tennant for the respondent Pulsford.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

May 8.—The written judgment of the Court (Lord Coleridge, C. J., Brett, Denman, and Archibald, JJ.) was delivered as follows, by

BRETT, J.—At the time of the passing of the Ballot Act, parliamentary elections were conducted partly according to the common law practice and partly as regulated by the parliamentary statutes. The mode of conducting such elections is so well known that it is unnecessary to recapitulate it. Municipal elections were conducted according to the regulations of the Municipal Elections Act (22 Vict. c. 35). By sect. 30 of the former statute, it was enacted that upon the 1st Nov. in every year the burgesses enrolled in every borough should openly assemble and elect from the persons qualified to be councillors, the councillors of such borough, &c.; by sect. 32, every election of councillors, &c., shall be held before the mayor and assessors, &c., and the voting at every such election shall commence at 9 o'clock in the forenoon, and shall finally close at 4 o'clock in the afternoon of the same day, &c. By the Act 22 Vict. c. 35, s. 6: "At any election of councillors, &c., any person entitled to vote may nominate for the office of councillor any such person, &c., and every such nomination shall be in writing, and shall state the Christian names and surnames of the persons nominated, with their respective places of abode and descriptions, and shall be signed by the party nominating and sent to the town clerk at least two whole days (Sunday excluded) before the day of election." By sect. 7: "Any nomination paper may be in the form contained in the schedule to the Act annexed or to the like effect." By sect. 8: "At any election of councillors, &c. . . if the number of persons so nominated shall exceed the number to be elected, the councillors to be elected shall be elected from the persons so nominated, and from them only. If the number of persons so nominated shall be the same as the number to be elected, such persons shall be deemed to be elected, and the mayor, &c., shall publish a list of the names of the persons so elected not later than 11 o'clock in the morning of the said day of election." In both parliamentary and municipal elections there was the nomination, which took place whether the election was contested or not, and in both, if there was a contest, the election was naturally divided into three periods, the first including the nomination and all necessary to be done up to the moment of its being determined that a poll must be taken, and the second and third the taking of a poll and declaring the result of it. The mode of voting at the poll was the same in both, but the mode of nominating candidates was different, such nomination at parliamentary elections being in a traditional manner by speech, but at municipal elections in a regulated manner by nomination papers. It was in this state of things that the Ballot Act was passed, and the first point to be considered is the manner in which and the phraseology by which it deals with the necessarily distinct periods of an election. It seems to us to deal distinctly with three periods of an election: first, with the period up to the time of the determination that a poll must be taken; secondly, with the period of the taking the poll; thirdly, with the period of ascertaining and declaring the result of the poll. The statute begins by dealing

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only with parliamentary elections; the greater part of the Act deals naturally with the new mode of taking the poll at a parliamentary election; but sect. 1 and rules 1 to 12 inclusive deal with the new mode of nomination at parliamentary elections. By sect. 1 a candidate for election to serve in Parliament for a county or borough shall be nominated in writing. The writing shall be delivered "during the time appointed for the election." If at the expiration of one hour "after the time appointed for the election" no more candidates stand nominated than there are vacancies to be filled up, the returning officer shall forthwith declare the candidates who may stand nominated to be elected, &c., but if, at the expiration of such hour, more candidates stand nominated than there are vacancies to be filled up, the returning officer shall "adjourn the election" and shall "take a poll." Here the first period is distinctly defined, and the phrase used to define it is "the time appointed for the election, and the expiration of one hour after the time appointed for the election." The second period is described as the time during which the returning officer shall adjourn the election and shall take a poll, "and the time after the adjournment of an election by the returning officer for the purpose of taking a poll." That which is called "the election" is separated from that which is called "the taking a poll," and the former is adjourned while the latter is taking place. So in rule 1 of schedule 1, "Rules for Parliamentary Elections." The returning officer is to give public notice of the day on which, and the place at which he will proceed to "an election," and of the time appointed for "the election," and of the day on which the "poll will be taken" in case the election is contested. By rule 2 "the day of election" shall be fixed. By rule 3, "the place of election" "shall be a convenient room." In this rule "the election," which is to take place in a room, is obviously only the nomination. So by rule 4: "The time appointed" for "the election" shall be "such two hours between the hours of ten in the forenoon and three in the afternoon, as may be appointed." These two hours are obviously the time of an uncontested election, or of the nomination only, if the election is contested. Rules 5 and 6 regulate the mode of nomination at a parliamentary election. By rule 8 "the nomination papers shall be delivered to the returning officer at the place of election during the time appointed for the election." Here the place is that described in rule 3, and the time is that described in rule 4, and the first is not the place at which, and the second is not the time during which, a poll can be taken. Rules 12 and 13, which must hereafter again be noticed, apply to the nomination period, and are still within the division of the statute headed "Rules for Parliamentary Elections." By rule 12 "A person shall not be entitled to have his name inserted in any ballot paper as a candidate unless he has been nominated in manner provided by this Act, and every person whose nomination paper has been delivered to the returning officer 'during the time appointed for the election,' shall be deemed to have been nominated in manner provided by this Act, unless objection be made to his nomination paper by the returning officer or some other person before the expiration of the time appointed for the delivery or within one hour afterwards." And by rule 13, "the returning officer shall decide on the validity of every objec-

tion made to a nomination paper, and his decision, if disallowing the objection, shall be final; but, if allowing the same, shall be subject to reversal on petition questioning the election or return." The period "of the taking the poll" is dealt with in sect. 2 and many subsequent sections, and in the rules, commencing with rule 14, under the heading or division of "The Poll." By sect. 2: "In the case of a poll at an election the votes shall be given by ballot. The ballot of each voter shall consist of a paper (in this Act called a ballot paper) showing the names and descriptions of the candidates." The ballot is to take place at polling stations. The mode of taking the ballot is regulated by many sections, and by the rules 14 to 30. Nothing can be more distinctly divided in treatment or in words than that which is in the Ballot Act called "the election," from that which is called "taking the poll." Up to this point of the judgment, then, we have at a municipal election the nomination and polling, if a poll be taken, regulated by the Municipal Election Statutes, and the nomination and polling at a parliamentary election, regulated by the new legislation of the Ballot Act, and in both cases a sharp distinction drawn between the period of nomination and the period of polling. It is now to be considered whether all, or if only a part how much of the procedure at a municipal election is altered by the Ballot Act. That statute is divided into parts. Part 1 is entitled, "Parliamentary elections," and is divided into sections from 1 to 19 inclusive; then follows part 2, entitled, "Municipal elections." These elections have not been mentioned in part 1. By sect 20, which is the first which deals with municipal elections: "The poll at every contested municipal election shall, so far as circumstances admit, be conducted in the manner in which the poll is by this Act directed to be conducted at a contested parliamentary election, and subject to the modifications expressed in the schedules annexed hereto, such provisions of this Act, and of the said schedules, as relate to or are concerned with a poll at a parliamentary election, shall apply to a poll at a contested municipal election," and "a municipal election shall, except in so far as relates to the taking of the poll in the event of its being contested, be conducted in the manner in which it would have been conducted if this Act had not passed." In the first part of the section, it is not a municipal election which is mentioned, nor even a contested municipal election, but the poll at a contested municipal election, and it is not a Parliamentary election to which it is assimilated, but the poll at a contested parliamentary election. And in the second part, a municipal election "shall be conducted" in the same manner as before, except in so far as relates to the taking of the poll in the event of its being contested. If there is no contest the whole municipal election is to be conducted as before. If there is a contest, all but the taking of the poll is to be conducted as before. And considering the plain division made in the Act as before pointed out, between the other parts of an election and the poll, or the taking of the poll, it cannot, upon consideration, be held that the provisions as to the nomination are within the meaning of this section, such provisions "as relate to or are concerned with the poll." The nomination, therefore, and all proceedings with regard to it, are to be conducted as before, i.e., according

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to the Statutes 5 & 6 Will 4, c. 76, and 22 Vict. c. 35, except in this, that, according to the note at the end of the form of the nomination paper in Schedule 2, "The form of nomination paper in a municipal election shall, as nearly as circumstances admit, be the same as in the case of a parliamentary election." Considering the construction of sect. 20, and its affirmative and negative restriction of the effect of the Ballot Act in municipal elections to the conduct of the taking of the poll alone, this note is, in our opinion, not sufficient to authorise any alteration in the substantial requisites under the former statutes of a nomination at a municipal election. We are, therefore, of opinion that the mode of conducting the nomination at a municipal election, whether contested or uncontested, is still regulated by the municipal election statutes, and that no defect in a nomination which would be fatal under those statutes can be cured by rules 12 or 13 of the Ballot Act. As the nomination is not to be made "in the manner provided by the Ballot Act," those rules are by their terms prevented from being applicable. And sect. 13 is almost inapplicable to any defect but one in a nomination at a municipal election, because such defect—unless it be in the form of the nomination paper—is not a non-compliance with the rules contained in the first schedule or a mistake in the use of the forms in the second schedule of the Ballot Act. Turning now from the interpretation of the Ballot Act to its application to the points raised as to the conduct of the election in question, it is admitted that one nomination of the petitioner, Mr. Edward Northcote—namely, that represented as No. 5, was a bad and void nomination under the Municipal Election Statutes (*Reg v. Coward*, 17 Q. B. 893). If it had been the only nomination, the candidature of the petitioner ought to have been rejected. But the petitioner was by another nomination paper, that represented as No. 6, well nominated. It was impossible, therefore, as it seems to us, to reject his candidature. Suppose there had been but one vacancy, and the petitioner had been the only person nominated, but once by a good and once by a bad nomination, it is absurd to say that the bad nomination would destroy the good one. He must have been at once declared duly elected upon the good nomination. The suggestion that the returning officer ought not to inquire whether two nominations of the same name do or do not apply to the same person would lead to this, that if the same person were twice nominated for one vacancy, and no one else were nominated, yet there must be a poll by ballot for the two names but one person. The statement of such a proposition proves its absurdity. It is obviously the duty of the returning officer to inquire whether nominations which might apply to one or to different persons are of the same or different persons. A bad nomination cannot avoid a good nomination of the same person. Mr. Northcote was, therefore, a candidate properly nominated, and there were other candidates properly nominated, and there were more candidates elected than there were vacancies to be filled up. It was then by necessity, and by the terms of all the statutes, the duty of the returning officer to take a poll. From that point the sections and rules of the Ballot Act which apply to the conduct of a poll were, by the terms of sect. 20, applicable, and the poll was to be taken according to the sections

and rules in the Act. By rule 22 "each ballot paper shall contain a list of the candidates described as in their respective nomination papers." A question is raised whether the name of a candidate twice nominated ought by virtue of this rule to be twice entered in the ballot paper. It is suggested that if it is not he will not be described as in his nomination papers. This is one of the sort of points which must arise upon such statutes. No one foresaw the exact difficulty of dealing in this respect with a double nomination. The answer to the difficulty seems to be, that inasmuch as the ballot paper is to contain a list of the candidates and not a list of their nominations, the returning officer should enter the name of the candidate, and either describe him only as in his correct nomination paper, or append to his name the descriptions in any of his nomination papers which differ, as thus: "Charles Edward Northcote, described in one nomination paper as of Bridport-street, Barnstaple, gentleman, and in another as of South-street, Bishops Tawton, land agent." To enter his name twice, as if he were two candidates, is obviously wrong as matter of sense, and contrary to the words of the rule. The ballot paper in the present case was therefore wrongly drawn up. Still, Mr. Northcote was a candidate, and 372 electors voted for him, intending to vote for him. It is true that 71 voted for him under his description in No. 5 and 301 under his description as No. 6. If both the 71 and 301 votes can be counted as votes given for him, he was duly elected, and so, even though eight votes should be struck off on the ground that eight voters put two crosses to indicate their vote, one to No. 5 and one to No. 6. The question is whether all the votes given for him should be counted as votes given for him. The counting, it should seem, should be under sect. 35 of 5 & 6 Will. 4, c. 76, as amended by the schedule of the Ballot Act. That sect. (35) enacts "that the mayor and assessors shall examine the voting papers so delivered as aforesaid, for the purpose of ascertaining which of the several persons voted for are elected, and so many of such persons, being equal to the number of persons then to be chosen, as shall have the greater number of votes shall be deemed to be elected." If the votes in the present case had been counted and treated according to the words of that section the number of votes really given to appellant entitled him to be declared to be elected. There is nothing to prevent the counting and treating of the votes according to the words of that section, and according to the truth, but the irregular form of the ballot paper. That irregularity of form neither deceived or misled any voter. It was irregularity or mistake in the form of the ballot paper, the form of which is given in schedule 2 of the Ballot Act. As the mistake neither deceived or misled any voter, it may properly be said that it did not affect the result of the election. The mistake therefore was, as it seems to us, cured by sect. 13 of the Ballot Act, which enacts that "no election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act; if it appears, &c., that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election." That section is applicable to the taking of the poll, and the

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poll at a municipal election is to be taken or conducted according to the provisions applicable to a poll of the Ballot Act. That section is, therefore, applicable to the taking of the poll at a municipal election. For these reasons we are of opinion that the petitioner was duly elected, and that the return should be amended accordingly.

Judgment for petitioner.

Attorneys for petitioner, *Guscotte, Wadham, and Daw.*

Attorneys for respondent *Pulsford, Church, Sons, and Clarke, for Thorne, Barnstaple.*

Wednesday, May 5, 1875.

WELLS v. THE MAYOR, &C., OF KINGSTON-UPON-HULL.

Contract—Interest in land within sect. 4 of the Statute of Frauds—Licence to use graving dock—Corporation—Contract with, when it may be not under seal.

A municipal corporation being the owners of a graving dock, permitted the use of it to shipowners for the purpose of repairing their ships upon certain terms specified in a series of regulations. Under these it was necessary for the shipowner to enter the name of his vessel in a book kept by the Borough Treasurer and pay an entrance fee, and the use of the dock was granted in the order of priority of application, and each vessel was required to take her turn at the time of which notice was given to the owner. Certain charges were made for dockage, and it was required that they be paid before the vessel left the dock. The gates of the dock were under the control of an officer of the corporation who opened and closed them for the docking and undocking of the vessels. The use of blocks and shores the property of the corporation was permitted to the vessels in the dock, but the shipowners were made responsible for them, and also for cleaning out the dock daily to the satisfaction of the officer of the corporation. The plaintiff duly entered a vessel and paid the entrance fee, but the defendants admitted another vessel in the turn which properly belonged to the plaintiff. Upon an action for damages in respect of the breach of contract in not giving the plaintiff's ship her turn in order, a verdict was returned for the plaintiff.

Held, first, that the contract was not intended to be and was not concerning an interest in land, and therefore need not be in writing under the 4th section of the Statute of Frauds, and secondly, that being a matter of frequent occurrence and of daily necessity, the case came within the recognised exceptions to the rule that a corporation can only contract under its common seal, and that this contract, though not under seal, was nevertheless binding on the defendants.

THIS was an action tried before Archibald, J. at the Spring Assizes for the West riding of Yorkshire at Leeds in 1874.

The plaintiff was a shipowner at Kingston-upon-Hull, and the owner of a steamship called the *Wells*. The defendants who are the Municipal Corporation of Hull are proprietors of a graving dock, built upon and which they hold as part of the old corporate property. They are an ancient corporation appointed by Royal Charter originally, and came under the Municipal Corporations Act on the passing of that measure. This graving

dock the defendants are accustomed to let to persons requiring the same for the purpose of repairing their ships, and they let it subject to and in accordance with certain regulations, which are of importance in this case, and are as follows:

Regulations for the Corporation Graving Dock.

1. The dock will be let to parties requiring the same for the repair of vessels, at such rates as the council of the borough shall from time to time sanction.

2. With a view to secure to parties as far as possible the use of the dock, in the order of priority of application, a book is kept by the borough treasurer at the Town Hall, in which the names of all vessels intended for repair in the dock must be entered, and as far as practicable priority will be given to vessels in the order of entry, subject nevertheless to these regulations; and also in case of any question as to priority of any vessels, such question shall be determined by the borough treasurer in such manner as he shall see fit, and his decision shall be final.

3. No changing of turns shall be allowed.

4. No vessel is to be entered in the book except by a written order from the owner or master.

5. On entering each vessel a sum of 3s. shall be paid to the borough treasurer as entrance money.

6. The entrance money will be allowed as part of the dockage if the account for such dockage and moneys payable in respect of the vessel shall be paid within ten days after the same is sent in. If the account is not so paid, the entrance money will be absolutely forfeited. The entrance money and the right of turn for the use of the dock will also be absolutely forfeited if the vessel does not take her turn at the time specified at the time of entry, or subsequently fixed by notice (written or verbal) given to the owner, master, or other person in charge, or having the docking of the vessel.

7. The treasurer may on behalf of the corporation, notwithstanding the preceding regulation require the payment of all dockage or other moneys payable in respect of any vessel before such vessel is allowed to leave the dock, and to preserve the lien of the corporation may detain such vessel, and dockage in respect of the vessel will be chargeable during such time as she may be so detained in the dock.

8. The corporation foreman will open and close the dock gates for the docking and undocking of vessels as may be required.

9. The ground blocks and horizontal shores of the corporation may be used for vessels in the dock, but the parties using the same must take all risks and responsibility in respect thereof and of selecting and placing the same.

10. If any injury or damage shall be done to the dock, dock gates, engines, machine, blocks, shores, stores, or any other property of the corporation, by any vessel, or by any person employed thereon or connected therewith, or if any of the blocks or shores are left adrift or lost, full compensation, to be assessed and fixed by the corporation surveyor, shall be paid by the occupier of the dock or owner of the vessel, and the compensation when so fixed shall in like manner as dockage be deemed moneys payable in respect of the vessel, and shall be paid and recoverable accordingly.

11. The dock must be cleaned out each day at the expense of the vessel occupying it, to the satisfaction of the corporation foreman or other person in charge of the dock, and in the event of the occupier of the dock not fulfilling this regulation the corporation will do the work, and all charges or expenses in respect thereof shall be charged to the occupier of the dock or owner of the vessel and deemed moneys payable in respect of the vessel, and be paid and recoverable accordingly.

12. The corporation will for the convenience of parties occupying the dock, afford the usual facilities for using the same, but on this distinct stipulation, that the dock will in all cases be let subject to the parties occupying the same undertaking all risks and responsibilities whatsoever, as the corporation not being a trading body will not be responsible for any injury, damage, or detention however caused, occurring to any vessel docking or undocking, or being in the dock, or for any damage whatever resulting to the owner of such vessel or any other person connected therewith.

13. The corporation will not guarantee the depth of water shown by the scale at the entrance of the dock,

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or any other depth of water over the approaches to the dock. By order of the Town Council.

Hull, 3rd Jan. 1873.

In March 1873 the plaintiff wanted to repair his steamship *Wells*, and on March 15th his clerk engaged the graving dock for the *Wells*, by going to the Treasurer's office paying the entrance fee, and having her name entered in the book. Her turn was to be next after the *St. Petersburg*. When, however, the *St. Petersburg* came out of the dock the defendants allowed another steamship called the *Aberdeenshire* to take the turn which belonged to the *Wells*, and the latter was consequently delayed, and the plaintiff put to considerable expense in having his ship repaired at another place. It was to recover damages for this delay, and for the expenses so incurred by the breach of contract by the defendants in not giving the *Wells* her turn, that the plaintiff sued in this action. The declaration contained three special counts, and a money count, one setting out the above regulations. The defendants' pleas traversed the agreement, and further alleged that it was made subject to its being practicable to dock the *Wells*, and that it was not practicable. The amount of the entrance money was paid into court.

At the trial the learned judge ruled that the contract was not a contract of an interest in land, but a mere licence of the dock, and was not required to be in writing or to be under seal.

The jury found that the plaintiff was ready to avail himself of the turn as soon as the *St. Petersburg* left the dock, and that there was not due care and caution on the part of the defendants to give the plaintiff his turn. Upon this the learned judge ruled that the defendants were answerable for the want of care and caution, and directed a verdict for the plaintiff, and reserving leave to the defendants to move to enter a verdict for them upon the ground that to render the defendants liable the contract in question ought to have been in writing, and that it ought to have been under the seal of the corporation.

Accordingly, in Easter Term 1874, *Field*, Q.C., moved for and obtained a rule *nisi* in the above term, against which

Wells, Q.C. and *Mellor* now showed cause.—The first point raised by the defendants is that this contract was concerning an interest in land. But the fair inference from the regulations and the course of business, is that there was no intention to let land, when a ship was allowed to use the graving dock. The employment of the words "let," and "take possession of" does not necessarily mean demise, see

R. v. Smith, 3 E. & E. 383;

Bean v. Hogg, 10 Bing. 345;

Wright v. Stavert, 2 E. & E. 731; 2 L. T. Rep. N. S. 175.

It is merely a licence to take the ship into the dock and there repair her. [DENMAN, J.—It would be a test to consider if trespass could be brought by the occupier against anyone interfering with his occupation, especially against one of the corporation's servants.] The regulations provide for the presence of the corporation foreman; the occupier cannot get into or out of the dock without him. The words in regulations 2, 6, and 12, "use of the dock," and "using the dock," show what was really contemplated. The case of *Walkins v. Overseers of Milton-next-Gravesend* (18 L. T. Rep. N. S.

601; L. Rep. 3 Q.B. 350), is in point as showing that a licence to use moorings fixed to the soil is not a demise so as to make the licensee an occupier. The question is fully discussed also in *Roads v. Overseers of Trumpington* (23 L. T. Rep. N. S. 821; L. Rep. 6 Q. B. 56). If the dock here were let to each successive person who uses it, the occupier would be liable to be rated, and would be rated in respect of his occupation. This could not be in such a case as the present. There is only a permission to come on the land for a particular purpose and for a time. Just as a person in an inn may have a right to a room, but not to any particular room. [Lord COLERIDGE, C. J.—The judgment of Hill, J., in *Wright v. Stavert* (*ubi sup.*) instances a governess to whom a room is assigned. DENMAN, J.—If this was a mere licence, was it not revocable? See *Wood v. Leadbitter* (13 M. & W. at p. 844).] That case decides that a right to come and remain for a certain time on the land of another can be granted only by deed; but a licence coupled with a grant of an interest in the land which would be irrevocable is not to be assumed here. The second point is that the defendants, being a corporation, could only have entered into this contract under their common seal. But to the general rule as to corporations contracting under seal, there are well recognised exceptions, one of which is that the formality may be dispensed with where the matter is of necessity or urgency. Now here the corporation cannot hold a meeting without three days' notice being given, and yet the very object of a dock like this is to admit ships immediately. As a fact the *Aberdeenshire*, which was admitted instead of the *Wells*, was in a sinking state. It would defeat the very object of the work of the corporation as owners of the dock. *The South of Ireland Colliery Company v. Waddle* (18 L. T. Rep. N. S. 405; L. Rep. 3 C. P. 463), shows that where the contract is for a purpose connected with the objects of the corporation, the seal is dispensed with. [Lord COLERIDGE, C. J.—That is a case of a trading corporation. What do you say to *Ludlow v. The Mayor of Charlton* (6 M. & W. 815)?] That decision was on the ground that there was no paramount convenience so great as to amount to necessity; if there had been it would have come within the exceptions to the rule stated in the judgment as applicable to municipal as well as to trading corporations. [DENMAN, J.—Referred to *Austin v. The Guardians of St. Matthews Bethnal Green* (29 L. T. Rep. N. S. 807; L. Rep. 9 C. P. 91)] In that case the duties of the appointee were too important to admit of an informal appointment, and another late case *The Mayor, &c., of Kidderminster v. Hardwick* (29 L. T. Rep. N. S. 611; L. Rep. 9 Ex. 13) was where it was a question of letting tolls, and there was no hurry. Having regard to the facts of this case it is almost a *reductio ad absurdum* to suppose that the admission of disabled ships into this dock could be done in any other way than it was. In *Church v. The Imperial Gas Company* (6 A. & E. 846), the rules and its exceptions are fully stated by Lord Denman as they are applicable to municipal corporations, and this case comes within those exceptions.

Maule, Q.C. and *Cave* in support of the rule.—On the point as to the necessity of the seal, there has been throughout an assumption of urgency which did not exist. It was rather a deliberate proceeding in reality, as there were the formalities

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of going to the office, assenting to the rules, and having the priority registered on payment of the fee. That shows that there was in contemplation time during which the ship would be waiting her turn. It would not be any difficulty so great as suggested to affix the seal to these contracts because the corporation might appoint an officer for the purpose to do this by rule. Pollock, B. says, in *The Mayor of Kidderminster v. Hardwick* (*ubi sup.*) "It is open to every corporation to get rid of the whole difficulty by appointing an agent to act for them under seal." All exceptions which have been made are in favour of trading corporations, and the last case is that of the *South of Ireland Colliery Company v. Waddle* (*ubi sup.*), where the exception is expressly put on that ground, as it was said that the contract was for a purpose connected with the objects of the corporation. This is not so here, this is an ancient corporation, and the letting of this dock is in no sense one of the objects of its existence, the dock is built on corporate land and the corporation might have made any other use of it they pleased. *Dyke v. The St. Pancras Board of Guardians* (27 L. T. Rep. N.S. 342), where there was a non-trading corporation decided, that the appointment of a medical officer to an infirmary must be made under seal. The exceptions then are in the case of trading corporations and in trading matters. *The London Dock Company v. Sinnott* (8 E. & B. 347) is even stronger in our favour because there the plaintiffs, though a trading corporation, were held not bound by a parol agreement to execute a contract for scavenging the docks. Again *The Copper Miner's Company v. Fox* (16 Q.B. 229), where the contract was relating to a purpose for which the plaintiffs were not incorporated, it was held not binding on them. The other point is that this contract ought to have been in writing because it was within the 4th section of the Statute of Frauds. On this point *Wood v. Leadbitter* is a direct authority. That was where a ticket of admission to the grand stand at Doncaster, was held to be a grant of an interest in land, and not being by deed was revocable as a mere parol licence. This is an *a fortiori* case because here the possession must be an exclusive one. It is said that the 8th Rule negatives exclusive possession, but it is clear that the corporation foreman is only present as a porter or concierge, and does not interfere with the occupation by the shipowner. It was asked if trespass could be maintained against the foreman, but it is to meet that possibility that there is the special provision inserted admitting him. The contention must therefore be either that we gave a licence to the plaintiff to come upon our land, in which case it was revocable, and so no action will lie, which brings the case within *Wood v. Leadbitter* (*ubi sup.*) or that we gave an irrevocable licence, and that this was a contract to grant an irrevocable license. Now a licence only becomes irrevocable when it is accompanied by an interest, and such an interest must be either a chattel interest or an interest in land; here, however, it cannot be a chattel interest but it must be an interest in the graving dock which is an interest in land. If the action therefore is maintainable, it must be on the ground that this contract conveyed an interest in land. It seems plain that if a stranger broke down the dock gates the occupier could maintain trespass against him, and it would seem that such a license as there was here would amount to a demise. R.

Winter (2 Salk. 588). And if the rating be a test, such an occupier as the plaintiff might be rated, as has been held in cases where there was no such exclusive possession as the shipowners here have. *R. v. The Inhabitants of St. Martin's* (3 Q.B. 204), and *Roads v. The Overseers of Trumpington* (23 L. T. Rep. N.S. 821; L. Rep. 6, Q.B. 56). We are not obliged indeed to go so far here as to show that the occupiers of the dock would be entitled to be rated, but they are as much tenants as tenants of furnished lodgings, and an agreement to occupy then is an interest in land within the statute. *Inman v. Stamp* (1 Stark. 12). Occupying a stall in a market under an agreement would give a settlement. *R. v. Caversham* (4 B. & C. 683); and *Buszard v. Capel* (8 B. & C. 141), shows that where the exclusive use is demised the land is demised. *Selby v. Greaves* (19 L. T. Rep. N.S. 186; L. Rep. 3 C. P. 594), and *Mayor of Yarmouth v. Groom* (7 L. T. Rep. N.S. 161; 1 H. & C. 102), show that the contract here amounted to a demise. But if the plaintiff here had an interest in land not amounting to a demise, it would still be sufficient to bring the case within the statute (*Evans v. Roberts* (5 B. & C. 829); *Smart v. Jones* (33 L. J. 154. C. P.). *Wood v. Lake* (Sayer 3), which is referred to in *Wood v. Leadbitter* (*ubi sup.*), and would seem to be rather against the defendants' contention has been questioned by Lord St. Leonards, who thought that the agreement there amounted to a lease; and the case cannot therefore be upheld as an authority. [HUNDLESTON, J.—The case is cited in Chitty on Contracts, p. 280, without any suggestion that it has been overruled.] It is further distinguishable as there there was only a licence to stack coals on part of a close, and here we say that the contract was for the whole use of the dock, and so was a demise; and that is what Lord St. Leonard's thinks that the licence in *Wood v. Lake* (*ubi sup.*), really was, in which case the decision must be wrong: (Sugden Vendors and Purchasers, 14th edit., p. 124). He says, "*Wood v. Lake* was not considered an authority."

LORD COLERIDGE, C.J.—This case has been argued at some length before us, and a number of cases cited and arguments used more or less relevant to the points raised for our consideration, but disembarassed of most of these, I am of opinion that the case is in reality a simple one, and admits of an easy decision. It was an action brought by a shipowner against the defendants for an alleged breach of contract, and to recover damages for the injury to the plaintiff arising from that breach. As I understand the facts they are these. A contract in the terms of the regulations which are before us was entered into, and upon the payment of three guineas it was agreed that the plaintiff's ship should in her turn be allowed to go into the defendants' graving dock. That contract was broken by the defendants permitting another ship to go in instead of the plaintiff's ship, and for the damage consequent on the delay the action was brought and a verdict obtained. A rule to set aside that verdict was granted, and it has been endeavoured to be supported upon two grounds. First, that the contract, if it was a contract at all, was one relating to an interest in land within the 4th section of the Statute of Frauds, and must have been in writing, and that this was not; and secondly, that the defendants being a corporation, and not a trading but a municipal corporation, could only contract under their corporate seal, and they had

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not here done so. There are thus only two points to be discussed, and they may be, as I have said in my opinion, easily disposed of. First, was it an interest in land that this contract dealt with? This may depend on two considerations, was it intended by the parties to deal with an interest in land, and again, apart from intention, have they nevertheless dealt with such an interest. In either of these cases the contract would be brought within the 4th section of the Statute of Frauds, and it must be in writing for the plaintiff to be held responsible for a breach of it; but if neither of these suggestions be answered in the affirmative, then it is unnecessary that the contract should be in writing, and the parties to it will be bound by its terms. Now, *prima facie*, no one would think that such an arrangement as took place here was to be a grant of an interest in land. It was, as we know, an arrangement for the use of the graving dock by the plaintiff, but if there was such an intention as has been suggested, then it must have been the exclusive possession for a certain time of the land and the dock that was attempted to be conveyed to the plaintiff. I however am clearly of opinion that there was no intention to pass any interest in the land. It is incredible that the framers of the regulations or the shipowners, indeed, that either of the parties intended to deal with the land at all. They intended to deal with the use of the dock and the appliances for the repairing of the ships. It is equally clear that no interest was attempted to be created irrespective of intention, and intention must be gathered from the language of the regulations. Now look at that for a moment; the words "let," and "occupier" do not necessarily mean the creation of an interest in land by way of tenancy, and they are not words of art, but must be read by the light thrown upon them by the whole document. The heading speaks of the "occupation of the Corporation Graving Dock." The first no doubt says the dock will be let; and the second is a provision somewhat in favour of the defendants in so far as it says, though there is a contract, it is to be fulfilled only so far as is practicable, and the borough treasurer is to decide any question that may arise. The fifth regulation however shows that the payment of the entrance money constitutes part of the consideration, and the forfeiture of the entrance money shows that no right is given to the shipowners even to go into the dock. So far, therefore, as it seems to me, there is nothing inconsistent with the intention on the part of the defendants of keeping the dock in the possession and under the control of the corporation. That being so, what shall be said as to the 7th rule? (His Lordship then read the rule.) "Before the ship shall leave the dock"—that is before she shall leave the ground which they say is the shipowner's exclusive property. This contemplates locking the gate, for which they say the shipowner might maintain trespass against the corporation. I can scarcely conceive language stronger than this is indicative of a retention of the possession of the dock, coupled as it is with the notice of a lien being held on the ship while she is on the land said to be exclusively in possession of her owner. The 8th rule shows that the alleged tenant cannot open and shut his own door. The 9th and 10th make provision how corporation property is to be used by the ship using the corporation dock; that surely is a fair intendment that the corpora-

tion meant to keep the dock and everything belonging to it in their own possession, for they treat the owner of the ship and the occupier of the dock as synonymous terms, and hold them liable for the use of corporation property. The 11th speaks of the "corporation foreman, or other person in charge of the dock," and in the 12th they contract that the persons who use the dock shall have certain advantages which the corporation as owners can give. These, then, are the terms of the instrument from which it is said that a demise is to be inferred. It would be startling if the language in that instrument had said something so different from what we know must have been the intention of the framers of it; but the language is not, as I have shown contrary to the intention, it is to my mind quite plain, and it lays down on behalf of the corporation the terms on which this property is to be used. If the question of intention be raised, I decide against the corporation on the words which intimate no such intention; if the words are to be looked at apart from any question of intention I decide in the same way that they do not convey any interest in land. We are well within decided cases in so holding, and the judgment of Hill, J., in the case I first referred to, *Smith v. The Overseers, &c., of St. Michael's, Cambridge* (3 L. T. Rep. N. S. 687; 30 L. J. 74, M. C.), is expressly in point as to the principle. He says, "We think we must look not so much to the words as to the substance of the agreement, and taking the whole together we think it must be construed not as a demise of the five rooms, but as an agreement by which the appellant came into possession of those rooms, and keeping a servant there for himself; and certainly the exclusive enjoyment of the rooms was to be given in the same way as the guest at the inn, or a lodger in a house, has a separate apartment, or the master of a ship has a separate cabin, in which case the possession remains in the innkeeper, the lodging-house keeper, and the shipowner." It is true as has been pointed out that this is a rating case, and that there may be an occupation sufficient to constitute an interest in land within the Statute of Frauds, which would not be sufficient to entitle (as it is somewhat ironically expressed) the occupier to be rated. The incidents may not indeed be the same in the two cases, but looking here at the clear words of the instrument, I say that there was no intention to demise an interest in land, and that none has been by those words demised. *Wright v. Stavert* (*ubi sup.*) is also in point, and the language of Hill, J., is again lucid and clear. He says, "the defendant's position here is directly analogous to that of a domestic servant, or a governess, or a person employed to build a house upon another's land, all of whom have a right, incidental to their respective contracts, to go upon land in order to carry out their contracts; but none of whom take under their contracts any interest in the land upon which they are thus entitled to go." That hits the distinction to be taken between the cases. There was no intention to convey any interest in the land, but a leave given to go upon the land to do certain work. I do not feel called upon to go into the nice points that have been argued upon *Wood v. Leadbitter* (*ubi sup.*). They do not seem to me fairly to arise, and the dilemma ingeniously put by Mr. Cave upon either horn of which he invited Mr. Wills to take his seat, does

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not really arise. This is not on the one hand a mere licence, and therefore revocable, nor on the other a licence coupled with an interest in land so as to be within the statute, but it is a contract to allow the plaintiff the use of the corporation property for a time, they keeping possession all the time by means of their servants, and only allowing the use of it under stringent regulations. Next as to the question whether this contract should have been under seal. There is a distinction, and it is a sound distinction, between trading and municipal corporations. Therefore, the cases which have been decided on the capacity of trading corporations to contract without the formality of a seal are not applicable. There are no cases to show that municipal corporations when engaged in business which is in the nature of trading, are to be allowed the immunities which are given to professedly trading corporations. This, therefore, being a municipal corporation, is subject to the rules affecting those bodies. I find in *Comyn* and *Salkeld* the rule laid down, but also that it is subject to an exception, and that exception is well put in the judgments in *Church v. The Imperial Gas Company* and *Ludlow v. The Mayor of Charlton* (*ubi sup.*), in the latter of which Lord Denman's judgment in the former is set out at length. We have, therefore, the authority of the Courts of Queen's Bench and Exchequer in laying down this exception to the rule: "Wherever to hold the rule applicable would occasion very great inconvenience or tend to defeat the very object for which the Corporation was created the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions." To this Rolfe, B. agrees in the considered judgment in *Ludlow v. the Mayor of Charlton* (*ubi sup.*). Now I can hardly conceive any matter more exactly coming under this description of "acts very frequently recurring," than that of letting a ship into dock. It comes therefore most obviously within the exceptions to the rule as to the necessity of a corporation contracting under its common seal, exceptions which have been engrafted on it from the earliest times, and which have been applied to municipal corporations. It is enough to say generally that in *Williams*, *Saunders*, in *Comyn's Digest*, and in *Brooke's Abridgment*, the exception has been recognised from the earliest time as having been engrafted on the rule; that the facts of this case bring it within the exceptions, and that upon this second point also, I am of opinion that the defendants have failed, and the rule must be discharged.

DENMAN, J.—I am of the same opinion. On the first point upon which the rule was granted, viz., that to render the defendants liable the contract in question ought to have been in writing, of course that turns on the question whether a writing was necessary under the Statute of Frauds. I agree that it is not the duty of the court to take any single words occurring in the documents which constitute the contract, as being conclusive of the rights between the parties, on the simple meaning of such words alone; as here I am of opinion that it entirely depends upon what the court may think is the real nature of the contract entered into by the payment of the three guineas on the one side and the grant of the use of the dock on the other, both being in accordance with

the printed regulations. The mere use of the expression, "the dock will be let," is not conclusive of a demise, as the Lord Chief Justice has said; and if it were to be held so, it would give rise to the strange anomaly that we should treat the parties as using words in one direction as conclusive, when in the very same document other expressions might be found as strong the other way, which we should be obliged to disregard. For example, the word "let" occurs, but "rent" is never mentioned, it is "rate," and so, in like manner, on every clause similar observations might be made. I will not go through them all again, as my Lord has done so at length and in detail, and I could add nothing. It is not anything amounting to a demise of the land to a shipowner when he pays the entrance fee of three guineas. What he acquires is a right to have his vessel repaired there, but not of taking the dock for a moment out of the possession of the corporation. It is, I think, idle to say that a liability to rating could arise in the occupier, or that he could maintain trespass against the corporation. It is not, therefore, such an agreement as to give any right to or interest in the land, for many of the terms are wholly inconsistent with that construction of it. It is a complex contract, no doubt, and under it the corporation by their servants retain full control over the dock, subject only to such use of it as is shown by the regulations to be granted to the plaintiff. I need not go through all the cases decided on the statute; if there is one which is nearer than another to this, it is *Wood v. Lake* (*ubi sup.*) nor can I find that upon the point on which it is here applicable, it has been overruled. It is true that in reference to a question decided upon another matter in it, there is the great authority of Lord St. Leonards against it. It is, however, very like this case, but to my mind the present is even stronger than it is, against there being an interest in land dealt with by the contract. On the other point, as to whether the contract ought to have been under seal or not, I think that there was no necessity for it. The grounds on which a corporate seal is required to documents binding the corporation, are that as a general rule a corporation has no other means of expressing its will. Here, however, the case does not turn on the rule, but on the exceptions to it, and those exceptions are well set out in *Chitty on Contracts*, quoted from the judgment of Best, C.J., in the *East London Waterworks v. Bailey* (4 Bing. 283): "The first exception is where the contract is executed, in that case the law implies a promise and a deed under seal is not necessary. The next exception is where the acts done are of daily necessity to the corporation, or too insignificant to be worth the trouble of affixing the common seal." Now, I think that in this case this is a thing which falls within the description of daily necessity. I cannot conceive that business of this kind could be carried on, if it could be done only by affixing the seal on every occasion when a shipowner wanted to put his ship into dock. I think it also falls within the doctrine where a thing is said to be too insignificant to be worth having the seal affixed. "A fourth exception is where the acts to be done must be done immediately, and it would be impossible to wait for the formality of the corporation seal." Surely this is a case where the act must be done immediately. It would not be business-

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like to wait for the corporation seal when a vessel, perhaps in a sinking state, was wanting to be admitted to the graving dock. It has been said truly that there is a wide distinction between trading and municipal corporations, but these exceptions which I have read are all applicable to the latter class, and it is as so applicable that Best, C.J. points them out. He proceeds further to show how the principle of necessity applies to and is carried still further in the case of trading corporations, and therefore the result of his judgment in this respect comes to this, that he recognises the distinction between the two classes of corporations on this ground, that, in the case of trading corporations, the rule of necessity authorises things to be done without a seal which municipal corporations could not do without that formality, but, nevertheless, the rule of necessity is applicable in general terms to both, to municipal as well as trading corporations. I have said that I think this is a case of necessity, and as it is my opinion that the exceptions to which I have referred apply, I think that this rule must be discharged.

HUDDLESTON, J.—I am of the same opinion. My judgment is governed by a view of the facts before us. On the first question was it intended to create the relationship of landlord and tenant, by this contract, and give the exclusive possession of the dock to the plaintiff. It is to me quite clear that there was no intention that the graving dock should be exclusively handed over to the occupation of the plaintiff as tenant, and looking at the regulations and for the reasons given by the Lord Chief Justice, it is obvious that those regulations do not create an interest in and in the shipowner who uses the dock. Mr. Wills said that it was proved that some one was always present on behalf of the corporation in charge of the dock, and this not being denied would alone go far to show that the possession remained in the defendants. The case cited of *Watkins v. The Overseers of-Milton-next Gravesend* (*ubi sup.*), supports the view of the facts where Mellor, J., says: "The agreement only amounts to this, I give you liberty to moor the hulk there, and I will not give the liberty to anybody else." So as I read it, the only intention here was, you may come in in your turn, pay a certain sum when you have finished the repairs, and go out; if you do not pay we will keep you in and charge you also for the time during which we so detain you. So much for the intention; there was certainly none to demise the exclusive possession, and it was not in fact demised, therefore there was no necessity that this contract should be in writing. On the second point, as to the seal, I agree with the rest of the court. I referred during the argument to *Church v. The Imperial Gas Company* (*ubi sup.*), and the general rule laid down by Lord Denman, which has been read. I quite agree that in this case the exceptions are as they have been stated by my Lord and my brother Denman, and the facts bring the case within them. The point was considered again in the *South of Ireland Colliery Company v. Waddle* (*ubi sup.*), and though there it was a case of a trading corporation, yet Montague Smith, J., says that the exceptions on which we rely here still apply to municipal and ecclesiastical corporations. I think, therefore, that this rule ought to be discharged. *Rule discharged.*

Attorneys for plaintiff, Pritchard and Sons, for J. and T. W. Hearfield, of Hull.

Attorneys for defendants, Collyer, Collyer-Bristow, and Co., for Roberts and Leak, of Hull.

Thursday, April 29, 1875.

NEW RIVER COMPANY v. MATHER.

Water rate—Suit in County Court for—Bond fide dispute as to "annual value" of tenement supplied—Whether settlement of amount by justices a condition precedent to right to sue—New River Act 1852, ss. 35, 46—Waterworks Clauses Act 1847, ss. 68, 85—Railway Clauses Act 1845, s. 142.

Where the "annual value" of a tenement charged with water rate is bond fide disputed before action brought, it is a condition precedent to the right of suing for the rate that the water company should procure the dispute to be determined by summoning before justices the party liable.

The plaintiffs were a water company, whose special Act (the New River Act 1852) incorporated the Waterworks Clauses Act 1847, and the defendant occupied a house within their district for which he paid 20l. a year.

By the special Act the defendant was entitled to demand from them water for his house, as being under the annual value of 200l., at a rate not exceeding 4 per cent. per annum on such annual value.

By sect. 68 of the Waterworks Clauses Act 1847, which is incorporated with the plaintiffs special Act, water rates "shall be recoverable from the person requiring the water according to the annual value of the tenement supplied," and "any dispute as to such value shall be determined by two justices," and by sect. 142 of the Railways Clauses Act 1845, which is incorporated with the Waterworks Clauses Act, either party to a question referable to the determination of justices may cause the other to be summoned, whereupon "it shall be lawful for the justices to hear and determine such question."

By sect. 46 of the special Act, nothing therein, or in any Act incorporated therewith, "shall prevent the company from recovering any sum not exceeding 50l., which shall be due to them for water rates, by action in such manner as is by law provided."

The plaintiffs, in January, 1874, sued the defendant in the County Court for a balance of two years' water rate, due Christmas, 1872. The defendant had from April, 1873, up to the time of action brought, disputed the plaintiff's claim as excessive on the ground that "annual value" meant net annual value after deduction made for repairs, and paid into court a sum calculated upon an annual value of 18l. The plaintiffs based their claim upon a gross annual value of 22l.

Neither party had summoned the other before justices for the purpose of having the dispute as to annual value determined:

Held, upon appeal from the County Court Judge, who had given judgment for the plaintiffs for an amount calculated upon an annual value of 20l., being the rent paid by the defendant to his landlord, that the judge had no jurisdiction to determine the question as to annual value, and his judgment for the plaintiffs reversed.

Quære.—Whether it would be competent for a

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defendant to raise a question as to annual value after action brought.

This was an appeal from the Clerkenwell County Court upon a case stated by the judge thereof, of which the following is the material part:—

1. This is a plaint for 16s., being the balance of two years' water rate due at Christmas, 1873.

The plaintiffs are a water company having their head office in Clerkenwell, in Middlesex, and the defendant is lessee and occupier of No. 9, Hastings-street, Judd-street, Euston-road, within the company's limits of supply.

4. It was admitted on the part of the plaintiffs that the sum claimed, namely, 16s., was a mistake, and should only have been 13s. 2d. The account admitted in evidence as showing the balance due (assuming the plaintiffs were correct in their assessment of the rate), showed two sums of 18s. each as due to the plaintiffs in respect to Christmas, 1872 and 1873 respectively, and two payments by the defendant of 10s. and 12s. in 1872 and 1873 respectively, leaving a balance of 14s., thus:

Dr.	£ s. d.	23rd July, 1872.	By	£ s. d.	Cr.
To one year's water rate to Christmas, 1873	0 18 0	cash		0 10 0	
To one year to Christmas, 1873	0 18 0	cash		0 15 0	
		Balance		0 14 0	
	£1 16 0			£1 16 0	

5. Evidence on the part of the plaintiffs was given to prove the water rate owing, and that it was 4l. per cent. upon the annual value of the house, which they contended was 22l.

A long correspondence had passed between the parties, of which the following extracts are material:—

Defendant to plaintiffs' clerk. 15th April 1873.

Your collector has demanded 15s. of me for three quarters' water rate for this house, to Lady Day last, accompanied by a threat that if the amount be not paid on the 15th inst., the supply would be withdrawn without further notice.

I beg to inform you that I object to such demand as excessive and illegal.

The actual annual rent of the house, paid by me as occupier is 20l., and it is entered in the valuation list at 22l.

The annual rateable value is entered in the valuation list at 18l. only, and I claim to have the water rate calculated upon the basis of such annual rateable value (see 32 & 33 Vict. c. 67, s. 45.)

I will if necessary proceed under the provisions of the Waterworks Clauses Act 1847, to have this point set at rest once for all.

Defendant to plaintiffs' collector. 4th July 1873.

I hereby tender you the sum of 4s. for one quarter's water rate for this house, due 24th June last, being at the rate of 4 per cent. on my rental of 20l. per annum.

Defendant to plaintiffs' clerk. 16th Oct. 1873.

In consequence of your collector's continued demand and of a notice left here yesterday, I beg to refer you to . . . my letter to you, dated 15th April 1873.

As explained when I had the pleasure of seeing you on the last named day, I am, and always have been willing, to pay any and all demands which your company can legally make out, but as I consider that now made excessive and illegal, until under the provisions of the Waterworks Clauses Act 1847, and of their special Act, your company shall have established their right to make it, I shall continue to resist payment.

Without prejudice however, and to avoid litigation, I again renew my offer to pay your company 16s. per annum for their water supply to this house, being at the maximum rate of four per cent. on my actual rental of 20l.

Plaintiffs' solicitor to defendant, 3rd Nov. 1873.

You are in error in assuming the sect. 45 of the 32 & 33 Vict. c. 67 regulates your water rate, but if you will refer

to the 4th section of that Act, you will find that the term gross value means the annual rent which a tenant might reasonably be expected, taking one year for another, to pay for a hereditament if the tenant undertook to pay all usual tenants' rates and taxes and tithe commutation rent-charge (if any), and if the landlord undertook to bear the costs of the repairs, insurance, and the other expenses (if any), necessary to maintain the hereditament in a state to command that rent.

We understand you have a lease of the premises, and assume that you are under covenant to keep them in repair, and it is for this reason, therefore, the Assessment Committee have put the gross value at 22l., instead of 20l. the rent you pay.

Defendant to plaintiffs' solicitor, 5th Nov. 1873.

I have received your letter of the 3rd inst. You will distinctly understand that I have no wish to evade the just demands of the New River Company, but I dispute the correctness of the annual value they have put on my houses and consequently the water rate based upon it. Is a summons in the County Court the statutory mode of settling these differences? If so, pray proceed at once.

I quite agree with you that the difference between the company and myself involves a question of principle or the want of it; at all events, in my case the proceedings of their officers have been very vexatious. My tenancy of this house commenced at Christmas 1862, under a three years' agreement at a rental of 20l., and is now under a lease for twenty-one years at the same rent. In the year 1867 I sent these documents to the secretary of the company for his perusal, and he had them in his possession for some days. During these eleven years however the company have charged me three several and distinct water rates, and in the order named, namely, 18s., 16s. and 20s., and now again 18s. per annum. Can you tell me upon what principle these several assessments have been made, and in particular how the 18s. you claim of me is now made up?

I certainly hold under what is generally called a repairing lease, but my lessors pay the insurance, and they allowed me two years' rent towards the repairs of the term. In fact the lease was merely the form of an arrangement by which the lessors, who are trustees, relieved themselves of the trouble of seeing to the repairs personally.

Defendant to plaintiffs' solicitor, 22nd Jan. 1874.

You have not answered my letter of the 12th inst. requesting you to tell me at what annual value the New River Company put my house. Am I to understand that the company have instructed you not to give me that information? I have to-day, accompanied by a written tender, of which I enclose a copy, paid into court the sum of 6s. 10d.

[The original tender which was addressed to the Registrar of the County Court was as follows, the "annexed statement," thereto showing a balance due to the company of 6s. 10d.]

The question in dispute in this case is really not the amount of the water rate due to the company, but what is the true basis of annual value on which such rate should be calculated, and without prejudice to this question I hereby tender and pay into court as in full of all demands the sum of 6s. 10d., being the amount of the balance shown in the annexed statement, 22nd Jan. 1874.

Plaintiffs' solicitor to defendant, 22nd Jan. 1874.

The company's water rates for the year 1872 and 1873 respectively are based upon the gross annual value 22l.

The sum of 7s. is the balance due for the half year's rate of 9s. to Midsummer last, and from the fact of your having paid to the company sufficient to reduce such rate to 7s., that amount, together with 9s., the half year's rent due Christmas last, is now claimed by them.

7. The defendant paid into court the sum of 6s. 10d., pursuant to his letter of the 22nd Jan. 1874.

8. The question in dispute between the plaintiffs is the basis or annual value upon which the plaintiffs are entitled to charge the defendant's water rate, and the tribunal to which the dispute should be submitted to determine the annual value of defendant's premises.

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12. It was admitted that the defendant's statement was correct that the rateable value of the house in the valuation list was 18*l.*, and the gross annual value stated therein was 22*l.*, and that the rent paid by him was 20*l.* per annum, and that he had been allowed by his lessors two years' rent towards the repairs of the premises and, that no demand had been made for land tax or the commutation rentcharge.

13. The defendant produced the lease under which he holds the house for twelve years at 20*l.* a year, and the following, amongst other covenants are contained therein:

And also shall and will during the said term pay the land tax, sewers rate, main drainage rate, and all other taxes and assessments whatsoever, Parliamentary, parochial, or otherwise, imposed or charged, or which during the said term shall be imposed or charged, on the said demised premises or any part thereof, or on the lessors, their executors, or administrators, or assigns, or on their superior landlord as aforesaid, in respect thereof, or of the rent hereby reserved (landlords' property tax only excepted), and also shall and will during the said term allow or contribute a reasonable proportion of the expenses of making, renewing, repairing, and cleansing all party and fence walls aforesaid; and also that he the lessee, his executors, &c., shall and will . . . well and sufficiently repair, maintain, and keep, the said demised premises and all vaults, &c., in such good and substantial manner as shall be necessary or convenient for the occupation of a tenant at rack rent—damage by fire only excepted.

14, 15. For the plaintiffs it was contended that the words annual value meant the annual rent which a tenant might reasonably be expected, taking one year, with another to pay for a hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and the tithe commutation rentcharge (if any) and if the landlord undertook to bear the cost of repairs and insurance and other expenses (if any) necessary to maintain the hereditament in a state to command that rent; and there being no interpretation clause as to the words "annual value" in the Waterworks Clauses Act 1847, or the New River Company's Act 1852. The plaintiffs referred to the 32 & 33 Vict. c. 67 (The Valuation (Metropolis) Act, 1869), s. 4, in favour of their construction of the words "annual value."

16, 17. For the plaintiffs it was further contended that the rent paid by the tenant, the rates and taxes paid by him, and the repairs he was under his lease bound to do to the premises at his expense must be taken together and form one sum as the "annual value," so far as the tenant was concerned, and these would amount to more than the 22*l.* upon which the plaintiffs' water rate was calculated; and that if the landlord had borne them and the costs of such repairs, then the defendant's rent would have been more than 22*l.*

18, 19. It was further contended on behalf of the plaintiffs that Gordon Whitbread, the Judge of the said County Court, had no jurisdiction or power to inquire into the subject matter of the annual value of the property, and that it was only necessary to prove that the water rate claimed of defendant was calculated upon 4 per cent. upon the 22*l.* as the "annual value" of his premises, and that the water rate was owing, to entitle the plaintiffs to judgment in their favour; and that it was for the defendant, not for the plaintiffs, to take steps before the justices to have the question as to annual value determined.

20, 25. The defendant contended that he had in

good faith and sufficiently raised a question as to "annual value," and that the onus was on the plaintiffs to take steps under sect. 68 of the Waterworks Clauses Act 1867, to have such question determined, and that no evidence other than the decision of the statutory tribunal for determining such question could be received; that the rate of the plaintiffs is a compulsory one, and therefore within the maning of sect. 45 of the Valuation (Metropolis) Act 1869, which makes the valuation list for the time being in force conclusive as to rateable value; and that that Act repealed so much of the New River Act 1852, and the Waterworks Clauses Act 1847, as authorised any valuation of hereditaments to be made for the purpose of any rate or tax in respect of which the valuation list is conclusive. For the two latter propositions, *Sheffield Waterworks Company v. Bennett* (23 L. T. Rep. N.S. 109; L. Rep. 7 Ex. 409) was cited.

26. The judge held that he had by sect. 46 of the New River Act 1852, jurisdiction to decide the question as to annual value, that the Valuation (Metropolis) Act 1869, had no bearing on such question, and that the rent which a tenant paid to his landlord was the "annual value," according to the true meaning of the term, and he gave judgment for the plaintiffs accordingly for the payment of water rate upon the sum of 20*l.*, being the amount paid by the defendant to his landlord for rent, thus leaving a balance of 3*s.* 2*d.* due from the defendant to the plaintiffs above the 6*s.* 10*d.* paid into court.

The questions for the opinion of the court were:—

1. Whether the plaintiffs were entitled to charge the defendant a water rate upon the sum of 22*l.*, and not on 18*l.*

2. Whether the judge was correct in holding that the water rent (*sic*) must be charged upon the actual sum paid as rent by the defendant to his landlord.

3. Whether the judge had power or jurisdiction under sect. 46 of the New River Act 1852, to inquire into and determine the question of the annual value.

4. Whether the judge was not bound upon proof of the rate and the assessment to have found for the plaintiffs for the amount claimed, inasmuch as the defendant had neglected to apply to two justices to determine the annual value of his tenement.

If the court should answer questions 1 and 4 in the affirmative, and 2 and 3 in the negative, the judgment to be set aside, and a new trial ordered; if 1 and 4 in the negative, and 2 and 3 in the affirmative, the appeal to be dismissed with costs.

Philbrick, Q.C. with him *Poland* for the plaintiffs. It was no condition precedent to the plaintiffs' right to sue that the amount in dispute should first be ascertained by the plaintiffs summoning the defendant before the justices; it was for the defendant to summon the plaintiffs if he wished to dispute the annual value. The question of jurisdiction turns upon the true construction of a variety of enactments,^(a) but the right of the plaintiff to go

(a) The following enactments are material:

New River Company's Act 1852 (15 & 16 Vict. cap. clx.), sect. 35. The company shall, at the request of the owner or occupier of any house or part of a house in any street within their limits in which any pipe of the company shall

at once to the County Court would seem to be preserved to them by sect. 46 of the New River Act. The plaintiffs have no power of distraining for rates due, but are bound under penalty to supply the water. It is true that if the rates be not paid, the supply of water may be cut off. But this would be a harsh proceeding to adopt. It would be harsh for the company to summon a ratepayer to the police court. [Lord COLERIDGE, C.J.—Either party is at liberty to summon the other, and nothing appears to be payable until the annual value be determined. BRETT, J.—*Prima facie* the jurisdiction of the County Court would be good; the question is, whether there is any legislation to oust the jurisdiction which would ordinarily arise.] It would be highly inconvenient if the County Court had not jurisdiction to determine the amount; such a construction of the statutes would involve a double procedure; first, before the justices to determine the amount; and, secondly, before the County Court to recover it. Moreover such a construction would lead to an evasion of payment at the last moment; when sued in the County Court, a ratepayer might delay the just claims of the company, by setting up a dispute as to the annual value of his house. [Lord COLERIDGE, C.J.—That argument might be answered by saying

be laid, or of any person who under the provisions of this Act or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnished to such owner or occupier, or other person, a sufficient supply of water for domestic purposes at the rate hereinafter specified (that is to say), for water supplied to any dwelling-house where the annual value of the dwelling shall not exceed 200*l.* at a rate per cent. per annum not exceeding 4*l.*

Sect. 46.—Nothing in this Act or any Act incorporated herewith contained shall prevent the company from recovering any sum of money not exceeding 50*l.*, which shall be due to them for water rates or rents, or for damages, costs, or expenses, by action or proceeding in such manner as is by law provided for the recovery of debts not exceeding 50*l.*

By sect. 3 of this Act the Water Works Clauses Act 1847, is incorporated therewith.

The 1st section contains a reference to the various Acts "relating more or less directly" to the New River Company, from 13 Eliz. cap. 18 to 13 and 14 cap. cix. inclusive.

Waterworks Clauses Act 1847 (10 Vict. c. 17).—Sect. 68. The water rates . . . shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices.

Sect. 85. If the waterworks be in England or Ireland, the clauses of the Railways Clauses Consolidation Act 1845, with respect to the recovery of damages, not specially provided for, and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this and the special Act. . . .

Railways Clauses Act 1845 (8 & 9 Vict. c. 20), sect. 142.—Where in this or the special Act any question of compensation, expenses, charges, or damages, or other matter is referred to the determination of any one justice or more it shall be lawful for any justice upon the application of either party to summon the other party to appear before one justice or before two justices as the case may require, at a time and place to be named in such summons, and upon the appearance of such parties, or in the absence of any of them upon proof of due service of the summons, it shall be lawful for such one justice or such two justices as the case may be, to hear and determine such question, and for that purpose to examine such parties or any of them and their witnesses on oath, and the costs of every such inquiry shall be in discretion of such justices, and they shall determine the amount thereof.

that the dispute must be a *bond fide* one, or the defence would be of no avail. BRETT, J.—If going before the justices be a condition precedent, a prohibition might have issued to the County Court. HUDDLESTON, J.—Your argument seems to make the justices of no use.] The intention of the Legislature was to give a summary remedy in the case of small tenements, and a remedy not to be defeated by the occupiers suddenly raising points of law. As to the meaning of annual value, he referred to

Sheffield Waterworks Company v. Bennett, L. Rep. 7 Ex. 789; 41 L. J. 233, Ex.; 27 L. T. Rep. N. S. 199; affirmed on appeal, L. Rep. 8 Ex. 196; 43 L. J. 121, Ex.; 28 L. T. Rep. N. S. 509.

in which somewhat analogous case (a) the court had held that the meaning of the word "rent" in sect. 79 of the Sheffield Waterworks Act 1853 (with which the Waterworks Clauses Act 1847 is incorporated), meant "the proper rent to a tenant paying the rates and charges regularly paid by the tenant, of which the actual rent, when the tenant pays those rates and charges is in general the proper criterion."

Brown, Q.C., for the appellant, the defendant below.—The jurisdiction of the County Court is ousted by the strong and specific provision in sect. 68 of the Waterworks Clauses Act 1847, that "if any dispute arise" as to the annual value of the tenement supplied with water, the same shall be determined by two justices:

Crisp v. Bunbury, 8 Bing. 394;
Ex parte Payne, 5 D. & L. 679;
St. Pancras (Vestry of) v. Balterbury, 2 C. B., N. S., 477.

In *Ex parte Payne*, the member of a building society within 6 & 7 Will. 4, c. 32, sued an officer of the society, in the County Court, for an amount alleged to be due upon two shares in the society subscribed for by him and withdrawn. The judge directed a nonsuit on the ground that a rule of the society provided that "all disputes be referred to two justices of the peace," thereby ousting the jurisdiction of the County Court, and the court in a considered judgment discharged a rule for a *mandamus* to the judge to proceed with the action. In the *St. Pancras case* (*ubi sup.*), it was held that an action would not lie against the occupier of a house for the recovery of his proportion of the expenses of paving a street under the Metropolis Management Act 1855 (13 & 19 Vict. c. 120), but that recourse must be had to sect. 225 of the Act which provided that disputed amounts "should be ascertained and determined by and recovered before two justices." "Where an Act of Parliament," observed Cockburn, C.J., "creates a duty or obligation, and gives a remedy for a breach of it by a peculiar proceeding, a question often arises whether the remedy so provided is the only one, or whether it is cumulative. But here the words of sect. 225 are very peremptory . . . The words are 'shall be recovered.' I think it is clear that the Legislature intended that the summary proceeding thus pointed out should be the only one . . . I cannot conceive a tribunal better qualified to deal

(a) The action was to recover rates, and came before the court upon a special case, after a verdict had been found for the plaintiffs for the amount claimed in the declaration. The questions for the court were merely whether the defendant was entitled to make the deductions which he claimed, and the point in the present case as to jurisdiction was neither raised or argued.

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with such matters than the one chosen by the Legislature." [BARRT, J.—In that case the vestry had no rights at all without the Act, so that they were properly held to be tied down to the remedy pointed out by it.] It is submitted that their case is not very different from that of a water company whose monopoly is protected by statute. And in one sense the case of the water company is *à fortiori* to the *St. Pancras* case, for the water company is a private corporation suing for its own benefit, whereas the vestry were a public corporation, suing for the benefit of the public. [BARRT, J.—Suppose that the rate were paid for six years without dispute, could the ratepayer after all that lapse of time dispute the annual value as assessed, and so oust the jurisdiction of the County Court?] In such a case it is probable that the company might set up *mala fides* in the ratepayer, but the good faith of the present defendant is undisputed. [DENMAN, J. referred to *Re Edmundson* (17 Q. B. 67), where it was held that an adjudication by two justices as to compensation payable by a railway company for injuriously affecting lands is bad if the complaint on which the order is founded be made more than six months after the cause of complaint arose.] There is a close analogy between the present case and the numerous insurance cases in which it has been held that where a policy of insurance contains an arbitration clause, no action will lie upon the policy until arbitration had and award made. See especially

Scott v. Avery, 5 H. L. Cas. 811;

Braunstein v. Accidental Death Insurance Company,
31 L. J. 17, Q. B.; 5 L. T. Rep. N. S. 550.

In *Braunstein's* case the clause in the policy was "that they (the defendants) shall pay such sum by way of compensation as should appear just and reasonable, and in proportion to the injury received, such sum to be ascertained in case of difference or dispute in manner provided by the stipulations and conditions indorsed," which was by reference to a person named. "There is, no doubt," said Wightman, J., "that a difference did arise as to the amount to be paid, which was to be ascertained by the arbitrator before any action could be brought, and as this has not been done, the action is at all events premature." From every reason of policy, as well as upon the decisions in analogous cases, the new river company had no right to sue the defendant for an amount fixed by themselves.

Philbrick, Q. C., in reply.—The cases cited as to reference to justices, as the *St. Pancras* case (*ubi sup.*) might, perhaps, bear upon this case if it were not for section 46 of the New River Act, which expressly reserves the power of suing in the ordinary tribunals. As to the insurance cases, they turn upon questions of construction of particular clauses in policies. Having once made a charge upon calculation, the plaintiffs throw the initiative on the defendant of rectifying their mistakes, if any, before the justices, and if he fail so to have rectified them, the amount is recoverable by suit without further delay.

Lord COLERIDGE, C. J.—I am of opinion that the judgment of the County Court judge ought to be reversed, and that our judgment ought to be for the appellant. The questions proposed to us by the County Court judge are substantially two, being first whether he had jurisdiction to hear the case, and secondly, assuming that he had such

jurisdiction, for what amount he ought to have given judgment for the New River Company. Of these two questions the first has been fully argued before us, while upon the second we have heard no argument at all. Upon the first point only, therefore, I proceed to give judgment, and desire to say that I do not give the slightest opinion one way or the other upon the second. I am of opinion that upon the true construction of sect. 68 of the Waterworks Clauses Act 1847, and upon the circumstances of this case, the County Court judge had no jurisdiction. The proceedings were first instituted in the County Court to recover a rate which the company claimed upon an annual value of 22*l.* The defendant alleged that the annual value of his premises had been improperly put at 22*l.*, and alleged that it ought to have been put at 18*l.* For this allegation he gave reasons at length to the secretary of the company, and tendered in payment of his rate a sum calculated upon the annual value of 18*l.* The company declined to accept this sum, and sued him in the County Court for a rate calculated upon the annual value of 22*l.* Now, was a County Court the proper tribunal for the company to resort to at this stage of the dispute? The Act from which the company derived their powers is the New River Company Act 1852, and by sect. 3 of that Act the Waterworks Clauses Act 1847 is incorporated with it. Now, sect. 68 of the Waterworks Clauses Act is to the following effect: [Section read]. Now, here there was a *bond fide* dispute arising out a claim for a rate depending upon the annual value of the house of the defendant, and this dispute was one which I think the company ought to have had determined by the justices before prosecuting their claim in the County Court. This and this only is what I decide. What would be the proper application of the enactments before us to the hypothetical cases that have been suggested I cannot say. Here we have to deal with a *bond fide* dispute, with a claim for an amount known to both parties to be disputed, and I think that under these circumstances the claim ought to have been turned into a liquidated one under the provisions of sect. 68 of the Waterworks Clauses Act 1847, before the right to sue for it could attach to the New River Company. It appears that by sect. 85 of the Waterworks Clauses Act the clauses of the Railways Clauses Act 1845, "with respect to the determination of any matter referred to justices," are incorporated with the former Act. This brings us to sect. 142 of the Railway Clauses Act, 1845. By that section it is provided that "where any question of compensation, expenses, charges, or damages, or other matter is referred to the determination of any one justice or more, it shall be lawful for any justice, on the application of either party, to summon the other party to appear before one justice, or before two justices, as the case may require, at a time and place to be named in such summons." This is the section under which the company ought to have proceeded. In the case before us, at all events, the result seems to work out with perfect simplicity. The company sue a ratepayer for water supplied. The ratepayer says at once: "I dispute the amount of the rate assessed; before you sue me, it is a condition precedent that you should have that amount ascertained." This is quite reasonable. It is not a question of exclusive jurisdiction throughout. The justices have no such jurisdic-

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sion; all their jurisdiction is to decide a particular point, without the decision of which, if the point be disputed, the jurisdiction of the ordinary tribunals cannot arise. And this particular point is very properly assigned to the exclusive jurisdiction of the justices, whom the Legislature has entrusted with the duty of settling the valuation lists, and would, therefore, be peculiarly competent to ascertain the annual value of a man's house.

BRETT, J.—This is a very difficult case, and requires great consideration; but in the result I have come to the conclusion that our judgment ought to be for the defendant, on the ground that the county court judge had no jurisdiction to hear the plaintiff. The New River Company had supplied the defendant with water, and the defendant lived in a house below the annual value of 200*l*. The company claimed a rate calculated upon a certain annual value, but the defendant alleged that the calculation was based upon an improper construction of the term "annual value." The company then sue in the County Court for the amount as ascertained by themselves, and the defendant pays into court an amount which would be sufficient if his own contention should turn out to be correct; and accompanies his payment into court with a notice that the dispute between himself and the company was as to the meaning of "annual value," thereby fixing the County Court Judge with notice of the precise character of the dispute. This notice notwithstanding, the judge proceeds to hear the case, and gives a decision which proceeds upon the meaning which he himself gives to the term "annual value." That the dispute was a *bona fide* one nobody denies, and I have already observed that the judge had notice of it. Now, in water rate cases, the annual value of assessable property is not fixed in the same way as it is fixed for the purposes of the poor rate. The water companies do not assess the property before they supply the water, but supply the water before the assessment is made, and before the consumer has had any notice from them of the assessment, so as to give him an opportunity of appealing against it. The companies have their statutory rights and obligations, and one of their statutory rights is to make a charge for water supplied, but this charge they cannot make until the supply has been perfected. If the amount of rate be rightly charged, the money is due without having to be settled by anybody. In ordinary rating cases, both the liability to be rated and the amount of the rate are before the court, and the question for us is whether water rate cases are an exception to the general rule, whether the Legislature has excluded both a County Court and a Superior Court from determining the amount of the rate. It is contended on behalf of the defendant that both courts are so excluded by sect. 68 of the Waterworks Clauses Act, for the New River Act is to be read as if that section was actually contained in it. [Section read.] Now, if a dispute has arisen before a claim is actually made, can the company by prosecuting that claim in a County or Superior Court oust the jurisdiction of the justices to "determine" the amount of the rate? Construing the section by the light of the cases which have been cited by Mr. Brown, I come to the conclusion that where the dispute arises before action brought, the company cannot so oust the jurisdiction of the justices. It is not easy to say at first which of the parties is to bring the matter

before the justices, but I think that this is settled by sect. 85. Though, therefore, the dispute may arise after the water has been supplied, if it arise before action brought, the company must first settle the dispute by taking out a summons before the justices, and by claiming the determination of the amount by the justices, who decide the amount and that only. The amount determined, the company may then sue the consumer for the amount so determined, but not before. Thus far with reference to disputes before action brought. But it seemed to me obvious that we ought to consider what would be the bearing of our present judgment upon disputes arising after action brought. We might have been able to say that our judgment would have a general application, and that even if disputes should arise after action brought, the action would have to be stayed by reason of such disputes. But I, for my part, decline to go so far. I have very great doubts indeed whether the jurisdiction of the ordinary courts would be ousted. But in the present case, where the dispute arose before action brought, and where the judge had notice of such dispute (though I do not say that the notice was essential), I think that in deciding the dispute the judge was acting without jurisdiction, and that he ought to have nonsuited the plaintiffs on the ground that a condition precedent to their right of action had not been performed.

DENMAN, J.—I am of the same opinion, but I need not repeat the reasons already given. I will only say that I decide on the facts of this case alone, and disclaim any conclusion further than this, that in the present case a dispute had arisen of such a nature as to oust the jurisdiction of the County Court.

HUDDLESTON, J.—I am of the same opinion. On the facts of this case the County Court Judge had no power or jurisdiction to try the cause. A rate is made; the defendant intimates that he disputes the annual value of his house as assessed. Then the question arises which of the parties is to set sect. 68 of the Waterworks Clauses Act in motion. Mr. Philbrick argues that the most convenient course is that the company should fix the amount of the rate. No doubt that would be a convenient course for the company, but such was not the intention of the statute. I think that under the statute it was for the company in this case to go before the justices, and to get the amount ascertained. The saving in sect. 46 of the New River Act has no application. I also wish to confine my judgment to the particular facts before us.

Judgment reversed; nonsuit to be entered; costs to follow event.

Attorneys for plaintiffs, Thompson and Debenham.

Attorney for defendant, Greaiores.

COURT OF EXCHEQUER.

Reported by H. LEIGH and CYRIL DODD, Esqs.,
Barristers-at-Law.

May 8 and 10, 1875.

SECOND DIVISION OF THE COURT.

(Before BRAMWELL and CLEASBY, BB.)

CASTRO v. MURRAY.

Writ of error in a criminal case—Whether of right or of grace—Fiat of the Attorney-General—Condition precedent—Distinction between mis-

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demeanors and felonies—Clerk of the Petty Bag—Duty of with regard to sealing writ (12 & 13 Vict. c. 109, sect. 38)—Action against for refusing to seal—Frivolous and vexatious proceedings.

Although a writ of error is, in cases of misdemeanor, ex debito justitiæ, and not, as in cases of treason and felony, ex gratiâ, yet the fiat of the Attorney-General is a condition precedent to the issuing of such writ, and the granting or refusing of such fiat is a matter entirely within the discretion of the Attorney-General, in the exercise of which discretion he cannot be controlled by the court. Accordingly, therefore, an action by a convicted misdemeanant against the Clerk of the Petty Bag, for refusing to seal a writ of error tendered to him by such convict, on the ground of the Attorney-General's fiat not having been previously obtained, was held to be pretenceless and unmaintainable; and a rule to rescind an order of a judge staying such action altogether, as frivolous and vexatious, and an abuse of the process of the court, was refused, there being no duty on the Clerk of the Petty Bag to seal the writ until the fiat had been issued.

So held by Bramwell and Cleasby, BB. (concurrentibus Kelly, C.B., and Pollock and Amphlett, BB.)

THE plaintiff in this case was the claimant of the Tichborne estates in the recent action of ejectment, and is now a convict undergoing his sentence of penal servitude in Dartmoor Prison for perjury committed by him on the occasion of the trial of that ejectment. He brought the present action against the defendant, the Clerk of the Petty Bag in Chancery, to recover compensation in damages against him for refusing to seal a writ of error in the criminal case of *Regina v. Castro*, tendered to him on the part of the plaintiff. The declaration in this action contained two counts, and by the first count it charged that the defendant was Clerk of the Petty Bag in the Court of Chancery, and that an indictment for misdemeanor against the plaintiff, containing two counts, charging the plaintiff with perjury, was found at the Central Criminal Court, and was removed thence by a writ of *certiorari* into the Court of Queen's Bench, and was tried at the bar of that court; that the plaintiff was found guilty and sentenced to penal servitude for the term of seven years on the first count of the indictment, and to penal servitude for a further term of seven years on the second count; and that he was then undergoing the aforesaid sentences; and that the plaintiff, feeling aggrieved by such trial, verdict, and judgment, prepared, engrossed, and issued a writ of error in due, regular, and usual form, in order that such verdict and judgment might be reviewed and examined by the Justices of the Bench and the Barons of the Exchequer, in the Exchequer Chamber, and requested the defendant, as such Clerk of the Petty Bag as aforesaid, to duly seal the same writ; yet nevertheless the defendant wrongfully, &c., refused to seal the said writ, whereby the plaintiff was prevented from having the said proceedings reviewed and examined by the said Court of Exchequer Chamber, and had been obliged to endure the said sentences of penal servitude, and was thereby prevented from recovering possession of divers estates of great value. By the second count of his declaration the plaintiff claimed a writ of *mandamus* to the defen-

dant, as such Clerk of the Petty Bag, to duly seal the said writ of error.

Instead of pleading in answer to the above declaration, the defendant took out a summons at judges' chambers, calling on the plaintiff to show cause why his said action should not be stayed, on the ground that it was frivolous and vexatious, and an abuse of the process of the court; and on the 8th April last, Huddleston, J., at chambers, on reading the affidavits produced on the part of the defendant and the plaintiff respectively, made an order staying all further proceedings in the said action.

The plaintiff's attorney in his affidavit on the occasion stated that, in case the court should give judgment for the plaintiff and the defendant should obey it, the plaintiff's claim for damages would be abandoned; and that the plaintiff had no other means except the action aforesaid open to him for obtaining the opinion of a court of law on the constitutional question whether, in cases of misdemeanor, a writ of error is a writ of right or a writ of grace.

The defendant, in his affidavit, stated that he was Clerk of the Petty Bag in the Court of Chancery, and that he was informed and believed that before any application was made to him, the defendant in the matter, the attorney of the plaintiff had applied, on behalf of the plaintiff, to Her Majesty's Attorney-General to issue his fiat for the writ of error mentioned in the declaration, and that the Attorney-General had refused to issue it. That on the 12th Feb. last the writ of error was tendered to the defendant, and that he refused to seal it, on the ground that the Attorney-General had not issued his fiat for the said writ, and not otherwise; that it would be contrary to the defendant's duty as such Clerk of the Petty Bag, and contrary to the established regulations and practices of the Petty Bag Office to seal any writ of error in any criminal case without the fiat of the Attorney-General previously issued; that the rule on this point was precise and inflexible, and that the defendant had no option but to refuse to seal the writ of error without the production of the Attorney-General's fiat; and that if the defendant acted otherwise he would have been disobeying the regulations of the office.

Philbrick, Q.C. (with him was *O'Brien*), for the plaintiff, now moved for a rule *nisi* to rescind the above-mentioned order of Huddleston, J.—The plaintiff had a right to seek the opinion of the court upon the important constitutional question involved in the present action, and which was neither frivolous nor vexatious. That question was whether a writ of error in a case of misdemeanor was a matter of right, *ex debito justitiæ*, or, as in felony and treason, a matter of favour, and *ex gratiâ* only. Had the action gone on that question might have been argued and decided on demurrer, but the order now sought to be rescinded had precluded the possibility of a decision upon the point being obtained. There was a question also whether the Attorney-General's fiat was necessary at all, which, if the writ itself were of right, it was contended it would not be. There is much authority in favour of the view taken on the part of the plaintiff that the writ is of right. Thus, in 1689 the House of Commons resolved that a writ of error to reverse a judgment of outlawry was the right of the subject, and not an act of grace or favour to be denied or granted at pleasure: (See

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Sir Thos. Armstrong's case, 14 How. St. Trials, 117). So, again in the case of *Ashby v. White*, or *The Aylesbury case*, (14 Ib., 695-874), where certain burgesses who had brought an action against the returning officer for preventing them from giving their votes at a parliamentary election, were committed to prison by the House of Commons as for a breach of privilege; and on a *habeas corpus* being sued out they were remanded by the Court of Queen's Bench to prison, Holt, C.J., alone of the judges of that court, being of opinion "that they were entitled to be discharged." A petition was then presented to the Queen for a writ of error, and it was referred to all the judges whether the writ in such a case was of right, or *ex debito vel merito justitiae*, or *ex gratia*; and the opinion of ten judges, to two of the contrary opinion, was that in all cases under treason and felony a writ of error was not merely of grace, but ought to be granted, and they gave a certificate to that effect, the two dissentient judges delivering their opinion that a writ of error was of grace only in all criminal cases: (See the opinions of the judges and their certificate in note to *Res v. Burdett*, 14 East. p. 92.) A conflict of opinion thereupon arose between the two Houses of Parliament on the question, which, however, was shortly afterwards terminated by Parliament being prorogued. There is no doubt that some fifty years afterwards this opinion of the ten judges was somewhat qualified by Lord Mansfield, C.J., in his judgment in *Wilkes's case* (4 Burr. 2527), where a writ of error was sought for in order to reverse an outlawry, and where, at p. 2550, Lord Mansfield says that, "The ten judges did not mean 'that it was a writ of course,' but that 'where there was probable error,' it ought not to be denied." And further on, at p. 2551, he adds, "This opinion in the 3rd of Queen Anne has made a great alteration as to outlawries in criminal cases under treason and felony. In a misdemeanor, if there be probable cause, it ought not to be denied. This court would order the Attorney-General to issue his fiat. But be the error ever so manifest in treason or felony, the King's pleasure to deny the writ is conclusive." [BRAMWELL, B.—Those observations of Lord Mansfield appear to be *obiter dicta* merely.] The question came again before the court subsequently in more recent times in the case of *Reg v. Newton* (4 E. & B. 869; 24 L. J. 148, C. P.) The Attorney-General in that case had refused his fiat for a writ of error in a case of conviction of a misdemeanor, and Lord Campbell, C.J., in his judgment refusing a rule ordering the Attorney-General to issue his fiat, said that "probable cause being shown the Attorney-General ought to grant his fiat *ex debito justitiae*; but he was to exercise what was in the nature of a judicial function. If he refused to hear and consider the application for a fiat, we should compel him by *mandamus* to hear and consider it; but when he has heard and considered and refused, we cannot interfere. The Attorney-General may be made responsible to Parliament. If he gives an improper decision the Crown may, and if well advised, will dismiss him; but we cannot review his decision." It is admitted that that case is against the present application, but on the other side may be cited a case in the Irish Court (*Reg. v. Rowe*, 2 Moll. Ir. Chanc. Rep. 27), where the defendant, who had been convicted of an offence against the Revenue Laws, applied to the Attorney-General for his fiat for a writ of error and was refused,

and thereupon applied to the Lord Chancellor of Ireland, who ordered the Cursitor to issue the writ without the previous fiat or warrant of the Lord Lieutenant. [BRAMWELL, B.—Even if we assume that the writ is of right in this case, should not the plaintiff have applied to the Court of Chancery, of which court the defendant is an officer?] It is apprehended that he may also apply to a court of common law. The defendant is a ministerial officer, with a duty cast upon him by sect. 38 of the 12 & 13 Vict. c. 109, to seal all such lawful and regular writs of error as may be properly presented to him. He is a ministerial officer, and as such is responsible to and liable to an action at the suit of any person who may be damaged by any neglect of duty on his part. By his act, however regular and according to practice it may have been, the defendant has deprived the plaintiff of a right to which the latter is by law entitled, and therefore the present action is maintainable against him (see *Barry v. Arnaud*, 10 A. & E. 646, at p. 671; 9 L. J., N. S., 226, Q.B., at p. 230; 2 P. & D. 633.) [CLEASBY, B.—Would not the defendant have failed in his duty if he had sealed the writ in the absence of the Attorney-General's fiat?] That may be; but the very object of bringing the action was expressly to question the correctness of the official practice. It may, no doubt, be said that a litigious person may thus delay the course and execution of justice, to which, however, the answer is, that if the errors are frivolous and vexatious the court has power over its own process, and will prevent its being abused. At all events, notwithstanding the dictum of Lord Campbell, in *Reg. v. Law* (27 L. J. 403, Q.B.), to the effect that the fiat is a condition precedent to the issuing of a writ of error, it is contended that sufficient doubt is thrown upon the point, by the decisions which have been now cited, to make it a matter well deserving an opportunity of being seriously discussed and argued.

BRAMWELL, B.—We will consult the Lord Chief Baron and the other members of the court, before giving our decision in this case.

Our. adv. vult.

May 10.—BRAMWELL, B.—As there can be no doubt that the staying of an action absolutely and altogether is a matter of a somewhat grave nature, especially when and if, as in the present case, the plaintiff in the action asserts that he has an arguable point upon which he wishes to obtain the judgment of the court, we thought it well, my brother Cleasby and myself, to postpone giving our decision in this case until we had first consulted with the Lord Chief Baron and the other judges of the court on the matter. We have had an opportunity of doing so, and having had the advantage of that consultation, we are enabled to say that it is the unanimous opinion of the Lord Chief Baron and our brothers Pollock and Amphlett, as well as of ourselves, that the order of Huddleston J., was perfectly right and proper, and, consequently, that the rule applied for by the plaintiff to rescind that order must be refused, as not the slightest ground has been shown for reversing or in any way varying such order. The defendant has sworn, and indeed it is within the knowledge of the court, that it is his duty not to issue or seal a writ of error until the fiat of the Attorney-General permitting it to be done has

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been presented to him. Until, therefore, that fiat has been issued, there can be no duty on the defendant to seal the writ. But then the plaintiff says, the writ in this case is according to the authorities that have been cited, a writ to be granted *ex debito justitiæ*, and the court are therefore bound to give the plaintiff his rule. Our opinion, however, on that point is that that is a matter entirely for the Attorney-General himself alone to deal with and to decide according to his discretion, and with the exercise of that discretion we cannot interfere. The plaintiff did, it appears, apply to the Attorney-General for his fiat, which the Attorney-General refused to give, and thereupon the plaintiff tendered a writ of error to the defendant, to be sealed by him as the proper officer for that purpose, and the defendant refused to seal the writ on the ground that the necessary fiat of the Attorney-General had not been obtained; and thereupon the plaintiff brought this present action to recover damages against the defendant for such refusal. Now we are all clearly of opinion, and for the reason before-mentioned, that there was no duty whatever on the defendant in this matter, and that this action is a perfectly pretenceless one, and was most properly stayed by my brother Huddleston as being frivolous and vexatious, and an abuse of the process of the court. The action is entirely groundless, and it is the duty of the court to put a final and complete end to it. I again say that this is the unanimous opinion not only of my brother Cleasby and myself, but of every other member of the court.

CLEASBY, B.—I am quite of the same opinion. Until the Attorney-General has issued his fiat for the writ of error, no duty on the part of the defendant can arise at all. The present action is brought against the defendant for doing that which, as a ministerial officer, he was positively bound to do, namely, for refusing to seal the writ of error in the absence of the Attorney-General's fiat, and such an action cannot be maintained. Had the fiat been given a different question might have arisen.

Rule refused.

Attorney for the plaintiff, the applicant, C. Harcourt.

EXCHEQUER CHAMBER.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

June 15 and 16, 1875.

REG. v. THE JUSTICES OF SUSSEX.

Insane prisoner—Inquiry concerning settlement—Prison contract—Justices of contracting and receiving authority—3 & 4 Vict. c. 54—27 & 28 Vict. c. 29—28 & 29 Vict. c. 126.

By sect. 1 of the *Insane Prisoners' Act 1840*, two justices of the peace of the county, city, borough, or place where an insane prisoner is imprisoned may inquire, with the aid of two physicians or surgeons, as to the insanity of such person. By sect. 2, in all such cases as aforesaid, unless one of her Majesty's Principal Secretaries of State shall otherwise direct, it shall be lawful for such two justices or any other two justices of the peace of the county, city, borough, or place where such person is imprisoned, to inquire into and ascertain such person's legal settlement, with the object of ordering payment of the costs of his maintenance. Sect. 1 of this Act is repealed by the *Insane*

Prisoners' Act Amendment Act 1864, and other provisions are made for inquiring into a prisoner's insanity by visiting or other justices, with physicians or surgeons, and in certain cases by physicians or surgeons only. The *Prison Act 1865* provides for contracts between prison authorities for the detention of prisoners, and enacts (sect. 57) that every prison, wheresoever situate, shall, for all purposes be deemed to be within the limits of the place for which it is used as a prison; and also (sect. 65) that the prison of the receiving authority shall, for all the purposes of and incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority, or any of such purposes, according to the tenor of the contract, be deemed to be the prison of the contracting authority:

Upon demurrer to return to a mandamus, directing the justices of a county, in the prison of which an insane prisoner had been detained under a contract with a borough, to ascertain the settlement under sect. 2 of the said Act of 1840,

Held by the Exchequer Chamber, affirming the Queen's Bench, that this section imposes a duty upon the proper justices to make this inquiry upon receipt of a requisition from the Home Secretary; and that there is nothing in the said two later Acts of 1864 and 1865 to transfer the duty of making this inquiry from the justices of the county in which the prisoner was actually in prison to the justices of the borough which contracted for the prisoner's detention.

THIS was an appeal by the justices of the County of Sussex against a judgment of Cockburn, C.J., Mellor and Quain, J.J., in favour of the prosecution, upon a demurrer to a return to a writ of mandamus, by which writ the visiting justices of the county prison of Lewes were directed to inquire into and ascertain the place of the last legal settlement and the pecuniary circumstances of Christiana Edmunds, now confined as a criminal lunatic at Broadmoor.

The return stated that the council of the borough of Brighton and the justices for the Eastern Division of the county of Sussex were respectively prison authorities within the meaning of the *Prison Act 1865*; the former in 1867 had, in conformity with sect. 31 of the said Act, entered into a contract with the said justices for the receipt and maintenance in the said gaol at Lewes of all prisoners maintainable at the expense of the borough of Brighton for fifty years. In 1871, upon the committal of the Brighton stipendiary magistrate, the said C. Edmunds was convicted at the Central Criminal Court upon an indictment for murder within the borough of Brighton, and sentenced to death. Before and after her trial she was received into, imprisoned, and maintained in the said county prison at Lewes, pursuant to the said contract; and whilst there, after sentence of death, it was made to appear to the Secretary of State for the Home Department that she was insane; and she was, under his warrant, removed to Broadmoor Lunatic Asylum. It was submitted in the return to the writ that, at the time she was so removed, she was, under sects. 57 and 66 of the *Prison Act 1865*, constructively and in contemplation of law imprisoned within the prison of the council of the borough of Brighton, and not within the prison of the justices of the Eastern Division of Sussex, and that any such requisition as in the said writ mentioned, if made at all, should, pursuant to the

statutes of 3 & 4 Vict. c. 54; 23 & 24 Vict. c. 75; 27 & 28 Vict. c. 29; and the said Prison Act 1865, have been made to such council or to two justices in and for such borough, and could not be and was not lawfully made to the said justices of Sussex, and they were not bound to comply with the said requisition.

The case on demurrer in the court below is reported L. Rep. 10 Q. B. 166; and it is also reported, together with the writ, the return, and the judgments of Blackburn and Quain, JJ., on making the rule absolute, as well as the arguments and judgments on demurrer, 31 L. T. Rep. N.S. 723.

June 15.—*Cohen*, Q.C. (with *Lumley Smith*), argued for the defendants, the appellants.

Bowen appeared for the prosecution.

CLEASBY, B., at the conclusion of the argument for the the defendants, stated that the court would consider whether they should require to hear the counsel for the prosecution.

Our. adv. vult.

June 16.—CLEASBY, B.—We have determined that there will be no necessity to hear Mr. Bowen. The question is, who is to discharge the duty required by the second section of 3 & 4 Vict. c. 54? I say "the duty required," because a doubt has been suggested as to the effect of the words at the beginning of the section, "it shall be lawful" for such two justices to inquire into and ascertain the matters required. When we see the character that the persons fill who are called upon to make this inquiry, and for that purpose we must look at the section preceding, we conclude that the matter can be done by justices only, and that if the defendants are the right persons, it is as much their duty as if stronger words had been used. It has also been suggested that the Home Secretary is nowhere authorised to make an order which the defendants can be compelled by *mandamus* to obey; but that objection is based upon a mistake as to what is in the writ; the only reference thereto the Home Secretary is in respect of the requisition which he may make upon the proper justices. If the requisition be made, and the justices refuse to obey the Act of Parliament anybody may prosecute the *mandamus*, and it appears to be his duty rather than that of any other person; the second section begins "That in all such cases as aforesaid, unless one of Her Majesty's Principal Secretaries of State shall otherwise direct;" this leaves to the Secretary of State's discretion entirely whether this section shall be acted upon, and it is but reasonable, therefore, that some notice or requisition be given by him to the justices before they take any steps in the matter. The only further matter we have to consider, and that is the substantial dispute, upon whom this duty is imposed. The first section of the Act has been repealed, but it is necessary to refer to it, in order to understand the second; by it, two justices of the peace where a prisoner is imprisoned may, on his becoming insane, inquire with medical aid respecting such insanity. The second section enacts, subject to the direction of a Secretary of State, that it shall be lawful for such two justices, namely those who were employed under the first section, or any other two justices of the peace of the county, city, borough, or place where such person is imprisoned, to make inquiry concerning the place of settlement of the insane prisoner. By 27 & 28 Vict. c. 29, s. 1, the first section of the previous Act of 1840 is repealed, but nothing therein relates to the second

section. Sect. 2 of the later Act contains a provision with some alterations from that in the repealed section; if such insane person is confined in a prison to which visiting justices are appointed, two or more of the visiting justices of such prison are to make inquiry concerning the insanity; and if the Secretary of State has reason to believe a prisoner sentenced to death to be insane, he may institute the inquiry without reference to the visiting justices or justices of the place. The second inquiry, however, about the settlement and other matters is left as it was before. By these two Acts, the only justices who can perform any of the duties required are the visiting justices of the prison, if it has visiting justices, and the justices of the county, city, borough, or place, in which the place of confinement is situated, if it has no visiting justices. The Acts clearly point this out; no other justices can interfere, and there is nothing to show that any other set of justices should be admitted to the prison at all. Then we must consider the effect of 28 & 29 Vict. c. 126, which is said to transfer the duty of making the particular inquiry concerning the insanity under sect. 2 of the Act of 1840, to the justices of a different place from that of the confinement. The question turns upon the words of the 66th section, which enacts that "where a prison authority in this section called the contracting authority, has contracted with any other prison authority, in this section called the receiving authority that the receiving authority is to receive into and maintain in its prison any prisoners maintainable at the expense of the contracting authority, the prison of the receiving authority shall for all the purposes of and incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority, or any of such purposes, according to the tenor of the contract, be deemed to be the prison of the contracting authority, except that the contracting authority shall have no right to interfere in the management of the prison of the receiving authority." It is necessary to refer to two earlier sections in the Act; by the 31st "Any prison authority may contract with any other prison authority having a prison in conformity with the requisitions of this Act, that the latter authority is to receive into and maintain in its prison or one of its prisons all prisoners maintainable at the expense of the former authority, or any particular class or classes of such prisoners. Provided that no such contract shall be valid unless the prison of the latter authority is approved by one of Her Majesty's Principal Secretaries of State as being a fit prison to receive the prisoners contracted to be received there." And by the following (32nd) section, "A contract entered into between prison authorities for the reception into and their maintenance in the prison of the one authority of the prisoners maintainable by the other authority, may include the costs of conveying the prisoners to prison, and all other costs incurred in respect of such prisoners." Now we must see what is the proper effect which should be given to section 66, and whether that effect is such as the defendants contend. It appears to me to be an essential provision for carrying out the objects of that part of the Act which relates to prison contracts, and in order to avoid the difficulties which might otherwise arise therefrom. The purposes, however, for which the prison of the receiving authority is to be deemed to be the prison of the contracting author-

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ity are limited to such as are of and incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority according to the tenor of the contract. We can, I think, give full effect to the meaning of this provision without assuming it to contemplate the purpose of inquiry concerning the insanity of such prisoners. We ought not, I think, to strain the meaning of the section, even if our limitation of its meaning should entail some cost upon the receiving authority. The contract which they make may include costs of prisoners' conveyance and all other costs incurred in respect of such prisoners. It has been said that the costs of this inquiry are beyond those provided for by the 32nd section, and that any provision respecting them between the authorities would be *extra vires*; I cannot myself see how that can be, or why it should be so; but whether such costs can be contracted for or not under this Act of Parliament, the contract is at all events optional with the receiving authorities, and they can protect themselves from the risk of such expenses. With reference to the convenience and reasonableness of a choice of authority for carrying out this duty, I think that undoubtedly our decision to impose it upon the justices of the immediate neighbourhood is the best, and I fail to see that any hardship need follow in consequence. The judgment, therefore, of the Queen's Bench will be affirmed.

GROVE, J., POLLOCK, and AMPHLETT, BB. concurred.

DENMAN, J. was present throughout the argument, but not when judgment was delivered.

Judgment for prosecution.

Attorneys for the prosecution, *Raven* and *Bradley*, for the Solicitor to the Treasury.

Attorneys for the defendants, *Palmer, Bull*, and *Fry*, for *H. J. Jones*, *Lewes*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

May 29 and June 12, 1875.

(Before COCKBURN, C.J., KELLY, C.B., BRAMWELL, B., BLACKBURN, MELLOR, and LUSH, JJ., CLEASBY, B., BRETT, GROVE, DENMAN, QUAIN, and ARCHIBALD, JJ., POLLOCK, and AMPHLETT, BB., and FIELD, and LINDLEY, JJ.)

REG. v. PRINCE.

Abduction—Girl under sixteen—24 & 25 Vict. c. 100, s. 55.

It is no defence to an indictment for unlawfully taking an unmarried girl under the age of sixteen years out of the possession, and against the will of her father, &c., contrary to the 24 & 25 Vict. c. 100, s. 55, that the defendant bonâ fide and reasonably believed that the girl was older than sixteen. Brett, J. dissents.

CASE reserved for the opinion of this Court by Denman, J.

At the Assizes for Surrey held at Kingston-on-Thames on the 24th March last, Henry Prince was tried before me upon the charge of having unlawfully taken one Annie Phillips, an unmarried girl being under the age of sixteen years, out of the possession, and against the will of her father. The indictment was framed under sect. 55 of 24 & 25 Vict. c. 100.

He was found guilty but judgment was respited in order that the opinion of the Court for Crown

Cases reserved might be taken upon the following case.

All the facts necessary to support a conviction existed and were found by the jury to have existed, unless the following facts constitute a defence. The girl Annie Phillips, though proved by her father to be fourteen years old on the 6th April following, looked very much older than sixteen; and the jury found upon reasonable evidence, that before the defendant took her away she had told him that she was eighteen, and that the defendant *bonâ fide* believed that statement and that such belief was reasonable.

If the Court is of opinion that under these circumstances a conviction was right, the defendant is to appear for judgment at the next Assizes for Surrey, otherwise the conviction is to be quashed: (See *R. v. Robins*, 1 C. & R. 456; *R. v. Olifer*, 10 Cox 402.)

No counsel was instructed to argue on behalf of the prisoner.

May 29.—*Lilley*, for the prosecution. The conviction was right. The 24 & 25 Vict. c. 100, s. 55, which enacts that whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession, and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, is one of a series of enactments in the statute intended for the protection of females. It is no defence that the girl left voluntarily or consented to being taken out of the custody of her parents or guardian. In *Reg. v. Kipps* (4 Cox. C. C. 167) upon the previous statute of 9 Geo. 4, c. 31, s. 20 (which was precisely similar to the present enactment) it was so held. In that case Maule, J. said "If the construction apparently put upon the statute in *Reg. v. Meadows* (1 Car. & Kir. 399) be the right construction, the Act can hardly ever be violated except in the case of children in arms. It rarely or never happens that the abductor carries away a girl of fourteen or fifteen in his arms, or upon his back, so that such an interpretation would make the statute inoperative. The law throws a protection about young persons of the female sex, and within the age specified by the statute. It has been determined by the Legislature that at that age young females are not able to protect themselves, or give any binding consent to a matter of this description. It is, therefore, quite immaterial whether the girl abducted consent or not. If her family, that is to say, those who under the statute may lawfully have the possession and control over her, do not consent to her departure, the offence is completed." So in *Reg. v. Olifer* (10 Cox C. C. 404) where the prisoner's counsel contended that the statement of the girl to the prisoner that she was seventeen years old relieved him from the charge of abduction under the statute, Bramwell, B. was of opinion that any man who dealt with an unmarried female did so at his own peril, and if she turned out to be under sixteen years old he was liable under this statute. Again in *Reg. v. Mycock* (12 Cox C. C. 28) upon an indictment under this statute, Willes, J. told the jury that the fact of the girl being a consenting party could not, so far as the jury were concerned, absolve the prisoner from the charge of abduction, although it might be a matter for some consideration in dealing with him afterwards, should the case result in a conviction. The statute upon which the prosecution was based was for the

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protection of the rights of parents; and the prisoner had no more right to deprive the father of the girl of his property, as it were, in her and his possession of her, than he would have had a right to go into his shop, and carry away one of his telescopes or optical instruments. The girl was also just as much in the possession of her father when she was walking in the street, unless she had given up the intention of returning home, as if she had actually been in her father's house when taken off. Lastly the prisoner was bound to ascertain the girl's age; or failing to do that, to take the consequences of abducting her, if it turned out that she was under sixteen years old. In *Reg. v. Booth* (12 Cox C. C. 231) Quain, J. expounded the law in a similar way. The defence there was that the prisoner, actuated by religious and philanthropic motives, had taken the girl from her parents in order to save her from seclusion in a convent; and that he had no means of ascertaining her age. Quain, J. said to the jury: "The law is perfectly clear, and well established by decisions upon that section. You have nothing to do with what was the prisoner's motive in taking this girl away. It is utterly immaterial whether he thought her eighteen years of age or less. If he undertook the responsibility of taking an unmarried girl out of her father's house, though she consented to go, and he had no bad motive, and although he did not know her to be under the age of sixteen, he is responsible for his act. His motives, his philanthropy, and the fact that she was willing to go, have nothing to do with the question before you."

The following cases were also referred to

Reg. v. Robins, 1 Car. & Kir. 456;
Reg. v. Timmins, 30 L. J. 45, M. C.; 8 Cox C. C. 401;
Reg. v. Sleep, 8 Cox C. C. 472; 30 L. J. 170, M. C.;
Attorney-General v. Lookwood, 9 M. & W. 375;
Reg. v. Marsh, 2 B. & C. 717;
Lee v. Simpson, 3 C. B. 871.

Cur. adv. vult.

June 12.—BRAMWELL, B. delivered the following judgment, to which the Lord Chief Baron KELLY, CLEASBY, B., GROVE, J., POLLOCK, B., and AMPHLETT, B. assented.—The question in the case depends on the construction of the statute under which the prisoner is indicted. That enacts that "whosoever shall unlawfully take any unmarried girl under the age of sixteen out of the possession, and against the will of her father, or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor." Now the word "unlawfully" means "not lawfully," "otherwise than lawfully," "without lawful cause"—such as would exist for instance on a taking by a police officer on a charge of felony or a taking by a father of his child from her school. The statute, therefore, may be read thus: "whosoever shall take &c. without lawful cause." Now the prisoner had no such cause, and consequently except in so far as it helps the construction of the statute, the word "unlawfully" may, in the present case, be left out, and then the question is, has the prisoner taken an unmarried girl under the age of sixteen out of the possession of, and against the will of her father. In fact he has; but it is said not within the meaning of the statute, and that that must be read as though the word "knowingly" or some equivalent word was in, and the reason given is, that as a rule the *mens rea* is necessary to make any act a crime or offence, and that if the facts necessary to constitute an offence are not known to the alleged offender, there can be no

mens rea. I have used the word "knowingly," but it will perhaps be said that here the prisoner not only did not do the act knowingly, but knew, as he would have said, or believed, that the fact was otherwise than such as would have made his act a crime; that here the prisoner did not say to himself, "I do not know how the fact is, whether she is under sixteen or not, and will take the chance," but acted on the reasonable belief that she was over sixteen; and that though, if he had done what he did, knowing or believing neither way, but hazarding it, there would be a *mens rea*, there is not one when he believes he knows that she is over sixteen. It is impossible to suppose that a person taking a girl out of her father's possession against his will is guilty of no offence within the statute unless he, the taker, knows she is under sixteen—that he would not be guilty if the jury were of opinion he knew neither one way nor the other. Let it be then that the question is whether he is guilty where he knows, as he thinks, that she is over sixteen. This introduces the necessity for reading the statute with some strange words introduced; as thus: "Whosoever shall take any unmarried girl being under the age of sixteen, and not believing her to be over the age of sixteen, out of the possession," &c. Those words are not there, and the question is whether we are bound to construe the statute as though they were, on account of the rule that the *mens rea* is necessary to make an act a crime. I am of opinion that we are not, nor as though the word "knowingly" was there, and for the following reasons. The act forbidden is wrong in itself, if without lawful cause. I do not say illegal, but wrong. I have not lost sight of this, that though the statute probably principally aims at seduction for carnal purposes, the taking may be by a female, with a good motive. Nevertheless, though there may be cases which are not immoral in one sense, I say that the act forbidden is wrong. Let us remember what is the case supposed by the statute. It supposes that there is a girl,—it does not say a woman, but a girl something between a child and a woman—it supposes she is in the possession of her father, or mother, or other person having lawful care and charge of her, and it supposes there is a taking, and that that taking is against the will of the person in whose possession she is. It is then a taking of a girl in the possession of someone, against his will. I say that done without lawful cause is wrong, and that the Legislature meant it should be at the risk of the taker, whether or no she was under sixteen. I do not say that taking a woman of fifty from her brother's or even father's house is wrong. She is at an age when she has a right to choose for herself, she is not a girl, nor of such tender age that she can be said to be in the possession of or under the care or charge of anyone. If I am asked where I draw the line, I answer at when the female is no longer a girl in anyone's possession. But what the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a girl, and can be said to be in another's possession, and in that other's care or charge. No argument is necessary to prove this; it is enough to state the case. The Legislature has enacted that if anyone does this wrong act he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had the father's consent,

though wrongly, he would have no *mens rea*. So if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the act forbidden by the statute, an act which if he knew she was in the possession and care or charge of anyone, he would know was a crime or not according as she was under sixteen or not. He would know he was doing an act wrong itself, whatever was his intention, if done without lawful cause. In addition to these considerations one may add, that the statute does use the word "unlawfully," and does not use the words "knowingly or not believing to the contrary." If the question was whether his act was unlawful there would be no difficulty as it clearly was not lawful. This view of the section to my mind is much strengthened by a reference to other sections of the same statute. Sect. 50 makes it a felony to unlawfully and carnally know a girl under the age of ten. Sect. 51 enacts (when she is above ten and under twelve) to unlawfully and carnally know her is a misdemeanor. Can it be supposed in the former case, a person indicted might claim to be acquitted on the ground that he had believed the girl was over ten though under twelve, and so that he had only committed a misdemeanor, or that he believed her over twelve, and so had committed no offence at all; or that in a case under sect. 51, he could claim to be acquitted, because he believed her over twelve? In both cases the act is intrinsically wrong. For the statute says if "unlawfully" done. The act done with a *mens rea* is unlawfully and carnally knowing the girl, and the man doing that act does it at the risk of the child being under the statutory age. It would be mischievous to hold otherwise. So sect. 56 by which whoever shall take away any child under fourteen, with intent to deprive parent or guardian of the possession of the child, or with intent to steal any article upon such child, shall be guilty of felony. Could a prisoner say I did take away the child to steal its clothes, but I believed it to be over fourteen? If not, then neither could he say I did take the child with intent to deprive the parent of its possession, but I believed it over fourteen. Because if words to that effect cannot be introduced into the statute where the intent is to steal the clothes, neither can they where the intent is to take the child out of the possession of the parent. But if these words cannot be introduced in sect. 56, why can they be in sect. 55? The same principle applies in these cases. A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer (10 Cox 362). Why? because the act was wrong in itself. So also in the case of burglary; could a person charged claim an acquittal on the ground that he believed it was past 6 a.m. when he entered, or in housebreaking that he did not know the place broken into was a house. As to the case of the marine stores it was held properly that there was no *mens rea* where the person charged with the possession of naval stores with the Admiralty mark did not know the stores he had bore the mark: (*Reg. v. Sleep* 30 L. J. 171 M. C.); because there is nothing *prima facie* wrong or immoral in having naval stores unless they are so marked. But suppose someone told him there was a mark, and he had said he would chance whether or no it was the Admiralty mark. So in the case of the carrier with game in his possession, unless he knew he had it, there would be nothing done or permitted by him, no intentional act or omission.

So of the vitriol sender there was nothing wrong in sending such packages as were sent unless they contained vitriol. Take also the case of libel where the publisher thought the occasion privileged, or that he had a defence under Lord Campbell's Act, but was wrong. He would not be entitled to be acquitted, because there was no *mens rea*. Why? Because the act of publishing written defamation is wrong where there is no lawful cause. Further there have been four decisions on this statute in favour of the construction I contend for. I say it is a question of construction of this particular statute no doubt bringing thereto the common law doctrine of *mens rea* being a necessary ingredient of crime. It seems to me impossible to say that where a person takes a girl out of her father's possession, not knowing whether she is or is not under sixteen, that he is not guilty, and equally impossible when he believes, but erroneously, that she is old enough for him to do a wrong act with safety. I think the conviction should be affirmed.

BLACKBURN, J. delivered the following judgment to which COCKBURN, C.J., MELLOR, QUAIN, LUSH, ARCHIBALD, FIELD, and LINDLEY, JJ. assented.—In this case we must take it as found by the jury that the prisoner took an unmarried girl out of the possession, and against the will of her father, and that the girl was in fact under the age of sixteen, but that the prisoner *bonâ fide*, and on reasonable grounds, believed that she was above sixteen, viz. eighteen years old. No question arises as to what constitutes a taking out of the possession of her father; nor as to what circumstances might justify such taking as not being unlawful; nor as to how far an honest though mistaken belief that such circumstances as would justify the taking existed, might form an excuse; for as the case is reserved we must take it as proved that the prisoner knew that the girl was in the possession of her father, and that he took her knowing that he trespassed on the father's rights, and had no colour of excuse for so doing. The question, therefore, is reduced to this, whether the words in 24 & 25 Vict. c. 100, s. 55, that whosoever shall unlawfully take "any unmarried girl being under the age of sixteen, out of the possession of her father" are to be read as if they were "being under the age of sixteen, and he knowing she was under that age." No such words are contained in the statute, nor is there the word "maliciously," "knowingly," or any other word used that can be said to involve a similar meaning. The argument in favour of the prisoner must, therefore, entirely proceed on the ground that in general a guilty mind is an essential ingredient in a crime, and that where a statute creates a crime the intention of the Legislature should be presumed to be to include "knowingly" in the definition of the crime; and the statute should be read as if that word were inserted, unless the contrary intention appears. We need not enquire at present whether the canon of construction goes quite so far as above stated, for we are of opinion that the intention of the Legislature sufficiently appears to have been to punish the abductor, unless the girl, in fact, was of such an age as to make her consent an excuse irrespective of whether he knew her to be too young to give an effectual consent, and to fix that age at sixteen. The section in question is one of a series of enactments beginning with sect. 50 forming a code for the protection of women and the guardians of young women. These enactments are taken

with scarcely any alteration from the repealed statute 9 Geo. 4, c. 31, which had collected them into a code from a variety of old statutes all repealed by it. Sect. 50 enacts that "whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years, shall be guilty of felony." Sect. 51 "Whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years, shall be guilty of a misdemeanor." It seems impossible to suppose that the intention of the Legislature in those two sections could have been to make the crime depend upon the knowledge of the prisoner of the girl's actual age. It would produce the monstrous result that a man who had carnal connection with a girl in reality not quite ten years old, but whom he, on reasonable grounds, believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanor because she was, in fact, not above the age of ten. It seems to us that the intention of the Legislature was to punish those who had connection with young girls though with their consent, unless the girl was, in fact, old enough to give a valid consent. The man who has connection with a child relying on her consent does it at his peril if she is below the statutable age. The 55th section on which the present case arises, uses precisely the same words as those in sects. 50 and 51, and must be construed in the same way. And if we refer to the repealed statute 4 & 5 Phil. & Mary c. 8, from the third section of which the words in the section in question are taken with very little alteration, it strengthens the inference that such was the intention of the Legislature. The preamble states as the mischief aimed at, that female children, heiresses, and others having expectations, were, un-awares of their friends, brought to contract marriages of disparagement "to the great heaviness of their friends," and then to remedy this enacts by the first section, that it shall not be lawful for anyone to take an unmarried girl being under sixteen, out of the custody of her father or the person to whom he either, by will or by act in his lifetime, gives the custody, unless it be *bonâ fide* done by or for the master or mistress of such child, or the guardian in chivalry or in socage of such child. This recognises a legal right to the possession of the child depending on the real age of the child, and not on what appears. And the object of the Legislature, being as it appears by the preamble to protect this legal right to the possession, would be baffled if it was an excuse that the person guilty of the taking thought the child above sixteen. The words "unlawfully take" as used in the third section of 4 & 5 Phil. & Mary, c. 8, mean without the authority of the master, or mistress, or guardian mentioned in the immediately preceding section. There is not much authority on the subject, but it is all in favour of this view. In *Reg. v. Robins* (1 C. & K. 456) Atcherly, Serjt. then acting as a judge of assize so ruled (apparently though the report leaves it a little ambiguous) with the approval of Tindal, C.J. In *Reg. v. Olifer* (10 Cox C. C. 167) Bramwell, B. so ruled at the Old Bailey, apparently arriving at the conclusion independently of *Reg. v. Robins*. In *Reg. v. Mycock* (12 Cox C. C. 28) Willes, J., without the case of *Reg. v. Olifer* being brought

to his notice, acted on the case of *Reg. v. Robins*, saying that a person who took a young woman from the custody of her father, must take the consequences if she proved under age. And Quain, J. followed this decision in *Reg. v. Booth* (12 Cox C. C. 231). We think those rulings were right, and consequently that the conviction in the present case should stand.

BRETT, J.—In this case the prisoner was indicted under 24 & 25 Vict. c. 100, s. 55, for that he did unlawfully take an unmarried girl, being under the age of sixteen years, out of the possession, and against the will of her father. And according to the statement of the case, we are to assume that it was proved on the trial that he did take an unmarried girl out of the possession, and against the will of her father, and that when he did so the girl was under the age of sixteen years. But the jury found that the girl went with the prisoner willingly, that she told the prisoner that she was eighteen years of age, that he believed that she was eighteen years of age, and that he had reasonable grounds for so believing. The question is whether upon such proof and such findings of the jury, the prisoner ought or ought not, in point of law, to be pronounced guilty of the offence with which he was charged. He, in fact, did each and everything which is enumerated in the statute as constituting the offence to be punished, if what he did was done unlawfully within the meaning of the statute. If what he did was not unlawful within the meaning of the statute, it seems impossible to say that he ought to be convicted. The question, therefore, is whether the findings of the jury, which are in favour of the prisoner, prevent what he is proved to have done from being unlawful within the meaning of the statute. It cannot, as it seems to me, properly be assumed that what he did was unlawful within the meaning of the statute, for that is the very question to be determined. Now on the one side it is said that the prisoner is proved to have done every particular thing which is enumerated in the Act, as constituting the offence to be punished, and that there is no legal justification for what he did, and therefore, that it must be held, as matter of law, that what he did was unlawful within the meaning of the statute, and that the statute was, therefore, satisfied, and the crime completed. On the other side, it is urged, that if the facts had been as the prisoner believed them to be, and as by the findings of the jury he might reasonably believe them to be, and he was deceived into believing them to be, he would have been guilty of no criminal offence at all, and, therefore, that what he did was not criminally unlawful within the meaning of the criminal statute under which he was indicted. It has been said that even if the facts had been, as the prisoner believed them to be, he would still have been doing a wrongful act. The first point, therefore, to be considered would seem to be what would have been the legal position of the prisoner, if the facts had been, as he believed them to be, that is to say, What is the legal position of a man who, without force, takes a girl of more than sixteen years of age, but less than twenty-one years of age, out of the possession of her father, and against his will? The statute 4 & 5 Phil. & Mary c. 8 has been said to recognise the legal right of a father to the possession of an unmarried daughter up to the age of sixteen. The statute 12 Car. 2, c. 24, seems to recognise the right of a father to such

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possession up to the age of twenty-one. Mr. Hargrave in notes 12 and 15 to Co. Lit. 88 b. seems to deduce a right in the father to possession up to the age of twenty-one from those two statutes, and that such right is to be called in law a right *jure naturæ*. If the father's right be infringed, he may apply for a *habeas corpus*. When the child is produced in obedience to such writ, issued upon the application of a father, if the child be under twenty-one, the general rule is that "if the child be of an age to exercise a choice, the court leaves it to elect where it will go. If it be not of that age, and a want of discretion would only expose it to dangers or seductions, the court must make an order for its being placed in the proper custody, and that undoubtedly is the custody of the father:" (Lord Denman, C.J. in *Re v. Gladhill*, 4 A. & E. 624). But if the child be a female under sixteen, the court will order it to be handed over to the father, in the absence of certain objections to his custody, even though the child object to return to the father. If the child be between sixteen and twenty-one, and refuse to return to the father, the court, even though the child be a female, gives to the child the election as to the custody in which it will be. Now the cases which have been decided on this subject show that, although a father is entitled to the custody of his children till they attain the age of twenty-one, this court will not grant a *Habeas Corpus* to hand a child, which is below that age, over to its father, provided that it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests. The whole question is what is that age of discretion? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by statute for the arrival of the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The Legislature has given us a guide which we may safely follow in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue; and short of which such a child has no discretion to consent to leaving him. (Cockburn, C.J. in *Reg. v. Howes*, 3 E. & E. 332). But if a man takes out of her father's possession without force, and with her consent, a daughter between sixteen and twenty-one, the father would seem to have no legal remedy for such taking. It may be that the father, if present at the taking, might resist such taking by necessary force, so that to an action for assault by the man, he might plead a justification. But for a mere taking, without seduction, there is no action which the father could maintain. There never was a writ applicable to such a cause of action. The writ of "Ravishment of Ward" was only to such, as had the right to the marriage of the infant, and was, therefore, only applicable where the infant was an heir to property, whose marriage was, therefore, valuable to the guardian. (See *Ratcliff's case*, 3 Co. 37.) No such action now exists, and if it did, it would not be applicable to any female child, at all events, not to any who was heir apparent. Neither can a man who, with her consent, and without force, takes a daughter, who is more than sixteen years old, but less than twenty-one, out of her father's possession or custody, be indicted for such taking. There never has been such an indictment. The statute 3 Hen. 7, c. 2, was enacted against "the

taking any woman so against her will unlawfully, that is to say, maid, widow, or wife, that such taking, &c., be felony." It was held in *Lady Fulwood's case* (Cro. Car. 484), that the indictment must further charge that the defendant carried away the woman with intent to marry or defile her. Two things, therefore, were necessary which are not applicable to the point now under discussion, namely, that the taking should be against the will of the person taken, and that there should be the intent to marry or defile. The statute 4 & 5 Phil. & Mary, c. 8, deals with the taking out of or from the possession, custody, or government of the father, &c., any maid or woman child, unmarried, being under the age of sixteen years. For a mere unlawful taking the punishment is imprisonment for two years; for a taking and marriage five years, and the girl if she be more than twelve years old, and consents to the marriage, forfeits her inheritance. The statute 9 Geo. 4, c. 31, s. 19, is enacted against "the taking of a woman against her will with intent to marry or defile her," &c. The same statute, sect. 20, is as to an unmarried girl being under the age of sixteen years. It follows from this review that if the facts had been as the prisoner, according to the finding of the jury believed them to be, he would have done no act which has ever been a criminal offence in England; he would have done no act in respect of which any civil action could have ever been maintained against him; he would have done no act for which, if done in the absence of the father, and done with the continuing consent of the girl, the father could have had any legal remedy. We have, then, next to consider the terms of the statute, and what is the meaning in it of the word "unlawfully." The usual system of framing criminal Acts has been to specify each and every act intended to be subjected to any punishment, ("Criminal Law Consolidation Acts," by Greaves, Introduction, p. xli.) and then in some way to declare whether the offence is to be considered as a felony or as a misdemeanor, and then to enact the punishment. It seems obvious that it is the prohibited acts which constitute the offence, and that the phraseology which indicates the class of the offence, does not alter or affect the facts, or the necessary proof of those facts, which constitute the offence. There are several usual forms of criminal enactment. "If anyone shall, with such or such an intent, do such and such acts, he shall be guilty of felony, or misdemeanor, as the case may be." Whether the offence is declared to be a felony or a misdemeanor depends upon the view of the Legislature as to its heinousness. But the class in which it is placed does not alter the proof requisite to support a charge of being guilty of it. Under such a form of enactment there must be proof that the acts were done, and done with the specified intent. Other forms are, "If anyone shall feloniously do such and such acts, he shall be liable to penal servitude," &c., or "if anyone shall unlawfully do such and such acts, he shall be liable to imprisonment," &c. The first of these forms makes the offence a felony by the use of the word "feloniously;" the second makes the offence a misdemeanor by the use of the word "unlawfully." The words are used to declare the class of the offence; but they denote also a part of that which constitutes the offence. They denote that which is equivalent to, though not the same as,

the specific intent mentioned in the first form to which allusion has been made. Besides denoting the class of the offence, they denote that something more must be proved than merely that the prisoner did the prohibited acts. They do not necessarily denote that evidence need in the first instance be given of more than that the prisoner did the prohibited acts; but they do denote that the jury must find, as matter of ultimate proof, more than that the prisoner did the prohibited acts. What is it that the jury must be satisfied is proved beyond merely that the prisoner did the prohibited acts? It is suggested that they must be satisfied that the prisoner did the acts "with a criminal mind;" that there was *mens rea*. The true meaning of that phrase is to be discussed hereafter. If it be true that this must be proved, the only difference between the second form and the first form of enactment is, that in the first the intent is specified, but in the second it is left generally as a criminal state of mind. As between the two second forms, the evidence either direct or inferential, to prove the criminal state of mind must be the same. The proof of the state of mind is not altered or affected by the class in which the offence is placed. Another common form of enactment is, "If any person knowingly, wilfully, and maliciously do such or such acts, he shall be guilty of felony;" or "If any person knowingly and wilfully do such or such acts he shall be guilty of misdemeanor;" or "if any person knowingly, wilfully, and feloniously do such or such acts, he shall be liable," &c.; or "if he knowingly and unlawfully do such and such acts, he shall be liable," &c. The same explanation is to be given of all these forms as between each other as before. They are mere differences in form. And though they be all, or though several of them be in one consolidating statute, they are not to be construed by contrast. "If any question should arise in which any comparison may be instituted between different sections of any one or several of these Acts, it must be carefully borne in mind in what manner these Acts were framed. None of them was rewritten; on the contrary, each contains enactments taken from different Acts passed at different times, and with different views, and frequently varying from each other in phraseology, and for the reasons stated in the introduction, these enactments, for the most part, stand in these Acts with little or no variation in their phraseology, and, consequently, their differences in that respect will be found generally to remain in these Acts. It follows, therefore, from hence, that any argument as to a difference in the intention of the Legislature which may be drawn from a difference in the terms of one clause from those in another, will be entitled to no weight in the construction of such clauses; for that argument can only apply with force where an Act is framed from beginning to end with one and the same view, and with the intention of making it thoroughly consistent throughout: ("Greaves on Criminal Law Consolidation Acts," p. 3.) I have said that as between each other the same explanation is to be given of these latter forms of enactments as of the former mentioned in this judgment. But as between these latter and the former forms there is the introduction in the latter of such words as knowingly, wilfully, maliciously. Wilfully is more generally applied when the prohibited acts are in their natural consequences, not necessarily or very pro-

bably, noxious to the public interest, or to individuals, so that an evil mind is not the natural inference or consequence to be drawn from the doing of the acts. The presence of the word requires somewhat more evidence on the part of the prosecution to make out a *prima facie* case, than evidence that the prisoner did the prohibited acts. So as to the word "maliciously." It is used where the prohibited acts may or may not be such as in themselves import, *prima facie*, a malicious mind. In the same way the word "knowingly" is used, where the noxious character of the prohibited acts depends upon a knowledge in the prisoner of their noxious effect, other than the mere knowledge that he is doing the acts; the presence of the word calls for more evidence on the part of the prosecution. But the absence of the word does not prevent the prisoner from proving to the satisfaction of the jury, that the *mens rea* to be *prima facie* inferred from his doing the prohibited acts, did not in fact exist. In *Reg. v. Marsh* (2 B. & C. 717) the measure of the effect of the presence in the enactment of the word "knowingly," is explained. The information and conviction were against a carrier for having game in his possession, contrary to the statute (5 Anne, c. 14), which declares "that any carrier having game in his possession is guilty of an offence, unless it be sent by a qualified person." The only evidence given was that the defendant was a carrier, and that he had game in his waggon on the road. It was objected that there was no evidence that the defendant knew of the presence of the game, or that the person who sent it was not a qualified person. The judges held that there was sufficient *prima facie* evidence, and that it was not rebutted by the defendant by sufficient proof on his part of the ignorance suggested on his behalf. The judgments clearly import that if the defendant could have satisfied the jury of his ignorance, it would have been a defence, though the word "knowingly" was not in the statute. In other words, that its presence or absence in the statute, only alters the burden of proof. "Then, as to knowledge, the clause itself says nothing about it. If that had been introduced, evidence to establish knowledge must have been given on the part of the prosecution; but under this enactment the party charged must show a degree of ignorance sufficient to excuse him. Here there was *prima facie* evidence that the game was in his possession as carrier. Then it lay on the defendant to rebut that evidence:" (Bayley, J.). "The game was found in his waggon employed in the course of his business as a carrier. That raises a presumption *prima facie* that he knew it, and that is not rebutted by the evidence given on the part of the defendant:" (Littledale, J.). From these considerations of the forms of criminal enactments, it would seem that the ultimate proof necessary to authorise a conviction, is not altered by the presence or absence of the word "knowingly;" though by its presence or absence the burden of proof is altered; and it would seem that there must be proof to satisfy a jury ultimately, that there was a criminal mind or *mens rea* in every offence really charged as a crime. In some enactments, or common law maxims of crime, and therefore in the indictments charging the committal of those crimes, the name of the crime imports that a *mens rea* must be proved, as in murder, burglary, &c. In some the *mens rea* is contained in the specific

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enactment as to the intent, which is made a part of the crime. In some the word "feloniously" is used, and in such cases it has never been doubted but that a felonious mind must ultimately be found by the jury. In enactments in a similar form, but in which the prohibited acts are to be classed as a misdemeanor, the word "unlawfully" is used, instead of the word "feloniously." What reason is there why in like manner a criminal mind or *mens rea* must not ultimately be found by the jury in order to justify a conviction?—the distinction always being observed that in some cases the proof of the committal of the acts may *prima facie*, either by reason of their own nature, or by reason of the form of the statute, import the proof of the *mens rea*. But even in those cases it is open to the prisoner to rebut the *prima facie* evidence, so that if in the end the jury are satisfied that there was no criminal mind or *mens rea* there cannot be a conviction in England for that which is by the law considered to be a crime. There are enactments which by their form seem to constitute the prohibited acts into crimes, and yet by virtue of which enactments the defendants charged with the committal of the prohibited acts have been convicted in the absence of the knowledge or intention supposed necessary to constitute a *mens rea*. Such are the cases of trespass in pursuit of game, or of piracy of literary or dramatic works, or of the statutes passed to protect the revenue. But the decisions have been based upon the judicial declaration that the enactments do not constitute the prohibited acts into crime, or offences against the Crown, but only prohibit them for the purpose of protecting the individual interests of individual persons, or of the revenue. Thus in *Lee v. Simpson* (3 C. B. 871), in an action for penalties for the representation of a dramatic piece, it was held that it was not necessary to show that the defendant knowingly invaded the plaintiff's right. But the reason of the decision given by Wilde, C.J. (p. 883) is: "The object of the Legislature was to protect authors against the piratical invasion of their rights. In the sense of having committed an offence against the Act, of having done a thing that is prohibited, the defendant is an offender. But the plaintiff's rights do not depend upon the innocence or guilt of the defendant." So the decision in *Morden v. Porter* (7 C. B., N. S., 641) seems to be made to turn upon the view that the statute was passed in order to protect the individual property of the landlord in game reserved to him by his lease against that which is made a statutory trespass against him, although his land is in the occupation of his tenant. There are other cases in which the ground of decision is, that specific evidence of knowledge or intention need not be given, because the nature of the prohibited acts is such that, if done, they must draw with them the inference that they were done with the criminal mind or intent, which is a part of every crime. Such is the case of the possession and distribution of obscene books. If a man possesses them and distributes them, it is a necessary inference that he must have intended that their first effect must be that which is prohibited by statute, and that he cannot protect himself by showing that his ultimate object or secondary intent was not immoral: (*Reg. v. Hicklin*, L. Rep. 3 Q. B. 360.) This and similar decisions go rather to show what is *mens rea* than to show

whether there can or cannot be a conviction for crime proper without *mens rea*. As to that last question, it has become very necessary to examine the authorities. In Blackstone's Commentaries, by Stephen (2nd edit., vol. 4, book vi., Of Crimes, p. 98), it is said: "And as a vicious will, without a vicious act, is no civil crime, so, on the other hand, an unwarrantable act without a vicious will, is no crime at all. So that to constitute a crime against human laws there must be—first, a vicious will, and secondly, an unlawful act consequent upon such vicious will. Now, there are three cases in which the will does not join with the act—first, where there is a defect of understanding, &c.; secondly, where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done, which is the case of all offences committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees to it." And at p. 105, "Ignorance or mistake is another defect of will, when a man intending to do a lawful act does that which is unlawful. For here the deed and the will, acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake in fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his family, this is no criminal action; but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so, this is wilful murder." In *Fowler v. Padget* (7 T. Rep. 509), the jury found that they thought the intent of the plaintiff in going to London was laudable; that he had no intent to defraud or delay his creditors; but that delay did actually happen to some creditors. Lord Kenyon said: "Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender, but it is a principle of natural justice and of our law, that *Actus non facit reum, nisi mens sit rea*. The interest and the act must both concur to constitute the crime." And again, "I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for." In *Hearne v. Gatten* (2 E. & E. 66), the respondents were charged upon an information for having sent oil of vitriol by the Great Western Railway without marking or stating the nature of the goods. By 20 & 21 Vict. c. 43, s. 168, every person who shall send, or cause to be sent by the said railway any oil of vitriol, shall distinctly mark or state the nature of such goods, &c., on penalty of forfeiting, &c. By sect. 206, such penalty is recoverable in a summary way before justices, with power to imprison, &c. The respondents had in fact sent oil of vitriol unmarked, but the justices found that there was no guilty knowledge, but on the contrary, the respondents acted under the full belief that the goods were correctly described, and had previously used all proper diligence to inform themselves of the fact. They refused to convict. It must be observed in that case, as in the present, the respondents did in fact the prohibited acts, and that in that case as in this, it was found as the ultimate proof that they were deceived into the belief of a different and non-criminal state of facts, and had used all proper diligence. The case is stronger perhaps

than the present by reason of the word "unlawfully" being absent from that statute. The court upheld the decision of the magistrates, holding that the statute made the doing of the prohibited acts a crime, and, therefore, that there must be a criminal mind, which there was not. "As to the latter reason, I think the justices were perfectly right, *Actus non facit reum, nisi mens sit rea*. The act with which the respondents were charged is an offence created by statute, and for which the person committing it is liable to a penalty or to imprisonment. Not only was there no proof of guilty knowledge on the part of the respondents, but the presumption of a guilty knowledge on their part, if any could be raised, was rebutted by the proof that a fraud had been practised on them. I am inclined to think they were civilly liable, &c. Lord Campbell, C.J." "I was inclined to think, at first, that the provision was merely protective, but if it created a criminal offence, which I am not prepared to deny, then the mere sending by the respondents without a guilty knowledge on their part, would not render them criminally liable; although, as they took Nicholas's word for the contents of the parcel, they would be civilly liable." Erle, J." In *Taylor v. Newman* (4 B. & S. 89), the information was under 24 & 25 Vict. c. 96, s. 23, "Whosoever shall unlawfully and wilfully kill," &c., "any pigeon," &c. The appellant shot pigeons on his farm belonging to a neighbour. The justices convicted on the ground that the appellant was not justified by law in killing the pigeons, and therefore that the killing was unlawful. In other words, they held that the only meaning of "unlawful," in the statute, was without legal justification. The court set aside the conviction. "I think that the statute was not intended to apply to a case in which there was no guilty mind, and where the act was done by a person under the honest belief that he was exercising a right.—Mellor, J." In *Buckmaster v. Reynolds* (13 C. B., N. S., 62), an information was laid for unlawfully, by a certain contrivance, attempting to obstruct or prevent the purposes of an election of a vestry. The evidence was that the defendant did obstruct the election because he forced himself and others into the room before eight o'clock, believing that eight o'clock was past. The question asked was whether an intentional obstruction by actual violence is an offence, &c. This question the court answered in the affirmative, so that there, as here, the defendant had done the prohibited acts. But Erle, J. continued, "I accompany this statement (*i.e.*, the answer to the question) by a statement that upon the facts set forth, I am unable to see that the magistrate has come to a wrong conclusion. A man cannot be said to be guilty of a delict unless, to some extent, his mind goes with the act. Here it seems that the respondent acted on the belief that he had a right to enter the room, and that he had no intention to do a wrongful act." In *Reg. v. Hibbert* (L. Rep. 1 Cr. Cas. Res. 184) the prisoner was indicted under the section now in question. The girl, who lived with her father and mother, left her home in company with another girl to go to a Sunday school. The prisoner met the two girls, and induced them to go to Manchester. At Manchester he took them to a public house, and there seduced the girl in question, who was under sixteen. The prisoner made no inquiry, and did not know who the girl was, or whether she had a father or

mother living or not, but he had no reason to, and did not believe, that she was a girl of the town. The jury found the prisoner guilty, and Lush, J. reserved the case. In the Court of Criminal Appeal, Bovill, C.J., Channell, and Pigott, B.B., Byles, and Lush, J.J. quashed the conviction. Bovill, C.J.—"In the present case there is no statement of any finding of fact that the prisoner knew, or had reason to believe, that the girl was under the lawful care or charge of her father or mother, or any other person. In the absence of any finding of fact on this point the conviction cannot be supported." This case was founded on *Reg. v. Green* (3 F. & F. 274) before Martin, B. The girl there was under fourteen, and lived with her father, a fisherman, at Southend. The prisoners saw her in the street by herself, and induced her to go with them; they took her to a lonely house, and there Green had criminal intercourse with her. Martin, B. directed an acquittal. "There must," he said, "be a taking out of the possession of the father. Here the prisoners picked up the girl in the streets, and for anything that appeared they might not have known that the girl had a father. The girl was not taken out of the possession of anyone. The prisoners no doubt had done a very immoral, but the question was whether they had committed an illegal, act. The criminal law ought not to be strained to meet a case which did not come within it. The act of the prisoners was scandalous, but it was not any legal offence." In each of these cases the girl was surely in the legal possession of her father. The mere fact of her being in the street at the time could not possibly prevent her from being in the possession of her father. Everything, therefore, prohibited was done by the prisoner in fact. But in each case the ignorance of facts was held to prevent the case from being the crime to be punished. In *Reg. v. Tinckler* (1 F. & F. 513), in a case under this section, Cockburn, C.J., charged the jury thus: "It was clear the prisoner had no right to act as he had done in taking the child out of Mrs. Barnes's custody. But inasmuch as no improper motive was suggested on the part of the prosecution, it might very well be concluded that the prisoner wished the child to live with him, and that he meant to discharge the promise, which he alleged he had made to her father, and that he did not suppose that he was breaking the law when he took the child away. This being a criminal prosecution, if the jury should take this view of the case, and be of opinion that the prisoner honestly believed that he had a right to the custody of the child, then, although the prisoner was not legally justified, he would be entitled to an acquittal." The jury found the prisoner not guilty. In *Reg. v. Sleep* (8 Cox. C. C. 472), the prisoner had possession of government stores, some of which were marked with the broad arrow. The jury, in answer to a question whether the prisoner knew that the copper, or any part of it, was marked, answered, "We have not sufficient evidence before us to show that he knew it. The Court of Criminal Appeal held that the prisoner could not be convicted. Cockburn, C.J." *Actus non facit reum, nisi mens sit rea*, is the foundation of all criminal procedure. The ordinary principle that there must be a guilty mind to constitute a guilty act, applies to this case, and must be imported into this statute, as it was held in *Reg. v. Cohen* (8 Cox. C. C. 41), where the conclusion of the law was stated by Hill, J., with

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his usual clearness and power. It is true that the statute says nothing about knowledge, but this must be imported into the statute." Pollock, C.B., Martin, Crompton, and Willes agreed. In the cases of *Reg. v. Robins* (1 Car. & Kir. 456), and *Reg. v. Olfier* (10 Cox, C. C. 402), there was hardly such evidence as was given in this case as to the prisoner being deceived as to the age of the girl, and having reasonable ground to believe the deception, and there certainly were no findings by the jury equivalent to the findings in this case. In *Reg. v. Forbes and Webb* (10 Cox C. C. 362), although the policeman was in plain clothes, the prisoner certainly had strong ground to suspect, if not to believe, that he was a policeman; for the case states that they repeatedly called out to rescue the boy and pitch into the constable. Upon all the cases I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind or *mens rea*. Then comes the question, what is the true meaning of the phrase? I do not doubt that it exists where the prisoner knowingly does acts which would constitute a crime if the result were as he anticipated, but in which the result may not improbably end in bringing the offence within a more serious class of crime. As if a man strike with a dangerous weapon with intent to do grievous bodily harm and kills. The result makes the crime murder; the prisoner has run the risk. So, if a prisoner do the prohibited acts without caring to consider what the truth is as to facts, as if a prisoner were to abduct a girl under sixteen without caring to consider whether she was in truth under sixteen, he runs the risk. So, if he without abduction defiles a girl who is in fact under ten years old, with a belief that she is between ten and twelve, if the facts were as he believed, he would be committing the lesser crime. Then he runs the risk of his crime resulting in the greater crime. It is clear that ignorance of the law does not excuse. It seems to me to follow that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe, and does believe to be the facts, would, if true, make his acts no criminal offence at all. It may be true to say that the meaning of the word 'unlawfully' is without justification or excuse. I, of course, agree that if there be a legal justification, there can be no crime; but, I come to the conclusion that a mistake of facts on reasonable grounds, to the extent that if the facts were as believed, the acts of the prisoner would make him guilty of no criminal offence at all, is an excuse, and that such excuse is implied in every criminal charge and every criminal enactment in England. I agree with Lord Kenyon that "such is our law," and with Cockburn, C.J., that such is the foundation of all criminal procedure.

DENMAN, J.—The defendant was indicted under the 24 & 25 Vict. c. 100, s. 55. I cannot hold that the word "unlawfully" is an immaterial word in an indictment framed upon this clause. I think that it must be taken to have a meaning, and an important meaning, and to be capable of being either supported or negatived by evidence upon the trial: (See *Reg. v. Turner*, 1 Mood. C. C. 15; *Reg. v. Ryan*, 2 Moo. C. C. 241; 2 Hawkins P. C. c. 25, s. 96). In the present case the jury found that the defendant had done everything requisite to bring himself within

the clause as a misdemeanant, unless the fact that he *bonâ fide* and reasonably believed the girl taken by him to be eighteen years old constituted a defence. That is, in other words, unless such *bonâ fide* reasonable belief prevented them from saying that the defendant, in what he did, acted unlawfully within the meaning of the clause. The question, therefore, is whether upon this finding of the jury the defendant did "unlawfully," &c., the things which they found him to have done. The solution of this question depends upon the meaning of the word unlawfully in sect. 55. If it means "with a knowledge or belief that every single thing mentioned in the section existed at the moment of the taking," undoubtedly the defendant would be entitled to an acquittal, because he did not believe that a girl under sixteen was being taken by him at all. If it only means without lawful excuse or justification, then a further question arises, viz., whether the defendant had any lawful excuse or justification for doing all the acts mentioned in the clause as constituting the offence, by reason merely that he *bonâ fide* and reasonably believed the girl to be older than the age limited by the clause. Bearing in mind the previous enactments relating to the abduction of girls under sixteen, the 4 & 5 Phil. & Mary, c. 8, s. 2, and the general decisions upon those enactments and upon the present statute, looking at the mischief intended to be guarded against, and for the reasons given in the judgments of Bramwell, B., and Blackburn, J., it appears to me reasonably clear that the word "unlawfully" in the true sense in which it was used, is fully satisfied by holding that it is equivalent to the words "without lawful excuse," using those words as equivalent to without such an excuse as, being proved, would be a complete legal justification for the act, even where all the facts constituting the offence exist. Cases may easily be suggested where such a defence might be made out; as for instance, if it were proved that he had the authority of a court of competent jurisdiction, or of some legal warrant, or that he acted to prevent some illegal violence, not justified by the relation of parent and child, or schoolmistress or other custodian, and requiring forcible interference by way of protection. In the present case the jury find that the defendant believed the girl to be eighteen years of age. Even if she had been of that age she would have been in the lawful care and charge of her father as her guardian by nature: (See Co. Litt. 886, note 12, edit. 19, recognised in *Reg. v. House*, 3 E. & E. 332, and p. 336; also reported in 8 Cox. C. C. 405, under the name of *Ex parte Barford*). Her father had a right to her personal custody up to the age of twenty-one, and to appoint a guardian by deed or will whose right to her personal custody would have extended up to the same age. The belief that she was eighteen would be no justification to the defendant for taking her out of his possession and against his will. By taking her, even with her own consent, he must at least have been guilty of aiding and abetting her in doing an unlawful act—viz., in escaping against the will of her natural guardian from his lawful care and charge. This, in my opinion, leaves him wholly without lawful excuse or justification for the act he did, even though he believed that the girl was eighteen; and, therefore, unable to allege that what he had done was not unlawfully done within the meaning of the clause.

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In other words, having knowingly done a wrongful act, viz., in taking the girl away from the lawful possession of her father against her will and in violation of his rights as guardian by nature, he cannot be heard to say that he thought the girl was of an age beyond that limited by the statute for the offence charged against him. He had wrongfully done the very thing contemplated by the Legislature. He had wrongfully and knowingly violated the father's rights against the father's will, and he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing.

Conviction affirmed.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqrs.,
Barriers-at-Law.

Tuesday, May 4, 1875.

WESTWICK v. THEODOR.

Apprentice—Independent stipulations—Proviso—Power of master to discharge for misconduct.

By an apprenticeship agreement the defendant took the plaintiff's son as an apprentice for three years, to learn the business of a tea broker, and in consideration of the sum of 200l. he agreed to teach the son such business by the best means in his power, and further agreed to pay him a salary each year; provided always that he obeyed all commands, and gave his services entirely to the business during office hours.

The defendant pleaded to an action for not teaching the apprentice, and for dismissing and refusing to retain him, that the apprentice misconducted himself by disobeying the defendant's lawful orders, by neglecting his duties, and absenting himself from the service, wherefore the defendant discharged him.

Held, on demurrer, that this plea was good.

THIS was a demurrer to a plea.

The declaration stated that the defendant agreed with the plaintiff, as follows:

I hereby agree to take your son, T. B. Westwick, as an apprentice for three years, from the 1st Dec. 1873, to learn the business of a tea broker or merchant, and in consideration of the sum of 200l., paid to me by you, I agree to teach T. B. Westwick such business by the best means in my power, and further agree to pay him a salary of 30l., 50l., and 70l. per annum respectively for the three years; provided always, that he obeys all commands, and gives his services entirely to the business during office hours.

The declaration proceeded to aver the performance of all conditions precedent, and that the defendant did not teach the said T. B. Westwick in his business as aforesaid, for the period and on the terms aforesaid, and before the three years dismissed the said T. B. Westwick from the service, and refused to retain him therein for the remainder of the term.

The defendant pleaded, amongst other things: As to dismissing the said T. B. Westwick, that after the contract and before breach the said T. B. Westwick misconducted himself in the service by wilfully disobeying the reasonable and lawful orders of the defendant, by him given to the said T. B. Westwick in the service, and by habitually

neglecting his duties in the service and failing to perform the same; and by absenting himself from the defendant's service and refusing to give his services during office hours without just cause, and by acting and behaving with insubordination to the defendant, so being his master; wherefore the defendant then discharged the said T. B. Westwick from the service, which is the alleged breach.

Purvis argued for the plaintiff, in support of the demurrer.—The facts alleged in the plea are no justification for the plaintiff's dismissal. The stipulations in a deed of apprenticeship have been long determined to be independent of each other; the master cannot discharge his apprentice for misconduct, his remedy is by action. It would be impossible to allow such a power to a master, for he might thereby acquire the whole of the consideration without doing anything for it. This was so held in *Campbell v. Jones* (6 T. R. 570); *Winstons v. Linn* (1 B. & C. 460); and *Phillips v. Clift* (4 H. & N. 168). [BLACKBURN, J.—Although *Winstons v. Linn* decided that disobedience of orders or other acts of misconduct by the apprentice would not entitle the master to put an end to that particular contract of apprenticeship, it was said by Bailey, J., at p. 468, that "if the parties had intended that the master should have such a power, they might have provided for it by the express terms of the deed." There are no such words as the proviso here contains in either of the cases cited.] That proviso is merely a covenant which goes to part of the consideration; there is nothing in the contract to make the whole of it depend upon the proviso. According to the rule laid down in *Pordage v. Cole* (1 Wms. Saunders, 320), this is an independent covenant, a breach of which might be paid for in damages; and it is no answer to an action for the breach of another covenant in the deed. This, too, is the effect of *Boone v. Eyre* (1 H. Bl. 273 n.)

G. Francis appeared for the defendant.

BLACKBURN, J.—It is unnecessary to hear counsel in support of the plea. It is true that the consideration is paid for the whole service, and that in general, misconduct on the part of the apprentice would not put an end to the contract. The cases referred to during the argument support that contention. But in *Winstons v. Linn* (1 B. & C. 468), Bayley, J., in his judgment, points out that if the contract in express terms gives the master a power to dismiss the apprentice, the case would be different, I think here the contract provides that if the apprentice misconducts himself the master may dismiss him. I do not say that, upon a fair construction of the proviso, one act of disobedience would be a breach of the condition, but we must look at the plea, which must be taken to be true. The averment is, that the plaintiff's son wilfully disobeyed the defendant's orders, and habitually neglected his duties. I cannot say what amount of disobedience would justify a dismissal; it is a question of degree which would be for a jury; but I am of opinion that the plea is good.

MELLOR and FIELD, JJ., concurred.

Judgment for the defendant.

Attorneys for plaintiff, Noon and Tiddeman.
Attorney for defendant, Anthony Carr.

Q. B.] LEICESTER WATERWORKS CO. v. OVERSEERS AND CHURCHWARDENS OF CROPTONE.

[Q. B.]

*Thursday, May 6, 1875.*LEICESTER WATERWORKS COMPANY v. OVERSEERS
AND CHURCHWARDENS OF CROPTONE.*Poor rate—Appeal—Valuation list—OVERRATING—
Reference of appeal and all matters in difference
—Subsequent rates made pending the award.*

An appeal was made by a waterworks company to Quarter Sessions against a poor rate made on the company. The assessment committee of the union appeared as the respondents. The overseers of the parish did not appear. The appeal, and all matters in difference relating to the rating of the waterworks were referred to arbitration by an agreement between the assessment committee and the appellants, with power to the arbitrator to direct at what amount the appellants had been or should be rated before the making of the award, and to order the return of the excess, if any, of any sum paid by them to the overseers of the parish. The award was not made for eighteen months, and in the meantime several rates had been made by the overseers of the parish on the appellants, and paid by them, under protest, but without giving notice of appeal or taking any steps to dispute such rate. By the award the rateable value was largely reduced, and the amount paid by the appellants in excess of the sums due, according to the value so fixed, was ordered to be repaid, not only on the rate appealed against, but also the intermediate rates, and the overseers were also ordered to repay out of the next rate the balance due to the appellants, and overpaid by them. The overseers paid the difference on the rate appealed against, but refused to refund the difference on the other rates, on the ground that the assessment committee had acted *ultra vires* in referring those matters; and upon a rate being made upon the award, which the appellants refused to pay, setting up the award, obtained a distress warrant from the justices, and levied for the amount. The appellant thereupon replevied in the County Court, and now sought by the present rule to restrain all further proceedings by the overseers:

Held, that the overseers had acted contrary to good faith, and upon the authority of The London and North-Western Company v. Bedford (17 Q. B. 978), that this court would interfere to stop their further proceeding.

RULE calling upon the defendants to show cause why all proceedings in this action of replevin should not be stayed, and why the replevin bond should not be delivered up to the plaintiffs.

The plaintiffs constructed reservoirs, engine-houses and filter-beds, at the parish of Cropstone, in the Barrow-on-Soar Union, and laid pipes down thence to Leicester, passing through four other parishes of the Barrow-on-Soar Union, and such works were included in the supplemental valuation list for 1871, and a rate was made in Aug. 1871; upon such valuation, and in Oct. 1871, the plaintiffs gave notice of objections to such list to the assessment committee, and to the overseers of the parish; but the plaintiffs failed to obtain the relief they sought from the assessment committee, and on the 12th March, 1872, notice of appeal was given by the company to the committee and to the overseers of the parishes, on the ground that the rateable value was excessive, for the Quarter Sessions to be held on the 8th April, 1872. The assessment committee appeared as respondents to

the appeal, under the 27 & 28 Vict. c. 39, s. 2. and the appeal was entered and respited on the 8th April, 1872. The overseers of the parish did not appear. A meeting was held on the 8th June following, at the offices of the company, between the company and the guardians of the union, to prevent, if possible, any litigation, when it was resolved that all questions in relation to the rating of the above named company's works and mains should be submitted to two arbitrators; and this resolution was carried into effect by a formal agreement of reference made and executed on the 29th June, between the plaintiffs' company of the one part and the assessment committee of the Barrow-on-Soar Union, on behalf of the board of guardians of such union, on the other part, by which, for ending and determining and settling all differences and disputes relating to the rating of the waterworks, it was agreed that the same should be referred to the award of two arbitrators, with power to appoint an umpire in case of difference, and that they should have power to give directions as to the making of alterations in the amount at which the waterworks had been or should be assessed before the making of the award, and also as to the sum or sums of money, if any, to be repaid or allowed to the said waterworks company, by the overseers of any parish, in respect of any rate which has been or may be paid, and in which the assessment shall be in excess of the amount at which the same shall be severally assessed by the arbitrators. The time for making the award was enlarged from time to time, till the 31st Jan. 1874, when the award was made.

Between the commencement of the disputes and the making of the awards, as many as thirty-two rates in respect of the various branches in the union had been made, which were paid by the company under protest, and upon the understanding that the matter would be rectified and adjusted by the award, instead of giving notice after each rate of objection to the valuation list, and also notice of appeal, and entering separate appeals with adjournments from time to time of all the appeals.

By the award, the amount of the gross and rateable values of the waterworks in the several parishes in the union was settled, and was in reduction of the amounts objected to, and the overseers of the respective parishes were ordered to repay to the company out of the next rate the differences between the rates as assessed upon the amounts so settled and the rates as assessed and paid, and the amounts of the differences were then settled in the award.

At the sessions following the award, and held on the 8th April, the appeals were called on, and the rates were by order of the sessions reduced to the amount fixed by the award, and the amount paid in excess on the rate of the 11th Aug. was ordered to be repaid, and was repaid accordingly; but the parishes disputed the validity of the award as to the repayment of the sums paid in excess by the company upon the rates other than the one appealed against, and which had been made and paid pending the award. A fresh rate was made on May 2nd 1874, upon the reduced assessment, and its amount was demanded of the plaintiffs, who, however, refused to pay on the ground that the amount of the excess paid by them on the former rates, and ordered to be repaid by the award, was in the excess of the amount of

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such rate. The overseers of Cropstone thereupon obtained a distress warrant from the justices, and levied the amount of the rate on lead piping of the company. The company then served notices of replevin in the County Court on the overseers, and deposited in the County Court the amount of the sum distrained for and costs. In lieu of entering into a replevin bond, and in accordance with the condition of such deposit, an action of replevin was commenced by a writ issued out of this court, but no declaration had, as yet, been delivered.

Brown, Q.C. (with him *Willis*), showed cause.—The award is not binding on the overseers. They were no parties to the appeal. If they had been, they could not, as parish officers, refer all matters in difference; nor had the assessment committee any such power. The appeal then pending was all they could refer. The award is to become the judgment of the sessions by 12 & 13 Vict. c. 45, but the sessions could not give judgment on anything but the appeal. There was no order of a judge to refer the appeal. Next, the plaintiffs cannot come here to stop their own replevin suit. [*BLACKBURN*, J.—In replevin both parties are actors.] The defendants have done nothing, there is nothing for them to stay. [*BLACKBURN*, J.—They have taken the goods.] They contest the validity of the award to bind the parish; that must be decided in the replevin suit. In *The London and North Western Railway Company v. Bedford* (*ubi sup.*), the court strained their equitable powers to the utmost limit, and its application should not be extended.

Wills, Q.C. (with him *Merewether*), was not called upon to argue.

BLACKBURN, J.—The plaintiffs were induced by the pendency of the award not to appeal against the rates made during such time; and it is but just and equitable that the parish should take the consequences of the award being against them, and repay the money received by them and paid by the plaintiffs under protest. *The London and North Western Railway Company v. Bedford* is ample authority for us to interfere, and we shall act upon that case. The rule must go, but it will be moulded to meet the circumstances of the money being deposited in lieu of the replevin bond, and will be to pay back the money.

MELLOR, J., concurred.

Rule absolute, to stay the action and to refund the money deposited in lieu of the replevin bond.

Attorneys for plaintiffs, *Paterson, Snow, and Burney*, for *J. B. Hazby*, Leicester.

Attorney for defendant, *S. O. H. Sadler*, for *W. W. Goode*, Loughborough.

Thursday, May 27, 1875.

MIDLAND RAILWAY COMPANY (apps.) v. CHURCHWARDENS OF GREAT WIGSTON (resps.); SAME (apps.) v. CHURCHWARDENS OF BARROW-UPON-SOAR (resps.).

Lighting and watching rate—Houses, buildings, and property other than land—Line of railway—3 & 4 Will. 4 c. 90, s. 33.

By sect. 33 of 3 & 4 Will. 4 c. 90, the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any parish, shall be rated at and pay a rate in the pound three times greater than that

which the owners and occupiers of land shall be rated at and pay for the purposes of this Act. The appellants were possessed of railway property in the parishes of the respondents, in one case of about four miles of line, signal boxes and posts, signalmen's huts, a tank and pumping station, and certain bridges; in the other case, of about two miles of line, a railway station, and also similar things to those in the former case.

Held, that lighting and watching rates imposed according to the higher scale upon the whole of the appellants' property in the respondents' parishes were bad, for the line in each case ought to be rated as land.

GREAT WIGSTON CASE.

THE appellants are the owners and occupiers of the Midland Railway, of which 1 mile, 1130yds. and 2 miles, 5 furlongs, 1657 chains, are within the respondents' parish. The General Lighting and Watching Act (3 & 4 Will. 4 c. 90) has been adopted, and is in operation in the said parish.

On the 8th March 1873, by a rate duly made for the said parish, and under the provisions of the said Act, the appellants were rated in respect of their aforesaid property in the parish, at 1½d. in the pound.

The appellants were rated on the higher scale at which the owners and occupiers of houses, buildings, and property other than land were rated in the parish.

The company duly appealed to the Quarter Sessions against the rate, on the ground that the premises rated were rateable as land only, and not as houses, buildings, and property other than land, and that the same were improperly rated and assessed in the said rate at the higher rate chargeable by statute.

The sessions confirmed the rate, subject to the opinion of this court.

The premises in question consist firstly, of a portion of the main line, the longer portion aforesaid; and secondly, of a portion of a branch line which joins the main line at a point of junction within the said parish.

Along the whole length of both portions of railway there are the usual metals, rails, and sleepers, and at and near to the junction aforesaid, where the width of the railway is greater than at any other part, there are sidings with similar rails and sleepers, extending over the whole of the increased area.

Both portions of railway are also traversed for about three-fourths of their entire length by iron rods or wires used for working signals, and supported by short posts fixed in the ground at a distance of about fifteen yards from each other.

The following structures built in or fixed to the soil, and used by the appellants for the purpose of the said railway, are upon the portion of the main line at different points, that is to say:—

1. Three signal boxes made of wood, each being two stories in height, with the upper story glazed, and having a slated roof. These buildings are of an average width of about fifteen feet, and depth of about ten feet, and are fitted with telegraph and other mechanical apparatus.

2. Twenty-five signal posts with signalling apparatus attached to each, and with iron ladders to eighteen of them; and three connecting platforms, where signal posts are grouped.

3. Three large iron standards for pumping water into the appellants' engines.

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4. Four small houses or huts for the accommodation of signalmen and others, three of these being of wood, and one of brick, with a slated roof.

5. A large brick building, with doors and windows, and massive walls supporting an iron tank, which is fitted with iron pipes, valves, and other apparatus.

6. Seven bridges, the property of the appellants, cross the said portion of main line at different points. Three of these, built of brick on solid arches, for turnpike or other carriage roads, pass over the line; and four also, built of brick, pass under the said portion of line, of these one is for a turnpike road, and the others are used for the passage of cattle.

The railway is supported by massive iron girders where it passes over these bridges. The said portion of main line runs for about 2300 yards in a cutting, and for about 1500 yards on an embankment.

The following structures fixed to the soil are upon the said portions of branch line at different points, that is to say:—

1. A brick building supporting an iron tank similar to the one before mentioned.

2. Eleven similar signal posts, of which ten have iron ladders, and there are two platforms connecting the signal posts, which are grouped.

3. A large iron standard similar to those before mentioned.

4. A bridge, the property of the appellants, built of brick, with massive abutments, and used for a public carriage road, passes under the said portion of branch line.

The said portion of branch line runs for about 650 yards on an embankment. For about fifty yards the said portion of branch line runs on brick arches for about thirty feet above the level of the adjacent land, and for about thirty-six yards it runs on iron girders supported by brick pillars about twenty-seven feet in height, and for about twenty yards on a platform bridge constructed of wood, about thirty feet above the level of the adjacent land.

If the court shall be of opinion that both the said portions of railway are liable to be rated on the higher scale chargeable by statute, the order of the Court of Quarter Sessions is to stand.

If the court shall be of a contrary opinion as to both or either portions, then the rate is to be amended by reducing it to the sum of $\frac{1}{2}$ d. in the pound upon each portion so dealt with by the court.

BARROW-UPON-SOAR CASE.

The appellants are the owners and occupiers of the Midland Railway, of which two miles one furlong of the main line and a station house with premises adjoining thereto are within the respondent's parish. The General Lighting and Watching Act (3 & 4 Will. 4, c. 90), has been adopted and is in operation in the said parish. On the 8th March 1873, by a rate duly made for the said parish under the provisions of the said Act, the appellants were rated in respect of their aforesaid property in the said parish at 2d. in the pound.

Appellants were rated on the higher scale at which the owners and occupiers of houses, buildings, and property, other than land, were rated in the parish.

The company duly appealed to the quarter sessions against the rate on the ground that the premises rated were rateable as land only and not

as houses, buildings, and property other than land, and that the same were improperly rated and assessed in the said rate at the higher rate chargeable by the statute.

The sessions confirmed the rate subject to the opinion of this court.

The premises in question consist, firstly, of a house containing booking and other offices and used as a railway station and of a yard attached to the said station and used as a station yard, a portion of which is raised above the level of other portions of the yard, and it is supported by a wall of masonry on one side; secondly, of a portion of the main line of the Midland Railway of the length aforesaid; over the whole length of the said portion of main line there are the usual metal rails and sleepers, and the line is traversed for its entire length, with the exception of about three furlongs, by iron rods or wires used for working signals and supported by posts fixed in the ground at a distance of about fifteen yards from each other.

The following structures are built in or affixed to the soil and used by the appellants for the purposes of the said railway upon the said portion of the main line at different points, that is to say:

1. Three signal boxes made of wood, each being two stories high, with the upper story glazed and hanging slated roofs. These buildings are of an average width of about seven feet, and length of about nine feet, and are fitted with telegraph and other mechanical apparatus.

2. Signal posts with signalling apparatus, iron ladders, and platforms attached to each of them.

3. Two small houses or huts made of wood for the accommodation of signalmen.

4. Six bridges the property of the appellants cross the said portion of main line at different points; two of these built of brick on solid arches, and one made of iron for highway roads to pass over the line.

5. Two bridges built of wood for the use of foot passengers also cross over the line.

6. A bridge made of bricks for the passage of cattle passes under the line. There are also two brick culverts under the line through which streams of water pass.

The line runs for about 1320 yards on an embankment, and for about 2420 yards in a cutting, of which about 470 yards is supported on one side by a wall of masonry. The line crosses the river Soar by an iron bridge about 60 yards in length.

If the court shall be of opinion that both the portions of the aforesaid premises are liable to be rated on the higher scale chargeable by statute, the order of the court of quarter sessions is to stand.

If the court shall be of a contrary opinion as to both or either of such portions, then the rate is to be amended by reducing it to the sum of $\frac{1}{2}$ d. in the pound upon each portion so dealt with by the court.

A. Wills, Q.C. and Merewether for the appellants, argued first upon the Wigston case.—We do not dispute the rateability of the signal boxes, the signalmen's houses, or the reservoir, at the higher rate. If, however, the respondents were wrong in so rating the line, the whole rate must be set aside. The words of 3 & 4 Will. 4, c. 90, s. 33, are "That the overseers aforesaid shall, for the purpose of collecting, raising, and levying the rate necessary for the purposes of this Act, proceed in the same manner, and have the same

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powers, remedies, and privileges as for levying money for the relief of the poor in the said parish. Provided always that owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish, shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act. Provided also, that the total amount of the sum to be collected, raised, and levied for the purposes of this Act within any one year shall not exceed such sum as shall have been agreed on by the inhabitants of the said parish as aforesaid, and that the said sum shall be assessed upon the full and fair annual value to which lands, houses, buildings and other property within the said parish shall be rated or shall be rateable according to the last valuation made and acted upon for the rate for the relief of the poor within the said parish." And by sect. 34, "Provided always that it shall be lawful for the overseers of the poor of any such parish, and they are hereby required whenever according to the rate made for the relief of the poor one and the same person shall be rated in one sum in respect of land, and also of houses, buildings, and other property, to cause such land, and also such houses, buildings, and other property to be separately assessed, and the sum hereby authorised to be levied shall be assessed accordingly. Provided always that every court-yard, yard, or garden (such garden not being a market-garden or nursery-ground) shall be included in and make part of the assessment to be made on the house, buildings, or other property to which they may be respectively attached. Provided also, that such land, houses, buildings, and other property shall not in the whole be assessed at a higher amount than they were in the last rate made for the relief of the poor within the said parish." The last case on these sections is *Reg. v. Overseers of Neath* (L. Rep. 6 Q. B. 707), in which all the previous cases were discussed. The subject matter of the rate there was a canal and towing path, bridges, and a dry dock lined with masonry, used for repairing the canal boats. It is difficult to say which is more artificial, a canal or a railway, but they are for this purpose so much alike that the decision there is conclusive here. It was held that "property" meant things *ejusdem generis* with houses and buildings, and did not include a canal or towing path; that the bridges and dry dock were accessories to the canal and must be considered part thereof, and that the whole ought to be rated as land. It was attempted to show that *Reg. v. Midland Railway Company* (4 E. & B. 958), and *Peto v. Overseers of West Ham* (2 E. & E. 144), were authorities for rating the canal at the higher rate; but the court held they did not govern the case. In *Reg. v. Southwark and Vauxhall Water Company* (6 E. & B. 1008), Lord Campbell at p. 1013 laid down the principle of the distinction, "I think the object of the Legislature in making the distinction between different descriptions of property was that the higher rate should be thrown on the class of property which derives superior benefit from lighting, and the lower rate on the class which derives less benefit. That is the key to the interpretation of the Act." Here the line of railway would derive as little benefit from the lighting as the subterranean pipes of that water company.

Sir Henry James, Q.C. and Poland, not being present at the commencement of the arguments, now showed cause in both cases against the rules to quash the orders of sessions.—When this Act was passed, there were no railways, so they could not be expressly mentioned amongst the assessable property, and, if included at all, they must come within the words "property rateable to the relief of the poor." The first case to be considered is *Reg. v. Midland Railway Company* (*ubi sup.*), where a lighting rate was imposed by the Chesterfield Local Act of 1826, on "all houses, warehouses, shops, cellars, vaults, stables, coach houses, counting-houses, brew houses, and all buildings, erections, works, and tenements and hereditaments, except as hereinafter mentioned." One of the exceptions was that no person should be rated "for or on account of any land whatsoever." It was held that the exception of "land" in this Act must mean land occupied for cultivation and uses auxiliary thereto, and that the line of railway passing through the borough was properly rated. Lord Campbell delivered the considered judgment of the court, which was composed of three judges: "We are of opinion that it (the railway) was rateable under the word 'works,' and was not included in the exception of 'land.'" The Legislature intended, probably, to describe two classes of property, and to lay the rate on the one and give the exemption to the other, according as each class would or would not be benefitted by the lighting; but we are to give effect to the words of the enactment according to their ordinary meaning, without trying whether, in each particular application of these words, the burden is proportioned to the benefit according to this supposed intention. Reading the two clauses together, as comprehending all real property, we think that the exemption extends only to land used for the purposes of agriculture, or gardening, or any kind of mere vegetation, together with the roads and other matters that are auxiliary to those purposes; and that hereditaments in which capital has been invested for habitation, or for purposes of profit from manufacturing or mechanical industry, are to be rated. According to this construction, the line of a railway is liable. In places where it is constructed on arches or with walling, it would be liable under the word 'building' or 'erection.' Where it is simply laid on the surface it is a 'work' for profit from mechanical industry, and not 'land' used for vegetation." This authority would have been decisive in favour of the respondents, were it not for *Reg. v. Overseers of Neath*. All the other cases on this point are consistent with *Reg. v. Midland Railway Company*. In *Peto v. Overseers of West Ham*, which was in respect of a lighting rate, under these very sections, assessed upon the Victoria London Docks, Lord Campbell said (2 E. & E., p 158), "There is no doubt that a large capital must have been laid out in excavating and puddling the dock and basin, and surrounding them with walls. If they had been used for carrying on a manufactory without any buildings being erected upon them, and without water being introduced into them, they could not possibly have been considered 'land' within the meaning of this section of the Act of Parliament; and can it make any difference, that instead of their being paved and goods being deposited upon them, water is introduced into them, which supports floating warehouses in which the goods are

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stowed? This is the view we took of a similar enactment in a local Act in *Reg. v. Midland Railway Company*." Lord Campbell afterwards points out that when the facts of *Reg. v. Southwark and Vauxhall Water Company*, "and the ratio decidendi are examined, it will be found not at all to be at variance with the doctrine which I now propound," viz., the principle of the distinction as laid down in *Reg. v. Midland Railway Company*. The case of *Reg. v. Overseers of Neath* is clearly in conflict with the previous cases, and it is therefore open to this court now to follow either. [BLACKBURN, J.—I think the cases are conflicting, but you must show that we ought to follow Lord Campbell rather than Lord Chief Justice Cockburn.] The real test should be whether the property is land used for commercial purposes other than agricultural.

Wills, Q.C. (contra).—In the case of *Peto v. Overseers of West Ham*, Erle, J. dissented from the view of the majority. His opinion, therefore, taken with the unanimous conclusion of the court in *Reg. v. Overseers of Neath* (ubi sup.), gives the greater weight of authority in favour of the appellants. Land this country is never to be found in its natural state, and the proper distinction under this 33rd section between land and buildings is whether the effect of the alteration sustained by the land has left it more nearly to its natural condition, or more nearly resembling buildings; upon that distinction a line of railway should be liable only at the lower rate.

BLACKBURN, J.—In these cases, although there is some difficulty, I have come to the conclusion that this line of railway should be assessed at the lower rate as "land" within the meaning of 3 & 4 Will. 4, c. 90, s. 33. There is the station in one of the appeals, and there are some signal and watch boxes, which come under the head of "buildings," but they may be rated separately. The only question for us is whether the line itself is "property other than land," so that the appellants should pay a rate in the pound three times greater than that at which the owners and occupiers of land should pay for the purposes of this Act. What seems to have been passing in the mind of Lord Campbell throughout his decisions on this point was the benefit to be derived from lighting and watching by the respective kinds of property, and he seems to have thought that the Legislature had laid down a rough rule for the purpose of making this distinction but had used words which did not always succeed in establishing it. Whether that be so or not, we must say, upon the construction of the words used whether this railway is or not liable to the higher rate. The local Act upon which the case of the same company, *Reg. v. Midland Railway Company*, was decided, contained different words from those in this Act. It made works, tenements, and hereditaments as well as houses and buildings liable to be rated, the exception or proviso being that no one should be rated "for or on account of any land whatsoever." I think there is a great distinction between the two statutes, and whether that case was rightly decided or not, I do not feel that it is binding upon our conclusion here. That decision was followed by *Reg. v. Southwark and Vauxhall Water Company*, where the question was raised whether, under the same Act as that we are now considering, the occupants of water pipes under the surface of the soil were liable to the

higher or lower rate. "Property," Lord Campbell said, "here evidently means property of the same sort as houses and buildings. But the appellants are not rated as being occupiers of pipes; they are rated as being occupiers of the land which they occupy by means of those pipes. They are rated in respect of land which cannot, in any sense, be said to be houses or buildings, or property of that sort." Then came *Peto v. Overseers of West Ham*, where the majority of the court, Erle, J., dissenting, held that the docks were subject to the higher rate under this Act. Lord Campbell adopts the view taken by the court in *Reg. v. Midland Railway Company* as to the distinction between the kinds of rateable property. "The Legislature," he says "appears to have intended to divide land into two classes, one where capital is invested in it for commercial purposes, and the other where it remains in its natural state or is cultivated for agricultural purposes. Generally speaking the first class might be expected to derive much greater advantages from lighting and watching than the second, and therefore it is to be assessed at a higher rate." Certainly he had before expressed his opinion "that the dock and the basin are property *ejusdem generis* as the houses and buildings," but that seems to be at variance with his conclusion in the previous case of *Reg. v. Southwark and Vauxhall Water Company*. The judgment of the other members of the majority may have rested mainly on this ground that the subject of the rate was of the nature of a house or building; at all events they are not reported to have expressed any desire to limit the meaning of land to that used for agricultural purposes. Now comes the case of *Reg. v. Overseers of Neath*, which was the rating under this Act of a canal and towing path. I cannot distinguish the facts of that case from the present. A canal seems to me to be as completely artificial as a railway; one is for the conveyance of boats, the other for carriages; both have to be raised or lowered from the height of the adjoining land, according to the level. It seems that in that case we dissented from what Lord Campbell had laid down as the distinctive test of the two kinds of rateable property. I expressed my opinion that the majority in *Peto v. Overseers of West Ham* were right, on the ground, not that the exception was limited to cultivated land, but that the dock was part of the appellant's buildings. My brothers Mellor and Lush both agree on that point, and the latter said, "There is nothing in sect. 33 to warrant us in holding that land is confined to agricultural land." It has now been argued that we are not bound by this *Neath* case, because it is in conflict with the *West Ham* case. But on Lord Campbell's second ground the *Neath* decision was consistent with the judgment of the majority. Even if those judgments necessarily conflict, the *Neath* case is the last, and, according to the opinion I now entertain, the best we can follow. I think the word "land" in this section is not restricted to that which is kept in a natural state or for agricultural purposes only. Land on which rails are placed does not differ from land in which water-pipes are placed, or from land on the surface of which is the water of a canal. The distinction made by the Legislature seems to me to be between houses or buildings and other property in land. A railway is neither a house nor a building, and must there-

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fore come within the other division of rateable property. The result is that the order of Quarter Sessions must be reversed, and the rate must be quashed.

MELLOR, J.—I am of the same opinion. The authority of the case of *Peto v. Overseers of West Ham* is weakened by the dissent of Erle, J. It would, however, be binding upon us if the decision were necessarily on the ground of Lord Campbell's distinctive test that the exception "other than land" applied to all that was not natural or agricultural land. It would be an extraordinary hardship if this statute were to impose a treble rate on all land not so used, and it seems to me that the burden of proof lies upon that side which would make land of any kind subject to the higher rate. A line of railway certainly cannot, as I think, be called a building; and although it be land artificially used, it is more nearly within the description of land than that of houses or buildings. This is a reasonable construction, and we have already decided in this way a case which, in my opinion, is not distinguishable from this one. Even if inconsistent with *Peto v. Overseers of West Ham*, I prefer our later decision in *Reg. v. Overseers of Neath*.

QUAIN, J.—If this were *res integra*, I certainly should not adopt the principle laid down in *Peto v. Overseers of West Ham*. The words "other than land" cannot mean property of all kinds except natural and agricultural land. Nobody would describe a railway either as land or as a building, but this section more properly includes a railway in the excepted class of property, and the decision of this court in *Reg. v. Overseers of Neath* is clearly in point.

Judgment for appellants.

Attorneys for appellants, Beale, Marigold, and Beale.

Attorneys for respondents, Vizard, Crowder, and Co., for H. A. Owston, Leicester,

Monday, May 31, 1875.

SHAW (app.) v. ALDERSON AND ANOTHER (resps.).

Master and Servant Act 1867 (30 & 31 Vict. c. 141)
—*Wrongful dismissal—Jurisdiction of Justices.*

A workman dismissed without notice contrary to the contract of service, can recover compensation before two justices under the Master and Servant Act 1867 (30 & 31 Vict. c. 141).

Case stated by two justices of the peace, under 20 & 21 Vict. c. 43.

A summons under the Master and Servant Act 1867, which came on for hearing at a petty sessions holden at Huddersfield, on Tuesday, 13th Jan. 1874, upon an information preferred by Fred Shaw, hereinafter called the appellant, against John Alderson and George Brook, under sect. 4 of 30 & 31 Vict. c. 141, charging that the respondents had "refused or neglected to pay the appellant the sum of 4*l.* 14*s.*, being wages due and owing to him from the respondents for breach of contract in not giving a fortnight's notice, contrary to the statute in such case made and provided," was heard and determined by the justices, and upon such hearing the case was discharged on the ground that the justices had no jurisdiction in the case of a servant being discharged without notice, so as to give him wages in lieu of such notice by way of

compensation. The appellant's attorney stated that the appellant had been for some time in the service of the respondents as a coal miner, his average wages being 2*l.* 7*s.* a week, and the contract of service included a stipulation that it should not be determined without a fortnight's notice on either side. The respondents dismissed the appellant from their service without notice.

It was contended on behalf of the appellant on the hearing that the 4th section applied to any contract of service, and that the respondents being under contract to give to the appellant a fortnight's notice before discharging him, and having discharged him without such notice, he was entitled to recover the sum of 4*l.* 14*s.*, being the sum which he would have earned during the fortnight over which the notice would have extended, by way of compensation or damage for such wrongful dismissal. Upon this opening the respondents' attorney, admitting the facts, contended that there was no case shown, on the grounds—first, that this was, as shown by the summons, a claim for wages, and that such claim could only be for wages actually earned; secondly, that this was not a case to which sect. 4 of the Master and Servant Act applied, as that Act had no reference to wages; and, thirdly, that even if the summons had been taken out under that section for damages for breach of contract, the appellant's remedy was by action in the county court. The justices held that the statute did not apply, and that under the circumstances they had no jurisdiction, and dismissed the case.

If the court should be of opinion that the justices were, under the circumstances, wrong, then judgment to be for the appellant, otherwise the dismissal of the said information to stand.

By 30 & 31 Vict. c. 141, sect. 4, "Wherever the employer or employed shall neglect or refuse to fulfil any contract of service, . . . or wherever any question, difference, or dispute shall arise as to the rights or liabilities of either of the parties, or touching any misusage, misdemeanour, misconduct, ill-treatment, or injury to the person or property of either of the parties under any contract of service, the party aggrieved may lay an information or complaint in writing before a justice," on which a summons may be issued.

By sect. 9 two justices can hear and adjudicate on the case, and make such orders as are therein provided, including power to assess and determine the amount of compensation for damage to be made to the party complaining, and to direct the same to be paid.

Cave for the appellant.—The justices were wrong in dismissing the case. The respondents have refused to fulfil a contract of service within the words of sect. 4. Sect. 18 provides that "Nothing in this Act shall prevent employer or employed from enforcing their respective civil rights and remedies for any breach or non-performance of the contract of service by any action or suit in the ordinary courts of law or equity, in any case where proceedings are not instituted under this Act." This shows that there may be a remedy under this Act in cases where there is also a common law remedy by action. See also 20 Geo. 2, c. 19.

The respondents did not appear.

BLACKBURN, J.—It seems clear that the employers, having violated the stipulation contained in the contract of service, that it should not be determined without a fortnight's notice, have neg-

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lected or refused to fulfil a contract of service within the meaning of the 4th section of the Act; and this being so, the employed may go before the magistrates to recover, not, as the appellant seems to have thought, a fortnight's wages in lieu of the fortnight's notice, which ought to have been given, but compensation for the breach of contract.

LUSH, J.—I cannot entertain the slightest doubt that where the statute makes the employed liable for a breach of contract, the same statute makes the employer liable in the same way. It does not follow that the amount of compensation to which the appellant is entitled is necessarily a fortnight's wages.

FIELD, J.—I am of the same opinion.

Case remitted to the Justices to find what damages the appellant had sustained.

Attorneys for appellant, Gregory, Bowcliffes, and Rawle.

Monday, May 31, 1875.

JOHNSON (app.) v. COLAM (resp.)

Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70) ss. 64, 109—Sending cattle by railway without water—Jurisdiction of justices.

Justices have jurisdiction to convict for sending cattle by railway without requesting the company to supply water, so that the cattle remain without water more than thirty consecutive hours, contrary to 32 & 33 Vict. c. 70 s. 64.

Appellant sent cattle from K. to C. without making such request as above mentioned, whereby they were without water more than thirty consecutive hours; the thirty hours expired before they arrived at C.

Held, that the borough justices of C. could not convict, as the offence was completed out of their jurisdiction.

Sect. 109 does not enable justices to deal with such a case unless the party is within their jurisdiction when summoned.

Case stated by justices under 20 & 21 Vict. c. 43.

At a petty session of the justices for the borough of Colchester, in the county of Essex, held in and for the same borough, on Thursday the 16th April last, before two justices of the peace for the said borough, an information in writing preferred by John Colam, hereinafter called "the respondent," under the Contagious Diseases (Animals) Act, 1869, was heard and determined, in which information it was alleged that "the appellant" Henry Johnson on the 12th Feb. last, being the consignor of forty-one animals, to wit, cattle about to be carried on the railways of the North Eastern Railway Company and the Great Eastern Railway Company from Kirkby Stephen, in the county of Westmoreland, to the said borough of Colchester, did not make a request in writing to the said North Eastern Railway Company to supply water to the said animals during the time they were about to be carried as aforesaid, so that they remained without a supply of water for upwards of thirty consecutive hours, contrary to the statute in such cases made and provided, and upon such hearing the appellant (being present before the justices at the petty sessions aforesaid in pursuance of a summons for that purpose) was convicted.

The respondent gave evidence that the defendant was an extensive cattle dealer, and brought

the cattle to the Kirkby Stephen Station of the North Eastern Railway on 12th Feb. last, booking them to Peterborough, and he made no request verbally or in writing to water the cattle. The train left at 2.30, and reached Darlington at 4.45, a distance of thirty-eight miles. The beasts were seen at Peterborough station on 13th Feb. at 11.30 a.m. bellowing and suffering much. The label was examined, and there was no direction to feed and water the cattle. They left by the 12.30 train. The distance from Peterborough to Colchester is ninety-six miles. The cattle reached Colchester on 14th Feb. at 4 a.m. The distance from Darlington to Peterborough is 155 miles.

The respondent's solicitor then produced a copy of the order of the Privy Council dated the 31st day of March, 1871, and printed by the Queen's printers, by which it appeared that Kirkby Stephen, Darlington, York, Peterborough, and Stratford, were all watering stations.

At the close of the before-mentioned evidence the appellant's attorney submitted that no offence had been committed within the jurisdiction of the court, as that arose at Kirkby Stephen and not at Colchester, and that the words of the 109th section giving jurisdiction "where the party charged or complained against happened to be," referred to the place where he was at the time of commencing the proceedings by laying the information, and not to the place where he was at the time of hearing the information.

The respondent's solicitor objected that the appellant's attorney was too late in raising such objections, as he had acquiesced in the jurisdiction of the justices by cross-examining the witnesses, and that he ought to have objected before any evidence had been taken.

The justices found as facts that the appellant was the consignor of the cattle before-mentioned, that they were carried over the railways of the North Eastern Railway Company and the Great Eastern Railway Company from Kirkby Stephen to Colchester, that forty-one hours had elapsed without their having had water, and from their being put into the trucks to the period of their being released, and that the appellant did not make a request in writing to the North Eastern Railway Company to supply water to the same cattle, and was guilty of an offence under the said Act.

The justices were of opinion that section 109 gave them jurisdiction: First, because defendant's act continued up to the delivery of the animals at Colchester; secondly, in consequence of the appellant being there present before them; thirdly, because his plea and cross-examination cured all defects, as he accepted issue thereby; that the last proviso of sect. 1 of 11 & 12 Vict. c. 43, prevented any objection being taken or allowed to the information, or summons for any alleged defect therein in substance or in form; that the appellant ought to have made a request in writing to the North Eastern Railway Company at Kirkby Stephen that water be supplied to the cattle during their journey, and therefore convicted the appellant, and adjudged him to pay the sum of 1s. for each animal, and the further sum of 17l. 19s. for costs.

The questions of law were:—First, whether at the hearing of the information the justices had jurisdiction; secondly, whether sect. 1 of the 11 & 12 Vict. c. 43, prevented the foregoing objections

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being made to the information; thirdly, whether the justices did right in refusing to allow the appellant to give evidence upon oath. (a) The court to reverse or affirm the determination in respect of which the case had been stated, or remit the matter to the justices with the opinion of the court thereon, or make such other order in relation to the matter as to the court might seem fit.

By the Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70):

Sect. 64: "Every railway company shall make a provision, to the satisfaction of the Privy Council, of water and food, or either of them, at such stations as the Privy Council from time to time by general or specific direction direct for animals carried, or about to be, or having been carried on the railway of the company, and such water and food, or either of them, shall be supplied to any such animal by the company carrying it on the request in writing of the consignor thereof, or on the request of any person in charge thereof. . . . If in the case of any animal such a request as aforesaid is not made, so that the animal remains without a supply of water for thirty consecutive hours, or other period not being less than twelve hours, as the Privy Council from time to time by order prescribe, the consignor and the person in charge of the animal shall each be deemed guilty of an offence against this act; and it shall be on the person accused to prove the time within which the animal has had a supply of water."

By sect. 103: "If any person acts in contravention of, or is guilty of any offence against this Act . . . he shall, for every such offence (except as otherwise provided in this Act) . . . be liable to a penalty not exceeding 20l. Where any such offence is committed with respect to more than four animals, a penalty not exceeding 5l. for each animal may be imposed instead of the penalty of 20l."

By sect. 109: "For the purposes of proceedings under this act . . . every offence against this act . . . shall be deemed to have been committed, and every cause of complaint under this act . . . shall be deemed to have arisen either in the place in which the same actually was committed or arose, or in any place in which the person charged or complained against happens to be."

W. Wightman Wood for the appellant.—First, justices have no jurisdiction under sect. 64. The present case is distinguishable from *Cullen v. Trimble* (26 L. T. Rep. N. S. 691; L. Rep. 7 Q. B. 416, 41 L. J. 182, M. C.), where it was held that the justices had jurisdiction to convict under sect. 57, for there jurisdiction was impliedly given to the justices by the words in that section "unless he shows to the satisfaction of the justices before whom he is charged," &c., but there are no such words in sect. 64.—[FIELD, J., ss. 107, 108, relating to appearance by companies and to appeals seem to show an intention that all proceedings under the Act are to be taken before justices]. By sect. 104 certain offences are to be dealt with by justices, and sects. 107 and 108 may refer to those cases. By sect. 106 half the penalty is to be paid to the person who sues; this shows that civil proceedings were contemplated. [BLACKBURN, J.—Where there is a discretionary penalty it is not recoverable before a jury; consequently the justices must have jurisdiction, or it would not be recoverable at all]. Secondly. The Colchester Bench had no jurisdiction in this case, for the alleged offence consisted in not giving a request in writing at Kirkby Stephen. The thirty hours had elapsed before the cattle came within the jurisdiction of the Colchester justices. Sect. 109 does not give jurisdiction, for it cannot be said that the appellant hap-

pened to be before the justices, they brought him there. The words mean where the defendant happened to be when the proceedings were commenced; when they summoned him it was a proceeding. 11 & 12 Vict. c. 43, s. 1, does not prevent the objection being taken.

The respondent did not appear.

BLACKBURN, J.—I am of opinion that the respondent has gone to the wrong bench of magistrates. This is the only point on which we decide the case, for as to the other question which has been argued before us, *Cullen v. Trimble* (*ubi sup.*) shows that we can supply the want of positive words giving jurisdiction to the justices, when the intent is clear, and I think we are bound to say that penalties are recoverable before justices under the other sections of the Act. The question we have to decide is whether this case could be heard and dealt with before the Colchester magistrates. Now it appears clearly on the case that the offence was complete before the cattle got to Colchester, and if we look at the provisions of sect. 109, which is somewhat oddly worded, I think it is clear that "happens to be" means happens to be at the commencement of the proceedings. If he had been found travelling through the town, and had been summoned, as at present advised, I think that the justices would have had jurisdiction, and in many instances it would be desirable that they should have. His appearing before the magistrates does not affect the case, for he only appeared for the purpose of showing that they had no jurisdiction. The proceedings took place before the wrong bench of magistrates, and therefore the conviction must be quashed.

LUSH, J.—I am of the same opinion. I think the borough magistrates had no jurisdiction.

FIELD, J.—I am of the same opinion.

Judgment for the appellant.

Attorney for the appellant: E. Doyle, for Jones, Colchester.

Monday, May 31, 1875.

THE GUARDIANS OF THE POOR OF RYE UNION (apps.)
v. PAINE (resp.)

*Nuisances Removal Act 1855 (18 & 19 Vict. c. 121)
Sanitary Act 1866 (29 & 30 Vict. c. 90)—Nuisance
—Overcrowded house.*

An overcrowded house, occupied by one family, is a nuisance within the meaning of 18 & 19 Vict. c. 121, and Part 2 of 29 & 30 Vict. c. 90, which by sect. 14 are to be construed together, and justices have power in such a case to make an order under sect. 12 of 18 & 19 Vict. c. 121, notwithstanding that sect. 29 of that Act, giving them power to deal with overcrowded dwellings is limited to cases where the inhabitants consist of more than one family.

CASE stated by two justices of the peace for the county of Sussex, under 20 & 21 Vict. c. 43.

By virtue of the Public Health Act 1872 (35 & 36 Vict. c. 79), the guardians of the poor of the district within the rural area of the said Rye Union are the rural sanitary authority in such district, and are charged with the execution of all powers, rights, duties, capacities, liabilities, and obligations within such district exercisable or attaching by and to the nuisance authority under the Nuisance Removal Acts, and the local authority under the Diseases Prevention Acts, and by virtue of the

(a) As to this question, which it became unnecessary to consider, see *Parker v. Green*, 2 B. & A. 299; *R. v. Sullivan*, Irish Rep. 8 C. L. 404.

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said Public Health Act 1872, the said rural sanitary authority (hereinafter called the appellants) did appoint medical officers of health and one inspector of nuisances for the said sanitary district within the said rural union.

A portion of the parish of Rye is comprised within the area of the sanitary district of the said rural union, and in such portion of the said rural sanitary district the house hereinafter described is situate, such house being occupied by Thomas Paine (who is hereinafter called the respondent), and who, together with his wife and seven children and a grandchild, making together ten persons, did reside in the said house on the 22nd June last, when the said house was inspected and examined by one of the said medical officers of health, and also by the inspector of nuisances.

The ages of the children and grandchild of the respondent being as follows, viz., five sons of the respective ages of 27, 18, 13, 8, and 3 years, and two daughters of the ages of 23 and 15 years, and a grandchild, an infant, the child of the elder daughter of the respondent. The house consists of four rooms, viz., two day rooms and two bedrooms, the whole of the family then sleeping in the two bedrooms, one of such rooms being 12ft. by 8½ft., the other 6½ft. by 5½ft., and 5ft. 9in. in height.

The two day rooms being about the same size as the two bedrooms.

The bedrooms have no chimney opening in them. The inspector of nuisances reported the case to the appellants, who considered the house overcrowded and occupied prejudicially to health, and directed the inspector to serve a notice on the respondent, requiring the abatement of the nuisance within seven days, and, failing the respondents doing so, the appellants ordered legal proceedings to be instituted by the inspector of nuisances against the respondent to compel the abatement of the nuisance complained of. Due notice was given the respondent to abate the nuisance. Two of the respondent's children, viz., a son and a daughter of the respective ages of 27 and 23 years, and the grand-daughter, removed from the said house, leaving five of the respondent's children, viz., four sons of the respective ages of 18, 13, 8, and 3 years, and a daughter of the age of 15 years, making, with the respondent and his wife together, seven persons still residing in the house.

This abatement of the nuisance complained of not being, in the opinion of the appellants, sufficient or satisfactory, the respondent was summoned to appear before the justices, and on the evidence of the inspector of nuisances, and one of the medical officers of health, the charge of overcrowding was considered by the justices to be proved against the respondent. No evidence was called on behalf of the respondent (who appeared by his attorney) to rebut the evidence given in support of the charge.

On behalf of the appellants, it was contended that the proceedings in support of the charge against the respondent were not taken under the 29th section of the Act (18 & 19 Vict. c. 121), which, it was contended, had reference to cases where more than one family were the inhabitants of the same house, and did not apply to the present case, there being but one family comprising the inmates of the said house.

It was contended, on behalf of the respondent, that the justices could not make an order, because

the occupiers of the house, referred to, and described as above, did not consist of more than one family.

The justices gave their decision as follows:—
"We consider the fact of overcrowding is proved, and the magistrates hold that the house is occupied prejudicially to health. But we consider that the Act (18 & 19 Vict. c. 121, s. 29) not having been repealed, and the house being occupied by only one family, it is not a nuisance within the meaning of the Act, and are therefore compelled to refuse the order."

The question of law arising on the case for the opinion of the court was, whether a house, proved to be overcrowded, but by only one family, so as to be prejudicial to health, as was proved on the hearing of the above case, is a nuisance within the 19th section of the 29 & 30 Vict. c. 90, having regard to the 14th section of such Act, and sects. 8, 10, 12, and 29 of the 18 & 19 Vict. c. 121.

If the court should be of opinion that the determination of the justices was legal, and that no order could be made under the foregoing circumstances, then such determination to stand; but if otherwise, then the justices forthwith to make their order pursuant to the 12th section of 18 & 19 Vict. c. 121.

By the Nuisances Removal Act 1855 (18 & 19 Vict. c. 121), s. 8: "The word 'nuisances,' under this Act, shall include any premises in such a state as to be a nuisance, or injurious to health."

By sect. 10: "Notice of nuisance may be given to the local authority . . . and the local authority may take cognisance of any such nuisance after entry made, as hereinafter provided, or in conformity with any Improvement Act under which the inspector has been appointed."

By sect. 11 power of entry is given to the local authority.

By sect. 12: "In any case where a nuisance is so ascertained by the local authority to exist . . . they shall cause complaint thereof to be made before a justice of the peace; and such justice shall thereupon issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues; or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices in petty sessions assembled at their usual place of meeting, who shall proceed to inquire into the said complaint; and if it be proved to their satisfaction that the nuisance exist . . . the justices shall make an order in writing, under their hands and seals, on such person, owner, or occupier, for the abatement or discontinuance and prohibition of the nuisance, as thereinafter mentioned" . . .

Sect. 13 provides for the order for abatement and prohibition.

Sect. 29: "Whenever the medical officer of health, if there be one, or if none, whenever two qualified medical practitioners shall certify to the local authority that any house is so overcrowded as to be dangerous or prejudicial to the health of the inhabitants, and the inhabitants shall consist of more than one family, the local authority shall cause proceedings to be taken before the justices to abate such overcrowding, and the justices shall thereupon make such order as they may think fit, and the person permitting such overcrowding shall forfeit a sum not exceeding 40s."

By the Sanitary Act 1866 (29 & 30 Vict. c. 90),

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s. 14: "The expression 'Nuisances Removal Acts' shall mean 18 & 19 Vict. c. 121, and 23 & 24 Vict. c. 77, as amended by this part of this Act; and this part of this Act shall be construed as one with the said Acts" . . .

By sect. 19: "The word 'nuisances,' under the Nuisance Removal Acts, shall include (1) Any house or part of a house so overcrowded as to be dangerous or prejudicial to the health of the inmates" . . .

Part 2 of the Act contains sections 14 to 34 inclusive.

Alexander Glen, for the appellants.—The justices were wrong in dismissing the complaint, although this case would not have been within 18 & 19 Vict. c. 121, before the passing of 29 & 30 Vict. c. 90. Now, by sect. 14 of the later Act, the earlier Act and part 2 of the later, are to be construed as one, and by sect. 19 the word "nuisance" includes any house so overcrowded, &c. There is no mention of the number of families, and no limitation similar to that contained in sect. 29 of the earlier Act. The effect is, that by the Act of 1866 the definition of "nuisance" is extended, so that will include the present case.

Barnes v. Atwood, 26 L. T. Rep. N. S. 692; L. Rep. 7 Q. B. 474; 41 L. J. 110, M. C.

The respondent did not appear.

BLACKBURN, J.—I am satisfied that the justices were wrong. They have made the very natural mistake of thinking that, because the section of the earlier Act, placing a limited definition on the word "nuisance" is unrepealed, this case was not within the Act. The Nuisances Removal Act 1855 (18 & 19 Vict. c. 121), contains provisions, in sects. 12 & 13, for the removal of nuisances. There is nothing in those sections relating to overcrowding, but by sect. 29, where the medical officer of health certifies to the local authority that a house is dangerously overcrowded, and the inhabitants consist of more than one family, proceedings can be taken before the justices. In the present case the medical officer had not certified to the local authority, and the house was occupied only by one family. The justices rightly thought that if the original Act stood alone, there was nothing which would enable them to make an order, but sect. 14 of the subsequent Act (29 & 30 Vict. c. 90) enacted that, "this part of this Act shall be construed as one with" the earlier Act, the effect of which is, that the provisions of the Act of 1855, and of Part 2 of the Act of 1866, are all to be read as if they were contained in one Act; this is not a mode of expression conducing to clearness. Then, by sect. 19 of the later Act, "nuisances" are defined so as to include any house that is dangerously overcrowded, and this case is exactly within that definition, for there is no exception or limitation. All this part of the Act of 1866 must be read as including the provisions of 18 & 19 Vict. c. 121, and I can see no reason why this should not be held to be a nuisance which may be dealt with under sects. 12 & 13 of that Act. The case of *Norris v. Barnes* (26 L. T. Rep. N. S. 622; L. Rep. 7 Q. B. 537; 41 L. J. 154, Q. B.) is similar to the present case, but not exactly the same. That was a prosecution for a nuisance caused by black smoke, and there was a difference of opinion among the members of the court; but though we differed as to the decision of the case, the court was unanimous that but for the provisions of 18 & 19 Vict. c. 121, s. 44, there would have been power to

abate the nuisance. On that view of the law the justices here were wrong; it is far from extraordinary that in construing these Acts they should be mistaken, and very probably (looking at the view taken by the majority of the court in *Norris v. Barnes*, *ubi sup.*), the draughtsman of the Act of 1866 fell into the same mistake, for otherwise a clause would very likely have been inserted repealing 18 & 19 Vict. c. 121, s. 44. I am of opinion that the respondent ought to be convicted.

LUSH, J.—I am also of opinion that the view adopted by the justices was erroneous. The definition of "nuisances" in the Act of 1855, sect. 8, includes any premises in such a state as to be injurious to health, and then sect. 29 enacted that where any house is certified to be so overcrowded as to be dangerous or prejudicial to the health of the inhabitants, and the inhabitants consist of more than one family, proceedings may be taken to abate such overcrowding, and the justices shall fine the person permitting it. This provision, therefore, by implication, made it a nuisance within sect. 8, wherever a house was found overcrowded under the circumstances pointed out in sect. 29. Then 29 & 30 Vict. c. 90, is avowedly an Act to amend the law relating to public health, and it amends 18 & 19 Vict. c. 121, by providing that the earlier Act, and part 2 of the later, shall be construed as one. By sect. 19, "the word 'nuisances,' under the Nuisance Removal Acts, shall include any house or part of a house so overcrowded as to be dangerous or prejudicial to the health of the inmates," and if these words were not meant to be an extension of 18 & 19 Vict. c. 121, s. 29, they have no meaning at all, for it was not necessary to declare that a house overcrowded by more than one family was a nuisance. To give effect to them we must say that they extend the provisions of the earlier Act.

FIELD, J.—I am of the same opinion on the same grounds. Case remitted to the justices.

Attorneys for the appellants, *Arnold and Co.*, for *H. E. Paine*, Rye.

Tuesday, June 1, 1875.

MCQUEEN v. THE GREAT WESTERN RAILWAY COMPANY.

Action against carriers for loss of goods—Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68)—*Evidence of loss by felony of defendants' servants.*

In an action against carriers for loss of goods, to make out a case to go to the jury in support of a replication of felony by defendants' servants to a plea of the Carriers' Act, it is not enough to show that defendants' servants had greater facilities of access to the goods than any other persons.

A heavy case containing pictures was delivered to the defendants to be forwarded by train from C. to L., and was not declared under the Carriers' Act. It was packed by defendants' porters on a truck and covered over, and remained for some hours on a long siding to which the public had access, and was stolen. Some of the porters were called by plaintiff to prove delivery of the case to defendants, but none were called by defendants.

Held, that there was no evidence to go to the jury of a loss by the felony of defendants' servants, and a rule to enter a nonsuit was made absolute.

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Railway Company (30 L. T. Rep. N. S. 119; L. Rep. 9 Ex. 93; 43 L. J. 75, Ex.) distinguished. This was an action brought to recover the value of some pictures which had been delivered to the defendants at Cardiff to be forwarded by the train to London.

The defendants pleaded that the pictures had not been declared under the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68), and the plaintiff replied that the loss arose from the felony of the defendants' servants.

At the trial before Cockburn, C.J., at the sittings at Westminster after Michaelmas Term 1874, three of the defendants' porters were called on behalf of the plaintiff, and it was proved that the case containing the pictures was received at the defendants' station at Cardiff, and was weighed and put into a truck on the line, and covered over with a tarpaulin and fastened down with ropes.

The truck was left standing for about six or eight hours, from the middle of the day till the evening, on a siding a mile long, in a very low neighbourhood in the town of Cardiff.

The defendants' premises there were inclosed, and divided from the road by a fence. There was a way across the yard, which was used as a thoroughfare, and a gate in the fence, which was left open up to six o'clock in the evening, after which hour it was closed, except to foot passengers; during the day there was much traffic.

The pictures were contained in a large packing-case, which weighed more than a hundredweight; they were not declared under the Carriers' Act, but it was stated in evidence that the case was labelled "valuable pictures." The case was stolen out of the truck on the defendants' premises.

No one in the employ of the defendants was called on their behalf to prove that the felony had not been committed by the defendants' servants. It was contended on behalf of the defendants that there was no evidence to go to the jury that the loss had occurred owing to the felonious acts of the defendants' servants.

The learned judge left the case to the jury, reserving leave to move to enter a nonsuit, if the court should be of opinion that there was no evidence to go to the jury.

A rule was obtained to enter a nonsuit, or for a new trial, on the ground that the verdict was against the weight of evidence.

By the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68), s. 1: "No common carrier by land for hire shall be liable for loss of or injury to certain articles, including pictures, contained in any parcel or package delivered to be carried for hire, or to accompany any passenger, when the value of such articles contained in such parcel shall exceed 10*l.*, unless the value and nature of the articles be declared, and an increased charge paid, or agreed to be paid."

By sect. 8: "Nothing in this Act shall be deemed to protect any . . . common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ."

Digby Seymour, Q.C. (Lumley Smith with him) showed cause.—There was evidence to go to the jury of a loss by the felony of the defendants' servants. It must have been known to the porters that the contents of the case were valuable, and it was not left where any other person could easily

get at it, but was covered over and roped down on the truck. No outsider could have taken it without the connivance of the company's servants. There was a *prima facie* case made out, which the defendants might have answered by calling their porters. The effect of the decision in *Vaughton v. The London and North-Western Railway Company* (30 L. T. Rep. N. S. 119; L. Rep. 9 Ex. 93; 43 L. J. 75, Ex.) is, that if the state of the facts show it to be more probable that the felony was committed by the company's servants than by other persons, and the company do not rebut the presumption so arising by calling their servants, the jury are justified in finding a verdict for the plaintiff. It is submitted that the court must be guided by that decision. The facts in *Metcalfe v. The London, Brighton, and South Coast Railway Company* (4 C. B., N. S., 307; 27 L. J. 205, 333, C. P.) are distinguishable from those of the present case: (see also *Great Western Railway Company v. Rimmell*, 18 C. B. 575). *Boyce v. Chapman* (2 Bing. N. C. 222), which was not cited in *Metcalfe v. The London, Brighton, and South Coast Railway Company* (*ubi sup.*) is a strong authority in favour of the plaintiff, and so is the recent Irish decision in *Gogarty v. The Great Southern and Western Railway Company* (Ir. Rep. 8 Com. L. 344). [COCKBURN, C.J.—There the box was last traced to the possession of a porter.] That case treats *Vaughton v. The London and North-Western Railway Company* (*ubi sup.*) as showing that where there is a greater probability that the company's servants took the goods than that anyone else did, a presumption arises against the company. The plaintiff should not have been nonsuited. See the observations made in the House of Lords in *Bridges v. The North London Railway Company* (30 L. T. Rep. N. S. 844; L. Rep. 7 H. of L. Cas. 213; 43 L. J. 151, Q. B.), as to withdrawing the case from the jury.

Thesiger, Q.C. and Masterman, in support of the rule.—If the authorities are considered they will all be found consistent with the contention on behalf of the defendants in this case, and the argument on the other side would do away with the benefit of the Carriers' Act. If the facts are proved relating to particular persons, no doubt those persons should be called, but if that argument were to prevail in a case like this, the company would be in the position of having to prove a negative. *Gogarty v. The Great Southern and Western Railway Company* (*ubi sup.*), though partly founded on *Vaughton v. The London and North-Western Railway Company* (*ubi sup.*), turned in a great measure on the peculiar facts, and the mode in which the case was conducted at the trial. The judgment shows that the porter's account must have been unsatisfactory. *Vaughton v. The London and North-Western Railway Company* (*ubi sup.*) is a correct decision, apart from the dicta. One credible fact raising suspicion, as Willes, J., said in *Metcalfe v. The London, Brighton, and South Coast Railway Company* (*ubi sup.*), was there proved. The language of Pigott, B., is wide, but must be looked at according to the facts. That case was founded on *Boyce v. Chapman* (*ubi sup.*), there a 10*l.* note was traced to the possession of the defendants' porter. The correct distinction is clearly shown at the close of the judgment of Willes, J., in *Metcalfe v. The London, Brighton, and South Coast Railway Company* (*ubi sup.*). Here there was no specific fact to point to any one particular servant.

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MCQUEEN v. THE GREAT WESTERN RAILWAY COMPANY.

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COCKBURN, C.J.—I am of opinion that the rule ought to be made absolute to enter a nonsuit, on the ground that there was no sufficient evidence to go to the jury of a felonious taking by the company's servants. The case of *Vaughton v. The London and North-Western Railway Company* (*ubi sup.*) does not apply to the present case. We must bear in mind the provisions of the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68), the first section of which is for the protection of carriers, who were exposed to serious losses in being answerable for articles of great value, and of small bulk, which were easily taken, while the loss to the carrier arising from their being taken would be very great. By sect. 8 the Legislature has exempted from this protection cases where the lost property is taken feloniously by the carriers' servants. This is a wise provision, because it gives a motive to carriers to take care to employ honest servants, for if they do not the result is that they incur serious liabilities. In interpreting sect. 8 we must bear in mind that this Act was passed for the protection of carriers, and must take care to insist that, where there is a replication that the loss arose from the felony of the carriers' servants, we do not diminish that degree of proof which ought reasonably to be required. I agree in the doctrine involved in the decision in *Vaughton v. The London and North-Western Railway Company* (*ubi sup.*), that it is not necessary to show a taking by any individual servant, but is enough if proof is given to the satisfaction of the jury that the taking was by some one or more of the servants of the company. But the substance of the judgment of Pigott, B., must be applied to the particular facts, and the judgment must be taken in a more limited sense than the words standing alone would imply. Taking his language, which I followed almost verbatim in directing the jury in this case, it comes to this, that when the evidence points to a felony having been committed—and it is more consistent with the facts proved, and with probability, that it was committed by the servants of the company rather than by any other person—then the company are called upon to answer by the production of the evidence of their servants, and if this is not done then the inference must be drawn that the felony was committed by them. This is a proposition which cannot be maintained. The question of more or less probability is only an ingredient to be considered in determining the question, and the doctrine cannot be maintained that there must be a greater probability that the company's servants committed the felony because they had greater facility of access than a stranger. There is no such presumption necessarily to be drawn, but it is only a question of the degree of evidence. It by no means follows, that because A. more probably stole certain goods than B. it must necessarily be inferred that A. was the party who stole them, for a third person may be still more likely than either. There may be a greater degree of probability that A. stole than that B. did, but I cannot go the length of holding that it must be presumed that A. was the guilty party, and that proposition is, I think, involved in the direction in the present case. No doubt if there is a *prima facie* case, which the party against whom it is made out might by particular evidence displace, it may be a fair inference that the case is true; but it would be an inference for the jury and not a legal presumption, in the absence of that evidence,

that it would not be satisfactory. Unless there is a *prima facie* case, the omission to call evidence is nothing; if a case is not made out, the defendants are entitled to take their stand on the evidence which has been given, and say that there is no case. If Mr. Seymour had gone to the jury, asking them to draw the inference in this way, he might have, perhaps, succeeded in persuading them to do so, and so obtaining a verdict, but we have to say, not whether a verdict might be got, but whether it could be maintained. If we thought that any miscarriage of justice would arise from the decision which we now arrive at, we might send the case down for a new trial, but I think that a verdict on no better evidence than that which was produced on behalf of the plaintiff would be unsatisfactory. The mere facility of access is not enough—the question was between the railway servants and other people—and there was nothing but this facility to point to the servants. The rule must be absolute for a nonsuit.

MELLOR, J.—I entirely agree that the rule must be made absolute for a nonsuit. The evidence only amounted to this, that the railway company's servants had something to make them believe that the box was valuable, but in proving this it was also proved, or came out in cross-examination, that there was also evidence of this being a large station, to which a great number of people had access, and where the defence against marauders was slight, and there was ample opportunity for a stranger to come in and steal the goods. There was nothing tending to show a felony by the company's servants, except their greater facility of access, while on the other side there was the opportunity presented to strangers. The probability would and ought to weigh with a jury when a *prima facie* case has been made out, but the plaintiff fails to do that, if he shows no more than that greater facility exists for the company's servants to obtain access to the goods. If it were said that that was enough to go to the jury, it would be to read the Act so that the owner could recover by showing a loss by a felonious act, leaving out the provision that it must be the act of the company's servants. But the felony must be by the company's servants, and this puts the *prima facie* proof on the plaintiff; he must show something more than that a felony has been committed, and must make out a *prima facie* case that it was committed by the defendants' servants; if this were not so the Act would be no protection. Unless this is made out there is nothing to go to the jury, and it is not a case that satisfies the words of the Carriers' Act. The plaintiff must go further, and then it becomes a question of legitimate observation, if the defendants' servants are not called; then, as it was in the power of the defendants to clear up and disprove the *prima facie* case made out against them, it would be a legitimate conclusion on the part of the jury that the case was true. I entirely concur with my Lord that *Vaughton v. The London and North-Western Railway Company* (*ubi sup.*) is valuable, as deciding one point, and I concur that it is not necessary to bring home the felony to one particular servant, but it is enough to make out that some or one of the defendants' servants must have done it. The language of Pigott, B., if read with regard to the circumstances of that case, might bear a narrower construction than at first appears; if the judgment depended upon the doctrine which it has been

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cited to support, it would be unsatisfactory, and the other judges do not go so far. The language of Pigott, B., was, perhaps, not intended to be so wide as the words by themselves appear to be, and it was extrajudicial. The case is consistent with our decision in the present case.

QUAIN, J.—I am entirely of the same opinion. The plaintiff's cause of action rests on a loss by felony, and he must bring the case within sect. 8 of the Carriers' Act, and prove a loss by the felonious acts of the company's servants. The goods were in a truck on a long siding, and were left there for several hours; there was access to the siding, and a short cut across it, which up to six o'clock was open to carts; after six the gates were shut, but the sidegate was open to foot passengers. The public had access as well as the company's servants, and the only evidence as to the company's servants was, that they had more facility of access, because they might walk in unquestioned. Now, is that evidence of a felony by the servants? I think not. To hold that it was would deprive the company of the protection of the Act, for their servants would have greater facility in every case, even though the public had access; if this were held so, in every case there would be a verdict against the company. I think that, in addition, you must show special facts leading to the conclusion that it was almost impossible that the public could have stolen the goods, and, therefore, that the company's servants did (see the judgment of Willes, J., in *Metcalf v. The London and Brighton Railway Company* (*ubi sup.*); so far from that being the case here, it was shown that other persons had access to the premises. Therefore a *prima facie* case was not made out. *Vaughton v. The London and North-Western Railway Company* (*ubi sup.*), if considered as to the facts, has no bearing on the present case. There particular servants had done certain special acts; the carman had entered the receipt of the parcel in his book, and another servant of the company was found with some of the jewellery in his possession. It was a strong fact that neither he nor the carman was called, and the court properly said, Why were they not called? There the jewellery was actually traced to the company's servants, who were not called as witnesses to account for it, but here there was no evidence that the property was taken by the company's servants.

Rule absolute to enter a nonsuit.

Attorneys for the plaintiff, Lewis and Lewis.

Attorney for the defendant, R. B. Nelson.

Saturday, June 5, 1875.

SMALL (app.) v. BICKLEY (resp.)

Unwholesome meat—Reasonable time for examination—Obstructing an inspector of nuisances—26 & 27 Vict. c. 117, ss. 2 and 3.

The appellant, a butcher, at his residence half a mile from his shop, on a Sunday afternoon, was requested to go himself, or send some one with the key, to admit the inspector of nuisances to his shop, in order that some meat there might be examined. The appellant refused, and was convicted under 26 & 27 Vict. c. 117, s. 3, of preventing, obstructing, or impeding the inspector when duly engaged in carrying the provisions of that Act into execution.

Held, upon a case stated, that although Sunday afternoon might, under some circumstances, be a reasonable time for the examination of meat under sect. 2, the appellant had committed no offence under sect. 3.

THIS was a case stated under 20 & 21 Vict. c. 43, by two justices of the peace in and for the county of Derby.

On the 26th Nov. 1874, William Small, of Ilkeston, in the county of Derby, butcher, appeared before the said justices at the Town Hall, Ilkeston, pursuant to a summons in that behalf, to answer an information exhibited against him by William Bickley, inspector of nuisances of the urban sanitary authority of Ilkeston aforesaid, charging that he the said William Small, on the 1st Nov. then instant, at the township of Ilkeston in the said county, and within the district of the said sanitary authority, unlawfully prevented him the said William Bickley, then being such inspector as aforesaid, from entering the shop of him the said William Small there situate, and wherein butcher's meat was then kept for the purpose of sale, and of preparation for sale, to inspect and examine certain butcher's meat then deposited there for the purpose of sale, and of preparation for sale as and for the food of man, contrary to the statute in such case made and provided.

On the hearing of the said information it was proved by the inspector, that on Sunday morning, the 1st Nov. 1874, one William Clarke brought to him a piece of butcher's meat in a very offensive state, and made to him a statement with regard to the purchase of it; that he, the inspector, thereupon submitted the meat to the examination of the medical officer of the sanitary authority, and afterwards, a little before three o'clock in the afternoon, proceeded to Mr. Small's house, which is a victualling-house at Little Hallam, a suburb about half a mile from Ilkeston market-place; that he there found the appellant and informed him that he had received the piece of meat in question, and that it was said to have been bought at his (Small's) shop in the market-place, Ilkeston, on the previous night. That he (Bickley) asked leave to examine Mr. Small's premises, to which Mr. Small made no objection, and that he thereupon proceeded to examine the slaughter-house, an outbuilding adjoining the appellant's dwelling-house, but finding nothing there, he intimated to the appellant his wish to examine the sale shop in the market-place at Ilkeston, and requested that he would go himself, or send someone with the key to admit him; that the appellant angrily replied that he would not go, nor allow him or any other person to enter his shop on the Sunday, or before nine o'clock on Monday morning, when it would be opened as usual for business. The inspector intimated to the appellant that it would probably be his duty to summon him if he persisted in his refusal to allow the inspection. The appellant, however, could not be induced either to go with the inspector himself, or to send anyone else with the key to open the shop.

It did not appear in evidence whether the inspector ever went and tried the shop door on the Sunday or not.

Two other witnesses were called, and proved that about half-past seven the same evening, they were standing together in the market-place, within a very short distance of the appellant's shop, and

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observed inspector Bickley standing with a police constable at a distance of some thirty yards from the shop; that whilst they were so standing they noticed something over the door of the appellant's shop, where there was a small open grating. One witness described it as a person looking out, and the other as a hand or face, or something of the sort. Presently the inspector and police constable were observed to go away, and having gone, two women came out of the appellant's shop, one being the appellant's wife and the other a stranger, and the latter carrying a bundle, described as being somewhat larger than a man's hat. They proceeded a short distance down the street, and returned to the shop.

It was proved that on Monday morning the inspector, Bickley, went about ten o'clock to the appellant's shop, found it open, and the defendant there. Around the shop lay sundry pieces of meat, several of them looking dark coloured and dry, as if old killed. On this occasion the appellant threatened the inspector, "If you touch any of my meat I'll chop your fingers off."

No evidence was called for the defence, nor any attempt made seriously to question the evidence of the witnesses for the prosecution.

The appellant's attorney contended that three o'clock on Sunday afternoon was not a "reasonable time," and called attention to sect. 2 of 26 & 27 Vict. c. 117, which gives authority to the inspector to enter places where meat, &c., is deposited only at "reasonable times," and urged that the inspector having no lawful claim to enter at such a time, and under such circumstances, there could be no offence in refusing to admit him; and, moreover, that the offence of "prevention," as laid in the summons, was not supported by the evidence.

The justices being of opinion that under the circumstances the time was not unreasonable, and that it was the duty of the appellant to have accompanied the inspector, or sent someone with him to admit him into the sale shop in the marketplace to make the desired inspection, convicted the appellant, and adjudged him to pay a penalty of 20s., and 30s. for costs. And upon his application they reserved this case for the opinion of the court.

If the court shall be of opinion that the time in question was an unreasonable time, and that the appellant was not bound to go or send to his shop and open it at that time to allow of the inspection; or that the evidence otherwise failed to establish the offence charged in the information, the conviction was to be quashed, and if otherwise to be confirmed.

Mellor argued for the appellant.—By 26 & 27 Vict. c. 117, s. 2, "The medical officer of health, or, inspector of nuisances, may at all reasonable times inspect and examine any animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, or flour, exposed for sale or deposited in any place for the purpose of sale or of preparation for sale, and intended for the food of man, the proof that the same was not exposed or deposited for such purpose or purposes, or was not intended for the food of man, resting with the party charged; and in case any such animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, or flour, appear to him to be diseased, or unsound, or unwholesome, or unfit for the food of man, it shall be lawful for such medical officer of health, or in-

spector of nuisances, to seize, take, and carry away the same, or direct the same to be seized, taken, and carried away by any officer, servant, or assistant, in order to have the same dealt with by a justice; and if it shall appear to the justice that any such animal, or any of the said articles, is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall order the same to be destroyed, or so disposed of as to prevent such animal or articles from being exposed for sale or used for such food; and the person to whom such animal, carcase, meat, poultry, game, flesh, fish, fruit, vegetables, corn, bread, or flour belongs, or did belong at the time of sale or of exposure for sale, or in whose possession or on whose premises the same is found, shall upon conviction be liable to a penalty not exceeding 20*l.* for every animal, carcase, or fish, or piece of meat, flesh, or fish, or any poultry or game, or for the parcel of fruit, vegetables, corn, bread, or flour so found, or at the discretion of the justice, without the infliction of a fine, to imprisonment in the common gaol or house of correction for a term of not more than three calendar months." And by sect. 2, "In case any person shall in any manner prevent such medical officer of health or inspector of nuisances from entering any slaughter-house, shop, building, market, or other place where such animal, carcase, meat, poultry, or fish is kept for the purpose of sale or of preparation for sale, or shall in any manner obstruct or impede him, or his servant or assistant, when duly engaged in carrying the provisions of this Act into execution, such person shall be liable to a penalty not exceeding 5*l.*" First, it cannot be said that three o'clock on a Sunday afternoon was a reasonable time for an examination by the inspector at all, much less was it reasonable at that time to call upon the appellant to go half a mile to open a shop at which nothing was exposed for sale, nor deposited for the purpose of sale, or of preparation for sale. [BLACKBURN, J.—The magistrates seem to have referred to us the question whether, as a fact, this was a reasonable time. How can we say that the circumstances might not render it reasonable?] The object of this Act does not seem to have been to increase an inspector's powers, for the words, "at all reasonable times," occur in the 26th section of 18 & 19 Vict. c. 121, which it repeals. The difference in the two Acts is chiefly as to the onus of proof in respect of the intention for the food of man. [BLACKBURN, J.—I do not think the inspector's judgment of what is reasonable time should be final; but the justices must have a discretion in determining what time, under the circumstances of each case, is reasonable.] Secondly, the Act does not say a man is to open his shop for the examination of the inspector. [COCKBURN, C.J.—Nor, at all events, to go half a mile for that purpose.] The words, "prevent, obstruct, impede," all involve some physical resistance to the inspector. All the appellant did was to refuse to go this distance himself or give up his key.

Cave, for respondent.—As to the first point, I presume this court will not say that, as a matter of law, no time during Sunday is reasonable for the examination by an inspector. It must be a question of fact on the circumstances of each case. Saturday night being the most common time for the sale of meat, the inspector's opportunities would be considerably limited by the exception of Sundays from all reasonable

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times. [BLACKBURN, J.—Under the 3rd sub-section of the 18 & 19 Vict. c. 121, s. 11, it was clearly contemplated that the local authority or their officer should enter premises where meat is found at other than business hours and without notice.] The 1st sub-section provides for an entry of premises by order of a justice for the purpose of grounding proceedings. [BLACKBURN, J.—That, however, is quite distinct from the 3rd sub-section.] The case of *Young v. Gratridge* (L. Rep. 4 Q. B. 166) shows that the seizure need be made at neither the time nor the place of sale. Secondly, the words of the 2nd section cover this refusal to open the door or give the key. It must be observed that the penalty for an offence under sect. 3 is much less than under sect. 2. Here the appellant did something, or refused to do something, the result of which was to obstruct and impede the inspector. [BLACKBURN, J.—The Legislature, if it were so intended, might have used the words, "refused to assist." I hope some one will call attention to this *casus omisus* in the Act.]

Mellor was not heard in reply.

Per CURIAM (Cockburn, C.J., Blackburn, Mellor, and Field, JJ.),

Judgment for appellant.

Upon the application of the respondent's counsel, the court refused the appellant his costs.

Attorneys for appellant, *Hand, Son, and Johnson*.

Attorney for respondent, *F. T. Dubois*, for *S. Leech*, Derby.

Saturday, June 5, 1875.

NISBET (app.) v. GREENWICH BOARD OF WORKS (resps.)

Paving new street—Apportionment of expenses—Appeal—18 & 19 Vict. c. 120, s. 105—25 & 26 Vict. c. 102, s. 77.

The respondents charged the owners of land in a less proportion than the owners of house property for the expenses of paving a new street under the Metropolis Management Amendment Act 1862, sect. 77. The appellant was owner of one of the houses and premises abutting on the said street, each of which consisted of a dwelling house and a garden. The several gardens were not of the same size, and the several frontages of the premises in the street varied considerably. The defendants had not apportioned the charges according to the frontages, but had charged the frontage of each dwelling house with only a small strip of ground used as an approach as house property, and the garden frontage, if more than this, as land at one-third of the house property. The appellant was charged at the higher rate on the whole of his frontage.

Held, upon a case stated by the magistrate, who ordered payment by appellant of his proportion so charged, that the defendants under this section had discretion to make an apportionment, and that there is no provision for any appeal. The court, therefore, refused to consider the principle upon which this apportionment was made.

THIS was a case stated by one of the magistrates of the Police Courts of the metropolis, sitting at the Greenwich Police Court, in the county of Kent, and within the metropolitan police district, under 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before him as hereinafter set forth.

On the 24th Dec. 1874 the appellant appeared before the said magistrate in obedience to a summons issued upon the complaint of the respondents charging that the appellant on the 2nd Oct. 1874, in the parish of Greenwich, in the said county, and within the said Greenwich district aforesaid, did neglect and refuse to pay the sum of 21l. 1s. 1d., being the amount charged upon and to be contributed by the appellant as being the owner of a certain house and premises fronting, and certain land abutting upon, a certain street called or known as Vanbrugh Park-road, East, in the parish of Greenwich, in the county of Kent, within the police district and Greenwich district aforesaid, pursuant to a resolution and order of the respondents for defraying the estimated costs and expenses of paving the said street, the same being a new street within the meaning of the Metropolis Management Act 1855 and the Metropolis Management Amendment Act 1862. The magistrate gave his determination against the appellant, and made an order for the payment by the appellant to the respondents of the amount claimed, and, upon the application of the appellant, reserved the following case:—

The following facts were proved or admitted by the appellant and respondents respectively.

The said street called Vanbrugh Park-road, East, is a "new street" under the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), and the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), and is within the district of the respondents.

On the 16th April 1873 a resolution was duly passed by the respondents, whereby it was resolved "that this board deem it necessary and expedient that Vanbrugh Park-road, Vanbrugh Park-road East, and Vanbrugh Park-road West, in the parish of Greenwich, being new streets within the meaning of the 105th section of the Metropolis Management Act 1855, be severally formed and paved; that advertisements be issued, inviting tenders for the execution of the required works in the said new streets; and the several owners of houses forming such streets, and of the land abutting thereon be charged with such expenses, according to an apportionment to be made by the Board."

Pursuant to the above-mentioned resolution, the surveyor of the respondents estimated the amount of the costs and expenses of forming and paving Vanbrugh Park-road East, hereinafter referred to as the said street, at the sum of 447l. 14s. 9d., and the respondents apportioned the same amongst the owners of land and houses abutting on the said streets by the following resolution, after, as the respondents allege, due consideration of the nature of the various properties so abutting on the new street as aforesaid:—

Resolved: That the estimated costs and expenses of forming and paving Vanbrugh Park-road East, and Vanbrugh Park-road West, respectively, in the parish of Greenwich, and Milton Court-road, Alexandra-street, Vansittart-street, and Rutt's-terrace respectively, in the parish of St. Paul, Deptford, amounting for Vanbrugh Park-road to 475l. 10s. 6d., for Vanbrugh Park-road East to 447l. 14s. 9d., for Vanbrugh Park-road West to 648l. 0s. 4d., for Milton Court-road to 347l. 12s. 11d., for Alexandra-street to 380l. 15s. 10d., for Vansittart-street to 345l. 19s. 3d., and for Rutt's-terrace, to 242l. 16s., including all incidental costs and charges, be and are hereby apportioned amongst the owners of the houses and land abutting on the said streets in the proportions and in manner set forth in the apportionments hereunder entered, and that the usual notices be served requiring payment of such expenses, viz.:

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VANBRUGH PARK-ROAD EAST, GREENWICH.			
No. on Plan.	Length of frontage.	Amount.	
1	57-0	29	5 5
2	42-6	21	16 6
3	41-0	21	1 1
4	35-5	18	3 9
5	35-9	18	7 2
6	41-0	21	1 1
7	3-5	19	14 7
	23-6	4	0 4
	21-6	11	0 10
8	100-0	17	1 8
	45-0	23	2 2
	55-3	9	8 6
9	49-3	8	10 0
	45-0	23	2 2
	78-0	12	9 5
10	25-0	12	6 9
10A	18-0	9	4 11
	31-3	5	6 6
	37-0	19	0 0
11	42-5	21	15 8
12	38-3	19	12 10
13	38-3	19	12 10
14	42-5	21	15 8
15	43-7	22	7 7
16	50-0	25	13 7
	39-3	6	13 10
1141-5		2447	14 9

The appellant was at the date of the said resolution and still is the owner of one of those houses and premises abutting on the said street, viz., the house and premises numbered 3 on the plan, and numbered 3 in the said resolution.

Notice requiring the appellant to pay the portion of the said costs and expenses charged upon him pursuant to such appointment was duly served upon him, and the following is a copy of such notice:

Board of Works for the Greenwich District.
Offices: Church-street, Greenwich, S.E.,
28th July, 1874.
Vanbrugh Park-road East, Greenwich.

Sir,—In pursuance of a resolution and order of the Board of Works for the Greenwich District, whereby it was determined that it was necessary and expedient that the above mentioned street called Vanbrugh Park-road, East, in the parish of Greenwich, in the county of Kent, being a new street within the meaning of the Metropolis Management Act 1855, and the Metropolis Management Amendment Act 1862, should be formed and paved under the provisions of the said Acts, and that the owners of the land and houses bounding or abutting on, and forming such new street should contribute and be charged according to an equal apportionment for defraying the costs and expenses of so forming and paving the said new street, I have now to give you notice that the amount charged upon and to be contributed by you in respect of the land and house (of which you are the owner) bounding or abutting on the said new street, is 21l. 1s. 1d., and to request that the said amount may be paid to Mr. Henry Alfred Collington, at their offices as above, within one calendar month from the service hereof.—I am, sir, your obedient servant,
J. SPENCER.

Clerk to the Board.

To the owner of house, numbered 3 on plan, Vanbrugh Park-road East, Greenwich.

The appellant refused to pay the sum demanded of him by the said notice or any part of it.

The appellant's house and premises, numbered 3 on the plan referred to in the said notice, have a frontage of 41ft. abutting on Vanbrugh Park-road East, and consist of a dwelling house with frontage of 35ft. towards the said street, and also of a strip of ground about 6ft. wide forming the approach to the said dwelling-house and leading to a side entrance thereto.

The premises numbered 1 on the said plan have a frontage of 89ft. 2in. abutting on the said street, and consist of the following particulars: First, a dwelling-house with a piece of ground behind the same, together having a frontage to the said

street of 57ft (the front of such dwelling-house facing towards another road running at right angles to the said street); and secondly, a piece of ground in front of the said dwelling-house, with a frontage of 32ft. 2in. on the said street. The premises numbered 16 on the said plan, which are on the opposite side of the road from No. 1., have a frontage of 89ft. 2in. abutting on the said street and consist of the following particulars: First, a dwelling-house with a piece of ground behind the same, together having a frontage to the said street of 50ft. (the front of such dwelling-house also facing towards the said road running at right angles to the said street); and secondly, a piece of ground in front of the said dwelling-house, with a frontage of 39ft. 2in. to the said street. The premises so numbered respectively 1 and 16, are respectively within one enclosure and in one occupation, and the said several pieces of ground so attached to and forming part of the said premises numbered 1 and 16 as aforesaid, are set apart and kept exclusively for the use and enjoyment of the occupiers of the said dwelling-houses respectively.

The premises numbered 7 on the plan have a frontage of 83ft. 5in. abutting on the said street, and consist of the following particulars: First, a dwelling house with frontage of 38ft. 5in. towards the said street; secondly, a stable standing in the same line of frontage as the dwelling-house, with a frontage of 21ft. 6in. towards the said street; and thirdly, a piece of ground, coloured green on the said plan, with a frontage of 23ft. 6in. The frontage of the said piece of ground is marked A on the said plan, and is set apart and kept exclusively for the use and enjoyment of the occupiers of the said dwelling-house. Part of the said piece of ground forms the approach to the said dwelling-house and stable, and the remainder is occupied partly by a carriage drive leading from the said street to the dwelling-house and stable, and partly by gravelled walks leading to and from the said dwelling-house and stable, and partly also by several ornamental flower beds. The whole of the said premises numbered 7 were at the date of the said resolution of the said respondents and still are, within one enclosure, and were and are held and occupied by the same owner, and used and enjoyed by him together.

The premises numbered 10A have a frontage abutting on the said street of 86ft. 2in., and consist of the following particulars: First, a dwelling-house with a frontage of 37ft. towards the said street; secondly, a stable standing in the same line of frontage as the dwelling-house, with a frontage of 18ft. towards the same street; and thirdly, a piece of ground coloured green on the said plan, with a frontage of 31ft. 2in., abutting on the said street; the frontage of the said piece of ground is marked B on the said plan. Part of it forms the approach to the said dwelling-house and stable, and the remainder is occupied partly by a carriage drive leading from the said street to the dwelling-house and stable, and partly by gravelled walks leading to and from the said dwelling-house and stable, and partly by several ornamental flower beds. The said several pieces of ground respectively forming part of the said premises numbered 10A were and are set apart and kept exclusively for the use and enjoyment of the occupier of the said house. The whole of the said premises numbered 10A were at the date of the said resolution of the said respondents and

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still are, within one enclosure, and were and are held by the same owner, and used and enjoyed by him together.

The premises numbered 8 on the said plan adjoin the premises numbered 7 on the said plan, and have a frontage of 200ft. 2in. abutting on the said street. They consist of the following particulars: First, a dwelling-house, the side or flank wall of which has a frontage of 45ft. towards the said street (the front of such dwelling-house fronting towards another road running at right angles to the said street); and secondly a piece of ground coloured green on the said plan extending from the rear of the said dwelling house to the premises numbered 7, with a frontage of 100ft. abutting on the said street; and thirdly, a piece of ground also coloured green on the said plan, in front of the said dwelling-house, with a frontage of 55ft. 2in. abutting on the said street.

The premises numbered 9 on the said plan have a frontage of 167ft. 9in. abutting on the said street; they consist of the following particulars:—First, a dwelling house, the side or flank wall of which has a frontage of 45ft. towards the said street (the front of which dwelling-house facing towards the last-mentioned road running at right angles to the said street), and Secondly, a piece of ground, coloured green on the said plan, extending from the rear of the said dwelling-house to the premises numbered 10, with a frontage of 73ft. on the said street; and Thirdly, a piece of land also coloured green on the said plan in front of the last-mentioned dwelling-house, with a frontage of 49ft. 9in. on the said street. The said pieces of ground so forming part of the said premises numbered 8 and 9 respectively, were and are set apart and kept exclusively for the use and enjoyment of the occupiers of the said dwelling-houses respectively. Portions of the said last-mentioned pieces of ground in front of the dwelling-houses numbered 8 and 9 respectively, form the approaches to the said dwelling-houses numbered 8 and 9 respectively. They are not fenced off from the said respective dwelling-houses, and each piece of ground is occupied, partly by a carriage drive leading from the said dwelling-house into the road in front, and partly by gravel walks intersecting it in different directions, and leading to and from the dwelling-houses. The remainder is laid out in ornamental flower beds. The pieces of ground in the rear of the two last-mentioned dwelling-houses are laid out with gravelled walks and ornamental flower beds. The whole of each of the said premises numbered 8 and 9, were respectively at the date of the said resolution of the said district board, and still are within the enclosure, and were and are held by the same owner, and used and enjoyed by him together.

The said apportioned amount of 21*l.* 1*s.* 1*d.* charged upon the appellant as aforesaid, has been so apportioned and charged upon him at one uniform rate in respect of the frontage of his said dwelling-house, and the said strip of land leading to the entrance at the side of such dwelling-house.

The sum of 34*l.* 15*s.* 9*d.* has been apportioned and charged by the respondents upon the owner of the aforesaid dwelling-house and premises numbered 7, as his share of the said costs and expenses of forming and paving the said street.

In making the said apportionment, the 23ft. 6in. of frontage hereinbefore referred to, is charged by the respondents in their discretion as land at one-

third of the charge imposed in respect of the united frontage of the said house and stable, No. 7.

The following sums have been apportioned and charged by the respondents upon the owners of the above particularly described premises as their respective shares of the said costs and expenses of forming and paving the said street, viz.: on the owner of No. 1, 34*l.* 15*s.* 4*d.*; on the owner of No. 7, 34*l.* 15*s.* 9*d.*; on the owner of No. 8, 49*l.* 12*s.* 4*d.*; on the owner of No. 9, 44*l.* 1*s.* 7*d.*; on the owner of No. 10A, 33*l.* 11*s.* 5*d.*; and on the owner of No. 16, 32*l.* 7*s.* 5*d.* In apportioning and charging the said sums respectively the said frontages of 32ft. 2in., 23ft. 6in., 100ft., 55ft. 2in., 49ft. 9in., 73ft., 31ft. 2in., and 39ft. 2in. hereinbefore mentioned, have been charged by the respondents in their discretion as land at one third of the charge imposed on the owners of the said premises, numbered 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, and 15, in respect of the entire frontages of such last mentioned premises respectively. No part of the frontages of the said premises numbered 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, and 15, being charged at the reduced rate.

It was contended before the magistrate on the part of the respondents, that they had by their aforesaid resolution determined on forming and paving the said street, and that the Metropolis Management Act 1855, and the Metropolis Management Amendment Act 1862, had not prescribed the mode in which the apportionment of the expenses of forming and paving a new street was to be made, and that the respondents had therefore a discretion to make such apportionment in any manner they might think just, and that they were entitled under the circumstances to exercise it as they had done, and that the amount charged to the appellant in the said apportionment was valid, and could not be impeached or called in question before the said magistrate. It was contended on the part of the appellant that the respondents could not make their own apportionment capriciously, or treat house property as land in making their apportionment, and that they ought to have divided and apportioned the expenses of forming and paving the said street equally among the said owners of the property abutting on the street according to their respective frontages. It was further contended on his behalf that the piece of ground between the house and stable on the premises numbered 7, and the pieces of ground at the front and rear of the houses numbered 8 and 9, and the pieces of ground at the front of the houses numbered 1 and 16 were respectively under the circumstances stated in the case, subordinate and auxiliary to the respective dwelling-houses as residences, and for the purposes of making the apportionment in question were under the said Acts to be treated as part of the respective houses or house property, and not as "land." And it was also contended on his behalf, that the amount charged to the appellant in the said apportionment could be called in question before the magistrate.

The questions for the opinion of the court were, first, whether the said apportionment made by the respondents of the estimated costs and expenses of forming and paving the said street was binding upon the magistrate, or whether he had power to enquire into the correctness of the principle on which it was made; secondly, if he had power to enquire into the correctness of the principle, then

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whether the principle adopted by the board was correct.

If the court should be of opinion that the said apportionment made by the respondents was not binding upon the magistrate, and that he had power to enquire into the correctness of the principle upon which it was made, and that the principle adopted by the respondents was not correct, then his order upon the appellant for payment of 21l. 1s. 1d. was to be quashed; but if the court should be of opinion that he had no power to enquire into the correctness of the principle on which the said apportionment was made, or that the principle adopted by the respondents was correct, then his said order was to be confirmed.

Brown, Q.C. (with him *J. Digby*) argued for the appellant.—The Metropolis Management Act 1855 (18 & 19 Vict. c. 120), sect. 105, imposes the expenses of paving a new street upon “the owners of houses forming such street.” By the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), sect. 77, it is enacted, “That when any vestry or district board shall, under the powers given by the 105th section of the Metropolis Management Act 1855, have paved, or be about to pave, any new street, the owners of the land bounding or abutting on such street, shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein. Provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the costs of paving at the points of intersection of streets, and all other incidental costs and charges shall be apportioned by the vestry or district board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion; and it shall be lawful for the vestry or district board, at their discretion, to accept payment of the amount apportioned or charged in respect of each house or premises by instalments, spread over a period of not exceeding twenty years; and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner, before a justice of the peace, at the option of the said vestry or board.” A very similar point to this, viz., what was to be included in the word “house,” was discussed by this court on the 4th May 1867, in *Hole v. Commissioners of Milton*, reported in the 31st vol. of the Justice of the Peace, p. 804 (number of 21st Dec. 1867). There the Local Improvement Act imposed a rate on all “houses” within the parish; it was held that buildings and yards used for purposes of business did not come within the description of “house,” unless they were also within the curtilage of the house; but gardens or orchards subordinate to the occupation of the house as a residence, and occupied with the house as ancillary thereto, were so included in the word “house.” And therefore, a mill which opened into the yard adjoining the house, and had internal communication with the outbuilding and house was part of the house, and properly included in the rate. Cockburn, C.J., remarked during the argument that “Anything which can be brought within the curtilage of the house, such as the garden in which it stands, might perhaps be included in the

word ‘house.’” He also said in his judgment, “wherever you find anything that is accessory to the enjoyment of the house as a place of habitation, then I think it probable it is to be included in the word ‘house.’” Again, “Although where the garden is separated, and independent of being accessory to and an adjunct of the habitation, it would not be assessable under this Act, yet where the gardens are convenient to the enjoyment of the house, there I think they are sufficiently within the meaning of the term ‘house’ in the statute.” Under the Public Health Act 1848, and the Local Government Act 1858, the apportionment is conclusive after three months: (*Hesketh v. Local Board of Atherton*, 29 L. T. Rep. 530.). This court reviewed an apportionment under these Metropolis Management Acts in *Whitchurch v. Fulham Board of Works* (L. Rep. 1 Q. B. 233), although objection was taken in the argument that there was no appeal in these cases. The vestry no doubt has some discretion in the apportionment, but if they have adopted a wrong principle, both the magistrate and this court have jurisdiction to put them right. They have not here adopted the principle of value in apportioning the expense to the owners of houses and lands. They have taken the gardens, which are part of the houses as lands.

Manisty, Q.C. (with him *Willis*), for the respondents.—The statutes have clearly given the vestry power to apportion between the owners of houses and lands, “should they deem it just and expedient so to do,” and there is no provision for any appeal from their decision. [Stopped by the Court.]

COCKBURN, C.J.—It seems to me that by this section, when the vestry have made their apportionment, the magistrate has no power to interfere with it. He can only order the amount to be paid.

BLACKBURN, J.—I am of the same opinion. The Legislature has given a vestry power to apportion the charges in such a case as this, and has provided no court of appeal. Whether the vestry were right or wrong in the principle they have adopted, I have not been able to make up my mind.

MELLOR, J.—I am of the same opinion. I think this is a matter within the jurisdiction of the vestry, and we cannot interfere.

FIELD, J.—I am of the same opinion.

Judgment for respondents.

Attorneys for appellant, *Nisbet, Rooke, and Daw.*

Attorney for respondents, *J. Spencer.*

Tuesday, June 8, 1875.

COMMERCIAL GAS COMPANY (apps.) v. SCOTT (resp.).

Metropolitan Gas Companies—Incorporation of repealed provisions—Supply of gas under pressure—10 Vict. c. 15, 15 & 16 Vict. c. 155, 23 & 24 Vict. c. 125, 34 & 35 Vict. c. 41.

The appellants were constituted by the Commercial Gas Act 1852, which incorporated the Gasworks Clauses Act 1847. The Metropolis Gas Act 1860 relates to the appellants, and applies the Act of 1847 to them as fully as if their gasworks were authorised by that Act. The Gasworks Clauses Act 1871 provides by sect. 1, that it shall be construed as one Act with the Act of 1847, and that its provisions shall be held to repeal and super-

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sees such of the provisions of that Act as are inconsistent with it. By sect. 3 the provisions of the Act are to apply to every gas undertaking authorised by any special Act hereinafter passed. By ss. 11 & 36 a penalty is imposed whenever a company neglect or refuse to give a supply of gas to any owner or occupier under such pressure as is prescribed.

The appellants were convicted for breach of these last sections in respect of a total discontinuance of supply of gas to a consumer.

Held, upon a case stated, that the Metropolitan Gas Companies mentioned in the Act of 1860 are subject to the provisions of the Gasworks Clauses Act 1871; and that upon the facts the conviction was right.

This was a case stated by one of the magistrates sitting at the Worship-street Police Court, under 20 & 21 Vict. c. 43, for the opinion of the court.

The appellants, on the 24th Dec. 1874, appeared before the said magistrate in answer to a summons taken out against them by the respondent, which summons was as follows :

Police Court, Worship-street.

Metropolitan Police } To the Commercial Gas Company District to wit. } of Ben Jonson's Fields, Stepney.

Whereas complaint hath this day been made before the undersigned, one of the magistrates of the Police Courts of the Metropolitan, sitting at the Police Court, Worship-street, in the County of Middlesex, and within the Metropolitan Police District, by William Scott, for that you, on the 12th Dec. 1874, in the Parish of Whitechapel, in the County of Middlesex, and within the said district, did unlawfully discontinue a supply of gas by less than one month's notice, in writing, to the said William Scott, the consumer, contrary to the statute; and these are, therefore, to command you, in her Majesty's name, to be, and appear on Thursday next at two o'clock in the afternoon at the Police Court aforesaid, before me or such other magistrate of the said Police Court as may then be there to answer to the said complaint, and to be further dealt with according to law.

Given under my hand and seal this 18th Dec. 1874, at the Police Court aforesaid. H. J. BUSHBY [L.S.].

The respondent occupies premises within the limits of the special Act of the appellants, and before and at the time of the cause of complaint, and up to the final adjudication herein, was entitled to be supplied by them with gas. On 12th Dec. 1874, the appellants cut off and thenceforth discontinued the supply of gas to the respondent's premises, without giving him one month's notice in writing, although no rate for gas theretofore supplied to him was in arrear, and without any breach by respondent of any of the provisions of the Metropolitan Gas Act 1860 (23 & 24 Vict. c. 125), or of any other act. At the close of the case for the respondent it was submitted to the said magistrate by the counsel for the appellants that the 21st section of the said Metropolitan Gas Act, 1860, on which the summons was framed, created no offence, and provided no penalty, but that it was simply directed that no contract between a gas company and a consumer should contain any term or condition entitling the gas company to discontinue any supply of gas to a consumer by less than one month's notice in writing, unless his rate were in arrear, and then only after three days' notice in writing. The said magistrate was of opinion that this objection was well found, but intimated that he should amend the summons in the terms of the 36th section of the Gasworks Clauses Act 1871 (34 & 35 Vict. c. 41).

The amendment of the summons was consented

to by the counsel both for the appellants and the respondents, and when it had been so amended, instead of charging that the appellants "did unlawfully discontinue a supply of gas by less than one month's notice in writing to the said Wm. Scott, the consumer, contrary to the statute," the summons charged that the appellants "did unlawfully neglect and refuse to give a supply of gas to the said Wm. Scott, being an owner of premises within the limits of the special Act entitled to the same under such pressure as is prescribed."

To this summons the counsel for the appellants objected that as amended it could not be sustained, because by the third section of the Gasworks Clauses Act 1871 (34 & 35 Vict. c. 41) the operation of that statute was as they contended confined to every gas undertaking "authorised by any special Act hereafter passed," and therefore that it could not apply to an undertaking like that of the appellants which was incorporated in the year 1847. It was further contended on the part of the appellants that the 36th section of the Gasworks Clauses Act 1871, upon which the amendment summons had been framed, did not apply to a case where there had been a total discontinuance by a gas company of a supply of gas to a consumer, but that the words "under such pressure as is prescribed," plainly limited the operation of the clause to a case where the undertakers neglected or refused to give a supply of gas to an owner or occupier within their district "under such pressure" as their special Act prescribed. It was further contended on the part of the appellants that the only penal remedy for a discontinuance of gas was given by the 17th section of the Metropolitan Gas Act 1860, and that the respondent had not made the written application therein required. It was replied on the part of the respondent that the 1st section of the Gasworks Clauses Act 1871 (34 & 35 Vict. c. 41) having incorporated the Gasworks Clauses Act 1847 (10 Vict. c. 15), which latter Act had been incorporated by the 52nd section of the appellants' special Act (15 & 16 Vict. c. 115), the provisions of the Gasworks Clauses Act 1871 were applicable to and binding upon the appellants, and that the 17th section of the Metropolitan Gas Act 1860, did not apply to a discontinuance of gas.

The said magistrate was of opinion that the contention on the part of the respondent was right, and convicted the appellants, inflicting a penalty of 10*l.* and costs, but granted this case for the opinion of this court.

The question for this court to decide was whether the appellants were rightly convicted. If so, the conviction was to be confirmed; if not it was to be quashed.

Watkin Williams, Q.C., argued for the appellants. The four Acts of Parliament to be considered are: The Gasworks Clauses Act 1847 (10 Vict. c. 15), The Commercial Gas Act 1852 (15 & 16 Vict. clv.), The Metropolitan Gas Act 1860 (23 & 24 Vict. c. 125), and The Gasworks Clauses Act 1871 (34 & 35 Vict. c. 41). The private Act 1852, provides by sect. 52, that the Act of 1847, together with other Acts mentioned, "except so far as the several provisions of those Acts respectively are repugnant to or inconsistent with any of the provisions or purposes of this Act, shall be incorporated with this Act." Under neither of these Acts can any conviction be justified by the facts stated. Then came the Metropolitan Gas Act 1860, which mentions

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this company amongst others in the preamble, and is applied by sect. 3 to this company, specifically. Sect. 21, according to which the summons was framed, provides that no contract for any of the purposes before mentioned between gas companies and consumers shall contain any term or condition "which shall entitle the gas company, except for breach of any of the provisions of this Act, to discontinue any supply of gas by less than one month's notice in writing to the consumer, unless the rate due for gas shall be in arrear, in which case three days notice in writing to the consumer shall be sufficient." This section, however, contains no penalty for a breach of this term; nor indeed does it nor any part of the Act require a month's notice, or authorise a company to discontinue a supply after a month's notice. Clearly therefore there could be no conviction under that Act. Now by the 36th section of the last Act of 1871 "Whenever the undertakers neglect or refuse to give a supply of gas to any owner or occupier of premises within the limits of the special Act entitled to the same under such pressure as is prescribed, they shall be liable to a penalty not exceeding 40s. for each day during which such default continues." It may be contended first, that this section, even if it applied to the appellants, does not touch this case; the neglect or refusal is not in respect of any prescribed pressure. The only conviction which could be obtained for not supplying gas at all must be preceded by notice from the consumer requiring the supply under sect. 11 of that Act of 1871, or under sect. 17 of the Metropolis Gas Act 1860. But this Act of 1871 does not in any way apply to the appellants; by sect. 3 "The provisions of this Act shall apply to every gas undertaking authorised by any special Act hereafter passed;" it is nowhere made to apply to gas companies previously in existence. Although the 1st section repeals the Act of 1847 to some extent, it cannot without express words repeal those provisions of it which were incorporated in the private Act of 1852, which is left unrepealed: (*Reg. v. Smith*, L. Rep. 8 Q. B. 146).

Kydd, for the respondent.—It would be absurd if the Legislature had given a consumer a remedy for bad gas, and no remedy for his failure to obtain any gas at all. The words of the 36th section of the Act of 1871 are wide enough to cover this case. As to the application of this Act to the appellants, the 49th section of the Act of 1847 enacts "that nothing herein or in the special Act contained shall be deemed to exempt the undertakers from any general Act relating to gasworks, or any Act for improving the sanitary condition of towns and populous districts, which may be passed in the same session in which the special Act is passed, or any future session of parliament." The rule regarding the repeal of incorporated provisions without express mention depends upon the words used in the repeal clause. If a general provision be distinctly applied to a class or status of individuals or things, it is not limited to those who subsequently become members of that class; *Reg. v. Vine* (L. Rep. 10 Q. B. 195; 31 L. T. Rep. N. S. 842). The words of the 1st section of the Act of 1871 are very precise and extensive and are quite sufficient to include all companies with whose private Acts the provisions of the Act of 1847 are incorporated; the words are: "The Gasworks Clauses Act 1847, and this Act shall be construed

together as one Act, and the provisions of this Act shall be held to repeal and supersede such of the provisions of that Act as are inconsistent with this Act."

Watkin Williams, Q.C., in reply.—The Act of 1860, which was passed expressly to regulate the appellants and other companies mentioned in the preamble, provides (sect. 2), that "The Gasworks Clauses Act 1847 (except so far as the provisions thereof are inconsistent with this Act) is incorporated with, and forms part of this Act, and shall apply to the several companies before named or referred to as fully as if the gasworks of the several companies were authorised by this Act." There is no mention of this Act of 1860 in the Act of 1871, and it could not, therefore, have been intended to repeal by the latter Act any provisions of an earlier Act not alluded to.

LUSH, J.—I am of opinion that this conviction was right. The Gasworks Clauses Act of 1847 is to apply by the first section "to such gasworks as shall be authorised by any Act of Parliament hereafter to be passed, which shall declare that this Act shall be incorporated therewith." The private Act of the appellants' company, passed in 1852 declared the incorporation of the Act of 1847. Then in 1860, the Metropolis Gas Act, naming this and other companies, authorised a monopoly of the London gas supply, and by sect. 2 expressly incorporated the Act of 1847 amongst its provisions. From that time to the year 1871, the Act of 1847, as adopted by the Act of 1860, related to all the London gas companies, and constituted the general law concerning gas in the Metropolis. The Act of 1871 was not limited to the London companies, and therefore made no reference to the Metropolis Gas Act of 1860; but there is nothing in it to exclude its application from those companies. By the first section the general Act of 1847, to which the London companies are subject, is to be construed as one Act with the new Act, and the provisions of the new Act are to be held to repeal and supersede such of the provisions of the earlier Act as are inconsistent with it. The effect of sect. 3 is not to limit the application of the Act to future gas companies, but to extend its application to them beyond the mode of adoption provided in the previous general Act. I think there is not the slightest doubt that every provision of the Act of 1871 governs all the gas companies in London. It would be an extraordinary thing if it were not so, and it would be somewhat alarming if Mr. Williams's argument were good. The result would be that no general provisions of law could apply to the Metropolis if it had previously been subject to any exclusive legislation on the same subject. Then comes a question as to the construction of the 36th section, upon that I am clearly of opinion that the appellants are liable. The preceding Acts gave no remedy to a consumer for the discontinuance of his gas, but the Act of 1871 supplies that omission. By sect. 11, "the undertakers shall, upon being required so to do by the owner or occupier of any premises," situated as described, "give and continue to give a supply of gas for such premises under such pressure in the main as may be prescribed." Sect. 36 must be read with sect. 11; and the effect is that a gas company neglecting to supply gas at all to persons entitled and requiring to have it, or supplying it

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under improper pressure, is subject to a penalty. In this case the conviction was justified, and none of the objections to it are tenable.

QUAIN, J.—I am of the same opinion. Immediately it appeared that the general law concerning gas applied to this company, and it so appears I think not only from the incorporating clause of the Act of 1871, but also by the Metropolis Gas Act of 1860, the argument of Mr. Williams failed. That Act of 1860 applies the general Act of 1847 to all the companies there mentioned, and amongst them to the appellants. The first section of the Act of 1871 applies that Act to all companies to which the Act of 1847 previously applied; and the effect of sect. 3 is to apply that Act and all its provisions to every new company save when expressly varied or excepted. I think the magistrate properly allowed the summons to be amended, and the facts proved established an offence under the Act of 1871.

Judgment for respondent.

Attorneys for appellants, *Hollams, Son, and Coward.*

Attorney for respondent, *H. B. Roberts.*

May 29 and July 5, 1875.

ROLLETT (app.) v. OVERSEERS OF CORRINGHAM (resps.).

Exemption from highway rates—Immemorial non-payment—No proof of existence of highways—Onus of establishing consideration for exemption.

The appellant was occupier of a farm forming part of a township, and claimed exemption from the highway rates of the township. It was proved that the owners and occupiers had never in the memory of man paid highway rates, or done team work, or paid any composition in lieu thereof in respect of this farm; and that this farm from the time of Domesday book had been a known district and included lands and premises of different persons; but it was not proved that any highways had ever existed in the district.

Held, Lush, J. dissenting, that this was not sufficient to establish the existence of an immemorial usage to charge this district with repair of its own highways, and to exempt it from contribution to the repairs of the highways without its limits.

THIS was an appeal against two poor rates made respectively the 29th Sept. 1873, and the 18th Nov. 1873, for the parish of Corringham, in the Gainsborough Union, in the parts of Lindsey, in the county of Lincoln, to the Epiphany Quarter Sessions held Jan. 1874 for the said parts of Lindsey. The said court of Quarter Sessions confirmed the rates subject to the opinion of the court upon the following special case:—

The appellant, Thomas Rollett, is the occupier of certain hereditaments situated in the parish of Corringham and included in the said rates.

The said hereditaments so rated consist of a farm containing about 640 acres. As to 24a. 1r. 35p., a portion of the said hereditaments, no question arises, it being admitted that there is no ground of complaint with respect to the rates so far as they affect such portions of the said hereditaments.

With regard to the remaining portions of the said hereditaments, namely, 615a. 3r. 3p., objection was taken to the rates on the part of the appellant on the ground that they were made to cover highway expenses and to provide for sums

due from the respondents, the overseers of the said parish of Corringham, by virtue of a precept or precepts from the highway board of the Gainsborough highway district directed to the respondents as such overseers; that the said hereditaments, though exempt from liability to contribute to the expenses of the highways, are rated at the same amount in the pound as the other hereditaments in the said parish which are not so exempt; and that there is nothing to show on the face of the said rates how much was levied for highway and how much for other purposes.

It was not disputed that the said rates were made to include the highway precept as aforesaid, and the following appeared to be the facts with regard to the appellant's claim of exemption:—

The poor law parish of Corringham contains four townships, viz., Great Corringham, Little Corringham, Somerby, and Yawthorpe. Previously to the year 1868, the highways in the said townships were maintained as follows, viz., each township appointed a surveyor and levied highway rates, and maintained its own highways separately.

At the Lindsey Quarter Sessions held Jan. 1868, a provisional order was confirmed, by which the Gainsborough highway district was formed, such district including, *inter alia*, the four above-mentioned townships of Great Corringham, Little Corringham, Somerby, and Yawthorpe. In pursuance of this order separate waywardens were appointed for each of the said townships, and they continued to levy separate rates in each of the said townships upon the property previously rated to the highways.

On the 11th April 1872, a provisional order was confirmed by the said court of Quarter Sessions by which the said townships of Great Corringham, Little Corringham, Somerby, and Yawthorpe, comprising the parish of Corringham, were combined, and it was declared that the said parish of Corringham should be subject to the same liabilities in respect of all highways within it which were before maintained by the said townships separately, as if all their several liabilities had attached to the whole parish of Corringham.

In consequence of such last mentioned order the precepts thereafter made by the highway board of the Gainsborough district upon the parish of Corringham became payable out of the poor rate of the parish of Corringham.

The said hereditaments, in respect of which exemption was claimed as aforesaid, form the principal part of a district or estate containing about 700 acres which is known by the name of Dunstell, or Dunstall, with Bonsdale, and which is situated within the township of Great Corringham.

It was proved that in point of fact the owners and occupiers of Dunstell have never in the memory of man paid highway rates, or done team work, or paid any composition in lieu thereof in respect of hereditaments situated in Dunstell.

It was contended on behalf of the appellant, that Dunstell was a hamlet situated within and forming part of the township of Great Corringham, the inhabitants of which are exempt from liability in respect of the general repair of the highways in the said township.

Two extracts from Domesday Book with relation to Dunstell (then called Tunestale) certified by the deputy keeper of the records were put in by the appellant. The following is the translation of such extracts given in a translation of

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that part of Domesday Book relating to Lincolnshire, by Charles Gower Smith, which was referred to at the trial of the appeal.

"In Dunstall, Gamel had two carucates of land rateable to gelt. The land is two carucates and a half, ten bovates of which are in the soke. Ivo has there two carucates in desmesne and two villeins; eleven sokemen and one bordar have two carucates. There is a church, a priest, and a mill, worth 2s. yearly, and there are seven acres of meadow. The annual value in King Edward's time was 40s., it is now 4l.

"In Dunstall is one carucate and two bovates of land rateable to gelt. This land is twelve bovates (of which) four bovates are inland and six bovates soke. One villein and one sokeman hold there half a carucate. Ivo Tallibor has two bovates, for which he renders soke."

When the apportionment of rentcharge in lieu of tithes was made for the parish of Corringham, a separate tithe appointment was made for the hamlet or division of Dunstall and Bonsdale, with a plan or map of the place annexed. The soil of the lane hereinafter called Lair Hills Lane, which was alleged to be a highway, was by the said apportionment subject to the payment of tithes.

Dunstall is also described as a hamlet, in the index to the population tables of 1851, p. 76, and also in a return ordered to be printed by the House of Commons on the 10th July 1847, p. 91, both of which were put in evidence by the appellant.

It was contended on the part of the appellant, first, that it was not necessary to prove the existence of a consideration for the exemption which Dunstall had always *de facto* enjoyed in order to support such exemption in point of law; and secondly, that if it were necessary to prove a consideration, the following evidence conclusively proved the existence of such consideration.

It was proved by seven witnesses on behalf of the appellant, whose knowledge of the locality went back to periods varying from 1825 to 1841, one of them having been for twenty years surveyor of highways for Great Corringham, that there was a road called the Lair Hills Lane, running along part of the north side of the Dunstall estate, and within the boundary of the same; that the said road was not a stoned road, but merely a green lane, in some places 20yds. wide, in part fenced on both sides, and in part open to the fields; that the said lane opened into a field in Southorpe, called Scott's close, from which there was a lane leading to Southorpe, and the said Lair Hills Lane was a road leading from the top farm in Dunstall to Bonsdale Lane, which was a highway; that there were not more than two miles of stoned road in the parish of Corringham until after 1851, and that the occupiers of Dunstall had been in the habit of doing such slight repairs as were done to the said Lair Hills Lane, viz., hacking in the ruts and levelling the road, and stoning the gatesheads upon the same.

It was stated by the said witnesses for the appellant that as long as they were acquainted with the neighbourhood the inhabitants of Southorpe were in the habit of using the said Lair Hill's-lane as a cartway for the purpose of carting their farm produce to Gainsborough, and that it was their nearest road to Gainsborough, but that since the making of the Manchester, Sheffield, and Lincolnshire Railway new private roads have been made, and the Lair Hill's-road was not so much used as

formerly. It was proved that there were but three farmhouses in Southorpe, the occupiers of which, and the persons employed on the farms had been in the habit of using the road with carts, and had never, so far as the witnesses knew, been interrupted by the owners or occupiers of Dunstall in so doing. The appellant, who was called as a witness, had occupied a farm in Southorpe since the year 1841. The remaining witnesses for the appellant had worked on or near the Dunstall estate with the exception of one Hurst, who lived at Aisby, and who stated that Potter, the occupier of one of the farms at Southorpe, who occasionally used the Lair Hill's-lane in 1848, threatened to make Mr. Wells the owner of Dunstall stone the said lane, but that Mr. Wells replied that sooner than do that he would throw it open. None of the occupiers in Southorpe who were alleged to have used the said road were called as witnesses except the appellant, nor any labourer employed by the said occupiers.

It was proved by the appellant's witnesses that there was a road or way leading from the said township of Yawthorpe across Dunstall to the neighbouring parish of Northorpe, and that in point of fact persons who had occasion to go from one place to the other, used to go by this way on foot and horseback, without interruption by the occupiers or owners of Dunstall. That the same was not a stoned road, and was not enclosed, but there was a regular track across the fields from gate to gate, from which, however, people used to deviate to some extent on to the adjoining lands in places where, and at times when, the track was in an unusually bad state; and that the occupiers of Dunstall used the said track with their carts for the purpose of the farm, and to get upon the highway on the north, by the way of Lair Hill's-lane, and on the south by way of a lane called Mike's-lane, and used to hack in the ruts and stone the gatesteads on such track.

Five witnesses were called on behalf of the respondents from the neighbourhood of Dunstall, some of whom stated generally that they had never heard of any public highways in Dunstall, but they gave no specific evidence relating to the user of the above mentioned roads differing from that of the appellant's witnesses, with the exception that one of them stated that he had been on one occasion told by a Mr. Scott, who was the occupier of the field through which the Lair Hill's-lane passes after it leaves Dunstall on the way through Southorpe, that the Lair Hill's-lane was not a high-road.

It was contended on the part of the respondents, that there was no sufficient evidence that the said Lair Hill's-lane and the bridle-road across Dunstall were highways. That it was consistent with the evidence of the appellant that the user proved in the case of both of the said roads was merely permissive, and not of right, and that being so, that the appellant failed to prove any sufficient consideration for exemption from liability in respect of the repair of the highways generally in the township.

The Court of Quarter Sessions decided that there was not sufficient evidence to show that the said roads were highways, and they, therefore, dismissed the appeal, and confirmed the said rates on the ground that there was no consideration proved for the exemption of the said hereditaments from liability in respect of the highways.

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It was agreed that either party might refer to the ordnance map of the locality, which was put in evidence at the trial upon the argument of this case.

The question for the Court of Queen's Bench was whether the sessions were right in dismissing the appeal on the above ground.

If the court were of opinion in the affirmative, the said decision of the Quarter Sessions was to stand.

If the court were of opinion in the negative, the said rates were to be quashed.

Lawrance and Horace Smith for the respondents showed cause against the rule to quash the judgment of the Quarter Sessions.—By 5 & 6 Will. 4, c. 50, s. 33, it is enacted "that when the property, or the owner, or occupier in respect thereof has previous to the passing of this Act, been legally exempted from the performances of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property and the owners or occupiers thereof shall be exempt from the payment of the rate hereby imposed." The only ground upon which this legal exemption can be established is that the owners have repaired the roads on their property themselves; and, it was held in *Reg. v. Browne* (13 Q. B. 655), at least to be doubtful whether the exemption did not cease on the cessation of the consideration. The onus of proof is upon the person claiming exemption, and there was no highway here on which the presumption of a consideration by repairing it could be founded: (*Freeman v. Read*, 4 B. & S. 174; *Reg. v. Ashby Folville*, L. Rep. 1 Q. B. 213.)

Cave and Lumley for the appellant.—This is not the common law liability of a parish, but the customary duty of each township respectively to the parish. There is evidence of the ways in Dunstall having been highways, and possibly the inhabitants might now be indicted for non-repair. But there was no necessity for any consideration in order to establish this exemption by immemorial custom. The two cases of *Reg. v. Barnoldswick* (4 Q. B. 499); and *Reg. v. Ecclesfield* (1 B. & Ald. 348), are conclusive in the appellant's favour. See also 2 Wm. Saunders, p. 473. *Cur adv. vult.*

July 5.—LUSH, J.—This is a case stated by the Court of Quarter Sessions for the county of Lincoln, upon an appeal against a poor rate for the parish of Corringham. The rate was made for the purpose of raising amongst other sums an amount sufficient to provide for a precept of the highway board of the Gainsborough Highway district, in which district the parish of Corringham is included. The objection to the rate was that a large part of the farm occupied by the appellant is exempt from liability to contribute to the highways, and that notwithstanding this exemption he is rated at the same amount per pound as the other occupiers in the parish who are not so exempt. The parish of Corringham contains four townships, each of which had been accustomed from time immemorial to maintain its own highways, but in the year 1872 an order was duly made and confirmed under the Highway Act, 25 & 26 Vict. c. 61, by the Court of Quarter Sessions, whereby the townships were combined, and the parish declared to be subject to the same liabilities in respect of highways within it, which were before maintained by the townships separately, as if all their several liabilities had attached to the whole parish. In consequence of this order the

precepts of the highway board were directed to the overseers of the parish, and they were required to pay a lump sum as the contribution due from the parish out of money in their hands applicable to the relief of the poor. The lands, in respect of which the exemption is claimed, form the principal part of a district or estate containing about 700 acres, which is known by the name of Dunstall, and which is situated within the township of Great Corringham. This district appears from the entry in the Domesday Book set out in the case to be a hamlet or subordinate division of the township to which a custom to maintain its own highways may by law be attached; for a "hundred or township, or any other known portion of a parish may by usage and custom become so chargeable, whatever may be its extent" (*Reg. v. Ecclesfield*, 1 B. & Ald. 348), and as a consequence of such chargeability the district would be (presumably at least) exempt from liability to repair the other roads in the parish. The justices found as a fact that "the owners and occupiers of Dunstall have never in the memory of man paid highway rates, or done team work, or paid any composition in lieu thereof, in respect of hereditaments situate in Dunstall." They also found that there was not sufficient evidence to show that any of the roads in the district were public roads, and therefore found in effect that at the present time there are no highways repairable by the district. That being so, they disallowed the claim set up by the appellant on the ground that no consideration for the exemption was proved. It must be taken that no evidence was given to satisfy the justices that there were ever any public roads in the district, nor was there any evidence to the contrary; and the question is, whether the custom found by the justices can be upheld in the absence of affirmative proof that it had a legal origin. I am of opinion that it can, and that a legal origin ought to be presumed. I take it to be an established rule of law that every intendment is to be made in favour of ancient usage, provided it be such as can have had a lawful beginning. "Customs," says Mr. Justice Blackstone (Vol. i., p. 77), "must be reasonable, or, rather taken negatively, they must not be unreasonable; upon which account a custom may be good, although the particular reasons for it cannot be assigned, for it sufficeth if no good legal reason can be assigned against it." And Lord Mansfield says, in *Cocksedge v. Fanshaw* (1 Doug. 132), "The rule of law is, that wherever there is an immemorial usage, the court must presume everything possible which could give it a legal origin." For this reason it is not necessary in pleading a custom to state how it originated. It is sufficient to allege the fact that it existed from time immemorial. This was the point decided in *Reg. v. Ecclesfield*. An indictment was preferred against the inhabitants of a parish for the non-repair of a road. The plea alleged that the duty of repairing the particular road lay, by immemorial custom, on the inhabitants of a township in the parish, within which township the road lay. A verdict having passed for the defendants, a motion for judgment *non obstante veredicto* was made on the ground that the plea was bad for not stating the consideration for the alleged custom; but the court held that the plea was in conformity with precedents, and that the consideration need not be alleged. It follows that as the consideration in such a case need not be alleged it need not be

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proved, but that the custom being a reasonable one a sufficient consideration for it is to be presumed. The rule in question received a striking illustration in the case of *Reg v. Barnoldswick* (4 Q. B. 499). There a parish, consisting of five townships being indicted for non-repair of a road in Admergill, one of the townships, pleaded a custom for each of the five to repair its own road, and alleged that the road in question ought to be repaired by Admergill, and not by the parish at large. It was proved that the other four townships had ancient roads which they had always separately repaired, but there was no evidence that Admergill ever had a public road before 1804, when the road in question was made as a turnpike road. Since 1816 it had been repaired by some, though not by all, the inhabitants of the township. Parke, B. directed the jury, that there was evidence from which they might find that the custom which prevailed in four-fifths of the parish prevailed in the other also, adding "there is a good foundation for the custom in a presumed bargain made before the time of legal memory by the inhabitants, that each should take on itself the repairs of its own roads. It is not necessary there should have been beyond the time of legal memory some highway within the district, for there may be a perfectly valid custom that the inhabitants of either township should repair any high roads which might from time to time become public." The jury found in favour of the custom, and this court, without giving any opinion upon the larger proposition (which was not necessary to the case), affirmed the ruling of the learned baron, to the extent of holding that it was not necessary to prove that there were any ancient highways in the district, but that it was sufficient, that consistently with the evidence there might have been some. It is to be observed that the township was held liable to maintain the modern road, an obligation which the learned baron considered to be involved in the supposed bargain. That case appears to me to be the exact counterpart of the case before us. In that it was sought to enforce the supposed bargain on one side; in this, it is sought to enforce the bargain on the other. If before 1816 Admergill had been rated towards the repairs of the roads in the other townships, all that would have been proved was, that it had never had any surveyor, and had never contributed to any road repair; and yet it is difficult to see how the decision could properly have been otherwise than it was in 1843. For the fact that since 1816 the majority of the inhabitants had taken up the repair of the road, which was a modern one, added nothing substantial to the case. The material ground for holding Admergill to be a party to the supposed bargain, must be found in the immunity which it had always enjoyed from the burden of the roads in the other townships; it being an admitted fact, that each of the other townships had immemorially borne the repairs of its own roads without contribution from Admergill. Whether the direction of the learned Baron as to the supposed bargain was in its entirety correct or not, is immaterial. If it was, the custom here relied on must have been held valid, even though it had been proved that there never was an ancient road in Dunstall; if it was not, and the bargain must be supposed to have been made when highways actually existed in the district, then according to the judgment of the court it must be presumed, there being no evi-

dence to the contrary, that there were such roads. On either supposition a sufficient consideration to support the custom must be taken to have existed. A custom such as the one in question is compounded of a benefit and a duty, of exemption from the rate for roads beyond in consideration of the maintenance of roads within the district. The one is implied from the existence of the other, and as proof of immemorial usage to do the duty implies title to the benefit, so proof of immemorial enjoyment of the benefit implies obligation to do the duty. The customary exemption being established, it cannot matter that there happens to be at the present time no duty to be done. There is no reason for holding that the exemption should cease because the roads have fallen into disuse which would not equally apply to relieve from the duty, should it become more onerous by increased traffic and dedication of new roads. The burden may at times greatly outweigh the benefit, or the benefit may greatly outweigh the burden. The theory on which such a custom is based supposes the bargain to be in perpetuity, and to hold it to be permanent or fluctuating according as it is balanced or not by the accidents of the time would be productive of uncertainty and mischief. Two cases remain to be noticed which my learned brothers regard as inconsistent with these views. The first is *Freeman v. Read* (4 B. & S. 174). There the tything of Walcott, which claimed to be exempt from the highway rates of the parish, had always repaired its own roads (which, however, were only green lanes requiring very slight repairs), and had always been exempt from contribution to the other roads in the parish. The jury found for the tything, and the only question raised was whether there was any evidence to go to the jury of the exemption of the tything from the highway rates of the parish. The court held there was, though the liability was very small. I am unable to trace in this case anything bearing upon the present except that the Lord Chief Justice observed that a sufficient consideration was proved, and Wightman, J., that, perhaps, no one of the ingredients by itself would have exempted the parish, the ingredients being, first, immemorial exemption of the tything; secondly, non-repair by the parish; and thirdly, repair of the tything roads by the tything. But the question raised in this case was not present to the mind of the court, and nothing therefore can fairly be implied from this language which was addressed only to the facts before them. The other case, *Dawson v. Surveyor of Willoughby with Sloothby* (34 L. J. 37, M. C.), is of a different character, and seems to me clearly distinguishable from the present case, upon grounds which were recognised in, and explained by Lord Ellenborough in the case I have already cited of *Res v. Ecclesfield*. The facts were these. Mawthorpe was a hamlet in the parish of Willoughby, and had always been assessed to the poor rate, church rate, sewers rate, and tithes, in and as part of that parish. But it had as far as living memory went been assessed to the highway rates, as well as to land tax, assessed taxes and property tax to and as part of the adjoining parish of Well. From 1828 to 1841 the highways in Mawthorpe were repaired by the surveyor of Well jointly with the roads of that parish, but from that date, by private arrangement with Well, the occupiers of lauds in the hamlet had repaired the

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roads amongst themselves, except the East Lincolnshire Railway Company, which had always paid their highway rates to Willoughby parish. "The only grounds of exemption," says Cockburn, C. J., "put forward by the appellant, an occupier of land within the hamlet, is that the latter, though part of the parish of Willoughby, is as to the repair of the highways, and as to rates made for that purpose, united to the adjoining parish of Well. But it appeared to us, that giving full effect to the statement that as far as living memory went Mawthorpe had always contributed to the highway rates of Well, and the highways had always been repaired by the latter parish, yet that these facts could not alter the liability of Mawthorpe to be assessed to the highway rates of the parish of which it forms a part. No such thing is known to the law as part of one parish being united to another parish for the purpose of the repair of the highways, although it may in some cases happen that a parish may be bound to repair the highways in a part of another parish, if a good and continuing consideration for such an obligation can be shown. Here, however, no consideration is shown." Then, after discussing the question whether there was sufficient evidence that Mawthorpe was originally a hamlet repairing its own highway, and stating that the facts were not sufficiently cogent to warrant the court in arriving at the conclusion, the Lord Chief Justice proceeds: "We think, therefore, that the proper inference to be drawn from the fact is, that the present state of things originated in an arrangement made, at some remote period, between the parishes. And as such an arrangement, being founded on no consideration beyond that of convenience, would not be binding longer than it was acquiesced in by all parties, we are of opinion that the parish of Willoughby is entitled to insist upon its rights to treat the hamlet as part of the parish for the repair of the highways, and to assess it accordingly." Two questions were here decided by the court under the power conferred upon it to draw all inferences of fact. First, that Mawthorpe was not a hamlet which had from time to time immemorially repaired its own highways; secondly, that no consideration was shown for the alleged obligation of Well to repair the roads in Mawthorpe; so that if Willoughby had been indicted for the non-repair of this road, that parish could not have set up the liability of Well as a defence. From the latter finding it follows that no consideration was shown for the payment by Mawthorpe of highway rates to Well, or for their exemption from the rates of the parish of Willoughby, to which it belonged. This case illustrates the distinction pointed out by Lord Ellenborough in *Rez v. Ecclesfield*, and is in strict accordance with the case of *Rez v. St. Giles, Cambridge*, cited in that case. The distinction is, between the liability of a parish, township, or hamlet to repair its own roads, and the liability to repair the roads in a foreign parish, township, or hamlet. In the one case consideration need not be alleged, but may and ought, if nothing to the contrary be shown, be presumed; in the other, the consideration must be alleged and proved. "All customs," says Lord Ellenborough, "are purely local and confined to a particular place. There cannot be a custom in one place to do something in another. The land is a particular place, and the inhabitants in respect thereof may be charged by

custom for matters within the place; but customs will not apply to matters out of it. Lord Coke observes at the end of *Gateway's case* (6 Co. 60) that the custom there alleged was insufficient and repugnant, because it was alleged that the custom was, that every inhabitant of the town of S. had used to have common in a certain place in the town of H., which was another place. If, therefore, the inhabitants of one district can be charged at all for a matter out of their district (upon which point it is not here necessary to give any opinion, inasmuch as custom will not apply to the matter, and so they cannot be charged by custom) the only mode of charge will be that of prescription; and as no common intendment can be presumed for such a charge, it will be necessary to show some special matter whereby a lawful beginning may be intended." I cannot regard this case as an authority for the position for which it is quoted. On the contrary, the doctrine taught by it is, that a custom in a district to repair the roads within its own area is *prima facie* a good custom, and needs no evidence of consideration to support it; but that a custom to repair the roads in a foreign district is *prima facie* a bad one, and can only be supported, if at all, by proof of consideration. For these reasons I am of opinion that the order of sessions ought to be quashed.

LUSH, J. then read the judgment of the majority of the court (Cockburn, C.J., Quain and Field, J.J.), which was written by Field, J.—The question raised in this case is whether the appellant, who is the occupier of lands which form the principal part of a "district" or "estate" called "Dunstall," situate in the township of Great Corringham, in the parish of Corringham, in Lincolnshire, is liable to be assessed for the repair of those highways in the township in question which are situate beyond the limits of Dunstall. The facts found by the sessions are that the poor law parish of Corringham contains four townships, Great Corringham, Little Corringham, Somerby, and Mawthorpe, and before the year of 1868 each of these townships appointed a separate surveyor, and maintained the highways within its limits, and levied highway rates for that purpose separately from the others. That in 1868 the townships in question were formed with other parishes into a highway district, but each township continued to levy separate highway rates and appointed separate waywardens until 1872, when by an order duly made the four townships were combined, and two waywardens were elected for the whole parish, which it was declared should be subject to the same liabilities in respect of those highways within it which were before maintained by the townships separately, as if their several liabilities had attached to the whole parish. It appeared upon the evidence that Dunstall was mentioned in Domesday Book, and in subsequent documents, in such a manner as to lead to the fair inference that it was a known district, including other lands besides those occupied by the appellant, and within which a custom to maintain its own highways separately from the rest of the parish, might by law have existed: (*Reg. v. Ecclesfield*, 1 B. & Ald. 348.) But there was no evidence to show that there was in fact any highway within it which the inhabitants of the district had ever maintained, the only evidence being that there were two roads in Dunstall which the justices found not to be highways, and which had been repaired to the

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slight extent rendered necessary, such as hacking in the ruts, &c., by the occupiers of Dunstall. There was no evidence of any separate appointment of surveyors by Dunstall, or of the making of any separate rates, but it was found that the owners and occupiers of Dunstall had not in the memory of man paid highway rates or done statute work, or paid any composition in lieu thereof, in respect of hereditaments within the parish; and upon these facts the justices found that there was no consideration proved for the exemption of the appellant's land from liability. Now it is clear that the appellant is the occupier of land locally situate within the parish (which has the liability of the separate townships attached to it), and as such is *prima facie* liable to be assessed to the repairs of the highways within it, as the charge of such repair by law falls upon the parish in default of any usage or custom to charge a smaller territory. The only exemption of the appellant from such a charge applicable to the facts of the case would therefore be that Dunstall was a known district, having the capacity to undertake the liability of repairing the roads within it, separately from the inhabitants of the rest of the township, and that from time immemorial there had been a custom or usage within it to that effect. The form in which this exemption would be pleaded is correctly stated in the case of *Freeman v. Read* (4 B. & S. 174); and the question in the present case shortly stated is whether there is sufficient evidence upon which a jury ought reasonably to find such an averment proved. I think not. In the case of *Freeman v. Read* there was as here evidence that Walcot (the smaller division) was a tything or district such as Dunstall in the present case, that it had never contributed to the repairs of the highways in the parish of Swindon, nor had the parish of Swindon contributed to the repairs of the highways in Walcot, but there was the fact, which is wanting in the present case, viz., that the inhabitants of Walcot had always repaired the highways within it separately from the inhabitants of the parish; and in giving judgment the Court specially relied upon the concurrence of all these three elements as necessary to establish the exemption. Again, in the case of *Dawson v. Willoughby* (5 B. & S. 920), the parish of Willoughby had, as in the present case, never sought to assess the hamlet of Mawthorpe to the repairs of the highways in the parish, and the court was at first inclined to draw the inference from that circumstance alone that Mawthorpe had originally been a hamlet repairing its own highways, but, upon consideration, they said that although if the hamlet of Mawthorpe had in fact so repaired, the case of *Freeman v. Read* would have been an authority to show that such would be the proper inference to be drawn; they declined, in the absence of that fact, to draw such inference, and held that the exemption was not established. In the case of *Reg. v. Barnoldswick* (4 Q. B. 499), Admergill, one of the five townships forming the parish of Barnoldswick, claimed exemption from contributing to the repairs of the highways without its limits. It was not proved that it had ever had any surveyor, or contributed to the general parochial burdens, or that there had ever been any immemorial public road within it which they had repaired; but it was shown that the other four townships similarly situated had always separately repaired their highways, and

that Admergill itself had since 1816 repaired the road there under indictment, which had come into existence in 1804, and the jury having found upon all the facts of the case that Admergill was bound by custom to repair its own roads, Parke, B., directed a verdict of guilty, but reserved the point whether it was essential to the proof of an immemorial usage "that ancient roads should be proved to have existed," and this court held that the exemption might be established without such proof, Coleridge, J., expressly limiting his judgment to the question reserved by the judge. The question in the present case substantially asked by the justices, seems to be whether they were right under the circumstances in this case in holding that the exemption was not established, and I think that they were. The mere circumstance that the occupiers of the district in question had never contributed to the payment of rates or to the repairs of the highway in the other parts of the township is not, I think, sufficient by itself to establish the existence of an immemorial usage and custom existing in Dunstall to charge it with repair of its own highways, and thus to exempt it from contribution to the repairs of the highways without its limits. I do not find any case in which that mere circumstance has been held sufficient, and for that reason I am of opinion that the decision of the quarter sessions therefore must stand.

Judgment for respondents.

Attorneys for appellant. — Collyer - Bristol, Withers, and Russell, for Hett, Freer, and Hett, Brigg, Lincolnshire.

Attorney for respondents, A. R. Oldman.

Saturday, May 1, 1875.

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Music and dancing licence under local Act—Surrender of licence—Power to convict notwithstanding licence.

By a local Act (25 & 26 Vict. c. 123) for the government of Cardiff, no house or room shall, by sect. 4, be kept or used for public dancing or music without a licence from the justices on their general annual licensing day, and any house or room so kept and used without such licence shall be deemed a disorderly house, and the persons occupying or rated as the occupier of the same, shall, on conviction before any two justices, be liable to a penalty. An inscription on the door or entrance is to be affixed, "Licensed pursuant to Act of Parliament." No house or room, although licensed, shall be opened for any of the said purposes except between the hours stated in the licence, and notice as to the inscription and the limitation of time was to be inserted in the licence. In case of a breach of these conditions the licence might be forfeited, and revoked by the justices at any subsequent annual licensing day. Provided that it shall be lawful for every person who shall think himself aggrieved by any order of such justices to appeal therefrom to the Queen's Bench.

One Lawrence received from the justices a licence for a room in 1870, and in each subsequent year until 1873, when they refused a further renewal. The licence in 1871 contained no limitation as to time, but the others both before and after were for one year. In 1871 Lawrence transferred all his interest in this room to the appellant, and some of the latter's performances were indecent. On these

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grounds the justices revoked the licence in 1873, and neither Lawrence nor the appellant appealed. The appellant afterwards opened the room as before, and was convicted for so doing without a licence.

Held, upon a case stated by the convicting justices, that the conviction was right.

THIS was a case stated by two of Her Majesty's Justices of the Peace for the borough of Cardiff, in the county of Glamorgan.

On the 29th Sept. 1873, the appellant, Frederick William Hoffmann, was convicted before the said justices of having, on the 24th Sept. then instant, at the said borough, unlawfully rented a room, called the Victoria Rooms, for public music and stage dancing, without being licensed so to do.

The justices stated this case pursuant to the Statute 20 & 21 Vict. c. 43 for the opinion of the Court of Queen's Bench upon the application of the said Frederick William Hoffmann.

The said Frederick William Hoffmann was summoned under the 4th section of a local Act, 25 & 26 Vict. c. 123, intituled "An Act for conferring further Powers for the good Government of the Borough of Cardiff, and for other Purposes."

The 4th section referred to is as follows:—

No house, room, or other place within the borough shall be kept or used for public dancing, music, or other public entertainment of the like kind, without a licence first had and obtained from the justices of the peace for the borough (which said licence such justices are hereby authorised and empowered to grant) on their general annual licensing day, and under the hands and seals of a majority of the justices then assembled, and any house, room, garden, or place kept and used for such purposes as aforesaid, without such licence first had and obtained, shall be deemed a disorderly house, and the persons occupying or rated as the occupier of the same, shall on conviction before any two justices, be liable to a penalty not exceeding 10*l.* for every day on which he shall offend. Provided always, that in order to give public notice what places are licensed pursuant to this Act, there shall be affixed and kept up in some conspicuous place, on the door or entrance of such house, room, garden, or place kept or used for any of the said purposes, although licensed as aforesaid, an inscription in large capital letters, of such dimensions as shall be prescribed in such licence, in the words following, "Licensed pursuant to Act of Parliament," and no such house, room, garden, or place kept or used for any of the said purposes, except between the hours stated in the licence; and the affixing and keeping up of such inscription as aforesaid, and the said limitation in point of time shall be inserted in and made conditions of every such licence; and in case of any breach of either of the said conditions, such licence shall be liable to be forfeited and revoked by the justices of the peace for the borough at any subsequent general annual licensing day or some adjournment therefrom. Provided also that it shall be lawful for every person who shall think himself aggrieved by an order of such justices to appeal therefrom to the Court of Queen's Bench (which court shall have power to hear and determine the same), whose order thereon shall be final."

The Victoria Rooms consist of a large room used for concerts and entertainments of a like kind, and is situate on the second floor of a building, the lower or ground floor of which is used as an auction room and for other business purposes, and the upper story as a dwelling by Hoffman. The owner of the whole building is one Nathan Lawrence, who is rated for the whole, including the Victoria Rooms.

The Victoria Rooms are held by Hoffman under lease from Lawrence.

The Victoria Rooms were first licensed at the

adjourned general annual licensing meeting held in Sept. 1870.

A licence was then granted to the said Nathan Lawrence, and was renewed to him annually until 1873, when at the adjourned licensing meeting on 24th Sept. a further renewal was refused, on the ground that Lawrence had transferred his licence without permission of the magistrates, that he had recently been convicted of selling wine there without a licence, and that some of the performances at the rooms had been of an indecent character.

On the 25th Sept. 1871, Lawrence entered into an agreement with Hoffman to transfer the then existing licence of the Victoria Rooms to him, and since that time Hoffman has had the management in his own hands, and received the profits.

The sanction of the magistrates to this transaction was not had or asked for.

Subsequent to, and notwithstanding this agreement, the licence was applied for and taken out by Lawrence, and not by Hoffman.

The licence granted to Lawrence on the 11th Sept. 1872, expired on the 10th Sept. 1873.

On the 24th of the same month, the date charged in the summons, the rooms were kept open by Hoffman for the usual entertainments.

On the part of Hoffman a licence was granted to Lawrence on 4th Sept. 1871, containing no limitation as to time, a copy of which was annexed to this case.

In defence of Hoffman it was argued by his counsel

1. That a licence once granted under the said Act could not be limited in its duration, and that, in fact, it was not limited in its duration.

2. That it could not be revoked except for breach of the conditions stated in the Act, and which appeared on the licence with regard to the time of the closing the rooms and the putting up of an inscription over the door, and stated that no such breaches had been proved.

3. That neither Lawrence nor Hoffman had been convicted of any such breach, and that, in fact, no such breach had occurred as was admitted by the prosecutor.

4. That the licence was not granted in respect of the person carrying on the entertainments, but in respect of the place of entertainments only, and consequently,

5. That the transfer of the licence did not require the sanction or consent of the magistrates, there being also nothing in the Act requiring such consent to such transfer.

6. That inasmuch as the licence granted in 1871 was silent as to its duration, it must be taken to be still in force, although a subsequent licence had been applied for, and granted.

Copies of the other licences of 1870 and 1872 were also annexed.

The justices were of opinion—

1. That the justices, having a discretion as to granting or withholding a licence under the Act, were not bound to grant all they had the power to grant, but were entitled to limit their licence for any period they might think proper.

2. That the licensing justices had authority in the interests of public order and morality to refuse a renewal of the licence, although conviction for breach of the two conditions referred to had not taken place, and that, at all events, seeing that the person aggrieved by their refusal had, under

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the Act, a right to appeal to a superior court, it was not for us to say that they had acted without jurisdiction.

3. It seemed to us most important that for the due regulation and control of these establishments, and in order to prevent them from becoming public nuisances, strict regard should be had to the character of the licensed person. This view, we thought, was in accordance with the policy of the Act before us, and we therefore considered that a licence was granted in respect of the person, as well as in respect to the place at which his entertainment was carried on; and that the licensed person could not transfer his licence without the consent of the licensing magistrates.

With regard to the licence of 1871 the justices were of opinion that, looking to the previous and subsequent licences, and to the fact of the licensed person applying for the subsequent licence, that the licence of 1871 was not intended to be indefinite, that the omission of the time was probably due to a clerical error, and that, at all events, it had been superseded by, and had ceased on, the grant of the licence of 1872.

The questions for the opinion of the Court are:—

1. Whether we were right in holding that licences under the Cardiff Borough Act, 1862, may be limited in duration for such a period as the licensing magistrates may think expedient.

2. Whether a licence under the Act may be transferred without the consent of the magistrates.

3. Whether we were right in holding that the decision of the licensing magistrates at the licensing meeting, in Sept. 1873, by which a renewal of Lawrence's licence was refused and binding upon him as not having been appealed against.

4. Whether the licence of 1871 had ceased, and determined on the grant of the subsequent licence.

5. Whether we were right in holding that the said appellant, Frederick William Hoffman, was an unlicensed person within the meaning of the Cardiff Borough Act 1862.

Poland (with him *B. F. Williams*) argued for the appellant.—The licence given in 1871 is indefinite as to time, unless one of its conditions be broken; and only if there was a breach, it might have been revocable by the magistrates. There are no words in the Local Act as to the power of transferring a licence without the consent of the magistrates; but the Local Act is like the Middlesex Act (25 Geo. 2, c. 40), and, as a matter of fact, licences are continually transferred in Middlesex without the magistrates' consent. A licence is a licence to a place and not personal and any licensee may transfer his licence to whom he chooses. If the person to whom the licence is transferred uses it for a wrong purpose, the remedy is by the common law, and not under the statute. [COCKBURN, C. J.—What do they mean in the case by saying, "the licence was renewed, annually?"] The appellant went before the magistrates at the end of each year and got a fresh licence. [COCKBURN, C. J.—Then he gave up his other licence.] The magistrates had no power to grant a licence for a limited time.

Giffard, Q.C., who appeared for the respondent, was not called on.

COCKBURN, C.J.—The magistrates have unconditional power to grant a licence, and may limit

it for the time they think proper. I think if a man takes a licence on general terms, and, understanding it to be a licence for a year, comes and takes another licence which is a licence for a year, he must be taken to surrender the first. That is the state of things here. There is a licence in 1871 that does not prescribe the period for which the licence was granted, and then, in 1872, Lawrence comes and takes out a licence for a year, and when he obtained that licence, I think he surrendered the other. The new licence of 1872 was terminated, and a renewal refused before the entertainment for which the appellant is charged. I think he was rightly convicted.

MELLOB and LUSH, JJ. concurred.

Judgment for respondent.

Attorneys for appellant, *Humphreys and Morgan*.

Attorneys for respondent, *Ingledeu, Ince, and Greening*.

COURT OF COMMON PLEAS.

Reported by *ETHERINGTON SMITH* and *J. M. LALY, Esqs.*
Barristers-at-Law.

Monday, April 26, 1875.

CORY AND OTHERS v. BRISTOW.

Poor-rate—Derrick, rateability of—Moorings in the Thames.

A revocable licence to use does not affect the licences with rateability.

The Conservators of the Thames being owners of the soil and bed of the river, and having statutory powers to give and revoke licences to lay down moorings, allowed two coal derricks of the plaintiffs to be moored subject to the conditions (inter alia) that "if at any time it should be found by the conservators inexpedient to permit the moorings to remain," the conservators might under their statutory powers cause them to be removed.

The moorings consisted of four anchors and two stones. Two of the anchors were made with one fluke each, and were such as are generally used for permanent moorings. In laying them down a hole was made large enough to contain the whole of the anchor, at a depth of seven feet below the bed of the river. The stones were placed in similar holes, and the derricks were attached by chain cables to both anchors and stones. The moorings formed were as firm as moorings could be, and the derricks could only be moved by casting off the cables, and leaving the anchors and stones behind.

The derricks had been so moored for many years, but daily changed their position slightly with the ebb and flow of the tide.

Held, upon a special case arising out of an action for illegal distress, that the derricks were not rateable.

THIS was an action brought (in pursuance of 9 Geo. 4, c. 43) against the defendant as clerk to the churchwardens, overseers, and directors of the parish of Greenwich, to recover damages for the unlawful seizure and conversion by such churchwardens, &c., of a ship known by the name of *The Atlas* (No. 2), and also for money had and received by them to the plaintiff's use. The cause came on to be tried before Brett, J., at the sittings in Middlesex, after Hilary Term, 1874, when a verdict was found for the plaintiffs for 145l.

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subject to the opinion of the court upon the following

CASE.

1, 3. The plaintiffs are coal merchants in the Metropolis, and the defendant is liable to be sued for the acts of the churchwardens, &c., of Greenwich, in pursuance of 9 Geo. 4, c. 43. Certain assessments for poor rates and rates for other purposes were made on 2nd Nov. 1871, by the churchwardens, &c., in vestry assembled, under 4 Geo. 4, c. 70, and 9 Geo. 4, c. 43, and were afterwards allowed by two justices for the county of Kent, and due notice was given of the same in pursuance of the said statutes.

4. By the said assessments the plaintiffs were rated in the sum of 139*l.*, as the occupiers of certain lands in the parish, the entries in the rate-book being as under:

Name of Occupier.	Description of property rated.	Rateable value.
William Cory and Son.	Moorings by which coal derrick and apparatus Atlas No. 1 are moored to bed of river.	£484 0 <i>s.</i> 0 <i>d.</i>
William Cory and Son.	Moorings to which coal derrick and apparatus No. 2 are moored to bed of river.	£400 0 <i>s.</i> 0 <i>d.</i>

5. The said coal derricks are large floating hulks, and are respectively above 250*ft.* long, and 90*ft.* wide. They are respectively fitted up with the necessary machinery and apparatus for unloading coal from colliers, and reloading the same into vessels and barges brought alongside. No coals are deposited or stored in the same derricks, nor does anyone live or sleep thereon.

6. The said derricks are the property of the plaintiffs, and ride afloat on the river Thames within the boundary of the parish of Greenwich. They have been moored or anchored at the same place for some years, but daily change their position slightly with the ebb and flow of the tide.

7. *Atlas* No. 1 was originally a vessel called a derrick, built and constructed for the purpose of raising wrecks and sunken vessels, and anchored in the Thames, but not at the place where she now rides. She afterwards came into the possession of Messrs. Cory, the plaintiffs, when alterations were made in her suitable to her present use, and she was removed from her then to her present position.

8. The place where she was originally moored was about a quarter of a mile further up the river, and she was then kept in position by four anchors, two on the north and two on the south. In moving her from this position, where she had remained about three years, to her present one, the four anchors and the chain cables were removed with her, and two of them were put down again in mooring her at her present moorings.

9. The derrick *Atlas* (No. 1) is now moored or retained at the spot where she floats, in the following way, i.e., by two single fluke anchors, on the side nearest the shore, by two stones on the channel side, and by two stream anchors, one at the head and the other at her stern.

10. Prior to *Atlas* (No. 1) taking up her position, the resolution next following was passed by the Conservators of the River Thames, in whom, by virtue of the Thames Conservancy Acts, the soil and bed of the river Thames is vested,

and the terms and conditions therein contained were assented and agreed to by the plaintiffs:

Resolved, "That permission be given to Messrs. Cory and Son to lay down moorings (at which they may place derrick hulk) immediately opposite the sluice next eastwards of Angerstein's Wharf, East Greenwich, and 510*ft.* from the river wall at the said sluice as per plan, the work to be done to the satisfaction of the Conservators of the River Thames, and under inspection of the harbour master, and to remain under the following conditions being agreed to and observed by Messrs. Cory, viz., that the accommodation be assessed and the rent paid thereon, that the hulk be not used for the purpose of storing coals, that it be for the general use of the coal trade, but the barges to or from the hulk be in all cases towed by a steam tug, to or from the Custom House, London; that all vessels leave the hulk immediately after being discharged, and that sailing colliers when discharged be towed away to such part of the river as the harbour master may direct, and in all other respects be worked to the satisfaction of the conservators, under the inspection of the harbour master, and with the full understanding on the part of Messrs. Cory that if at any time hereafter it shall be found by the conservators inexpedient to permit the moorings of the derrick hulks to remain in that or any other part of the river, the conservators will, under the powers vested in them by the 91st section of the Thames Conservancy Act, cause the same to be removed."

11. Instead of themselves laying down the moorings contemplated by the said resolution, the plaintiffs caused and procured the necessary work to be done by the workmen of the said conservators, and paid the said conservators the whole of the costs and charges of the materials and labour expended in and about the same.

12. The moorings as actually laid down for *Atlas* (No. 1), consist of four anchors and two stones. Of the anchors, the two named in paragraph 8 are small and of little importance, and it is not contended on the part of the defendant that any liability to be rated in respect of the soil occupied by them attaches to the plaintiffs. But the other two anchors are made with only one fluke each, and are such as are never used as anchors on board ship, but are only used for permanent moorings. Anchors with one fluke could not be trusted to take the ground when dropped in the ordinary way. In laying down each of these anchors a hole was dredged out large enough to contain the whole of the anchor, and to a depth between 7*ft.* and 8*ft.* below the bed of the river with ballast which lies all round and over the anchor through which the chain cable is led up to the derrick.

13. The two stones used are each of them about 7*ft.* long by 5*ft.* wide and 3*ft.* thick. In order to put each of these in their places, a hole was dredged, and large enough to contain the stone, and about 7*ft.* deep. The stone was then let down into the hole, and the hole then filled up to the level of the bed of the river with ballast. There is about 4*ft.* thickness of ballast on each stone, and about 70 tons of ballast are used; in each hole a chain cable is led up through the ballast to the derrick. The moorings formed by these two anchors and stones, are as firm moorings as it is possible to place in the river. It is quite impossible that the derrick using them can weigh them in the ordinary way in which ships weigh anchor. If the derrick had to be moved, it could only be by casting off the cables and leaving these anchors and stones behind.

14. *Atlas* (No. 2) was built at Jarrow on the Tyne, and towed thence by steamer to her present position. Prior to her taking up her berth, the

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following letter was sent by the conservators to to the plaintiffs, and the terms therein contained were accepted and agreed to by them.

Thames Conservancy, 14th Feb. 1866.
Gentlemen,—With reference to your application of the 18th Oct. last, and to my letter of the 29th ulto, I am now directed by the Conservators of the River Thames to inform you that the conditions upon which you will be permitted to lay down moorings, and to place the *Atlas* hulk No. 2, in Bagsby's Reach, opposite the River Wall between the upper collier section pile and Messrs. Hill's factory, distant 530ft. from the River Wall, are as follows, viz.: That the work be done to the satisfaction of the Conservators of the River Thames under the inspection of the engineer and harbour master. That the accommodation be assessed and the rent paid thereon; that it be not used for the purpose of storing coals; that it be for the general use of the coal trade; and that the barges to or from the hulk be in all cases towed by a steam tug to or from the Custom House, London. That all vessels leave the hulk immediately after being discharged. That sailing colliers when discharged be towed away to such part of the river as the harbour master may direct, and in all other respects be worked to the satisfaction of the conservators under the inspection of the harbour master, and with the full understanding on your part that if at any time hereafter it shall be found inexpedient to permit the hulk or moorings to remain in that or any other part of the river, the Conservators will cause the same to be removed. Upon receiving from you an assurance that you are prepared to comply with these stipulations, formal permission will be given for the moorings of the hulk. I am, &c.,
Messrs. Cory and Son. E. BURSTALL, Sec.

15. As in the case of *Atlas* (No. 1), the plaintiffs caused and procured the moorings therein mentioned to be laid down by the workmen of the conservators, and paid the conservators for the labour and materials employed.

16. The material portion of the moorings of *Atlas* (No. 2), consists of two anchors similar to the anchors mentioned in paragraph 12, but having iron instead of wooden stocks which bury themselves by their own weight in the bed of the river, so that it was not necessary to dredge holes to receive them. But instead of the stones used for *Atlas* (No. 1), two large fair shaped screws have been used. These are screwed into the bed of the river to a depth of 10ft. [Plan annexed.] These screws, together with the two single fluke anchors form moorings as permanent as those used for *Atlas* (No. 1), and it would be equally impossible for the derrick using them to weigh them in the ordinary way.

17. The rent paid by the plaintiffs is 600*l.* per annum for the moorings of *Atlas* (No. 1), and 650*l.* for those of *Atlas* (No. 2.)

18, 20. The plaintiffs deny that they are occupiers of land in the parish, and liable to be rated as such, and therefore refused to pay the said sum of 139*l.* at which they were rated or any part thereof. Proceedings were thereupon had before a Metropolitan Police Magistrate, sitting at Greenwich, who issued a warrant of distress in pursuance whereof the derrick *Atlas* (No 2.) was seized.

The plaintiffs then to free the derrick paid the 139*l.* with 7*l.* 9*s.* for costs, under protest, and brought this action.

21. Pleadings (to which no objection to be taken) and also Thames Conservancy Act 1857 (20 & 21 Vict. c. 147) (a) made part of case.

(a) By sect. 58 of this Act, "the consideration for any licence or permission which may be granted by the conservators . . . for laying down any mooring chains, or for driving any piles on any part of the bed or soil, or of the shores of the river Thames . . . shall be such

22. The question for the court is, whether the plaintiffs are occupiers of land in the parish of Greenwich, and liable as such to be rated, or assessed to the relief of the poor. If the court be of opinion that they are not such occupiers and are not so liable, the verdict is to be entered for the plaintiffs as aforesaid. If the court be of a contrary opinion, then a verdict is to be entered for the defendant.

Points for the plaintiffs: That the plaintiffs are mere licensees; that the facts found do not vary this case in principle from *Cory v. Churchwardens of Greenwich* (L. Rep. 7 C. P. 499), that the stones and screws are only a method of safe anchorage applicable to a large vessel, and that the plaintiffs are not occupiers.

Points for the defendant: That the facts show that the plaintiffs have a beneficial occupation of those parts of the soil of the river within the parish, in which they have laid down and keep the moorings of the derricks; and that the occupation of the plaintiffs is precisely similar to that of the Conservators of the River Thames as disclosed by *Watkins v. Milton-next-Gravesend* (37 L. J. 13 M. C.; L. Rep. 3 Q. B. 350).

Patchett for the plaintiff. — There is no such occupation of the soil of the river by the plaintiffs as to make them liable to be assessed to the poor rate: (*Cory and others*, appa. v. *Overseers of Greenwich*, resps., L. Rep. 7 C. P. 499; 41 L. J. 142, M. C.; 21 L. T. Rep. N. S. 150.) The only distinction between that case and the present, is that there the anchors were connected with the derrick itself, whereas here they are not connected with the derrick at all. [Lord COLERIDGE, C. J.—There are two questions: First, is this an occupation of the river? secondly, is it an occupation by the plaintiffs? *Watkins v. Overseers of Milton-next-Gravesend* (L. Rep. 3 Q. B. 350; 37 L. J. 73, M. C.; 18, L. T. Rep. N. S. 601) appears to be somewhat in favour of the defendants.] He also cited

Grant v. Oxford Local Board, L. Rep. 4 Q. B. 9; 38 L. J. 39, M. C.; 19 L. T. Rep. N. S. 378;
Reg. v. Abney Park Cemetery Company, L. Rep. 8 Q. B. 315; 29 L. T. Rep. N. S. 174;
Allan v. Liverpool Union, L. Rep. 9 Q. B. 180; 48 L. J. 69, M. C. 30; 30 L. T. Rep. N. S. 93;
London and North-Western Railway Company v. Hickmaster, L. Rep. 10 Q. B. 70; 44 L. J. 39, M. C.; 31 L. T. Rep. N. S. 835.

Barrow, for the defendants, relied chiefly on *Forrest v. Churchwardens of Greenwich* (8 E. & B. 890; 27 L. J. 96, M. C.) He also cited

Chelsea Waterworks Company v. Basley, 17 Q. B. 338.
Kiltow v. Liskeard Assessment Committee, 44 L. J. 53, M. C.; L. Rep. 10 Q. B. 7; 31 L. T. Rep. N. S. 601.

Sects. 84, 88, 91, and 105, of the Thames Conservancy Act 1857 (20 & 21 Vict. c. 147) were also referred to in the course of the argument.

as in the judgment of some competent person shall be deemed to be the value thereof to the person obtaining such licence." By sect. 91 "no mooring chains shall be put down or placed in any part of the river without the permission of the conservators previously obtained, and every such mooring chain which shall be put down or placed shall be so continued only during the pleasure of the conservators; and, the conservators may at any time by giving one week's notice in writing, require such mooring chains to be removed; and in case default shall be made in such removal beyond the time to be mentioned in such notice, such mooring chain shall be treated by the conservators as a nuisance and removed accordingly." The estate of the Crown in the soil and bed of the river within the flux and reflux of the tide was agreed to be conveyed to the conservators by articles of agreement set forth in the preamble to the Act.

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LORD COLERIDGE, C. J.—I am of opinion that the plaintiffs are entitled to judgment. This was an action to recover damages for an alleged unlawful distress for rates, and the question for us to determine is whether the rate was lawfully made. The plaintiffs have been rated for occupation of land enhanced in value by reason of the profits which are earned by such occupation, the description of the subject matter being "moorings to which coal derricks and apparatus are moored to the bed of the river." It is said that even assuming that there was an actual exclusive occupation, the question has already been decided, and in favour of the plaintiffs, the parties being substantially the same, in *Cory v. Overseers of Greenwich* (*ubi sup.*). But I am of opinion that the circumstances of that case make it distinguishable from this. The ground of that decision, as appears from the judgment of Willes, J., was that the actual moorings could not be occupied, but were part of the derricks. The question it is really necessary for us to decide here is whether there was such an occupation by the plaintiffs as to make them the proper objects of a rate. Now the correct definition is given in *Allan v. Overseers of Liverpool* (*ubi sup.*), and is "whether or not there was any exclusive occupation" given by the conservators to the plaintiffs. Such in effect is the test applied in the *London and North Western Railway Company v. Buckmaster* (*ubi sup.*), and in *Forrest v. The Overseers of Greenwich* (*ubi sup.*). Was there then such an occupation in the present case? I think not. The Conservators of the Thames had no statutory power to grant away the soil of the river, and, looking to the resolution of the conservators, under which the plaintiffs, for such occupation as they had, and to the 91st section of the Act, by which moorings may be removed at any time at the will and pleasure of the conservators, I cannot think that that resolution was anything more than a revocable licence to use.

BRETT, J.—The question whether the plaintiffs were rateable in this case depends on two questions; first, whether a particular part of the soil of the river has been so dealt with as to render some person or other rateable; and, if so, secondly, whether the plaintiffs are the persons rateable. Mr. Patchett argues that we are concluded by *Cory v. Overseers of Greenwich* (*ubi sup.*), but neither point was decided there. The mode of dealing with the soil of the river was not with any fixed spot, and therefore no person whatever could be rated. Mr. Barrow on the other hand cites *Watkins v. Milton-next-Gravesend*, and argues that that case shows that some person, at all events, is rateable. Now in that case Blackburn J., appears to have thought that the conservators were rateable, and ought to be rated, unless they had given away possession. If they give an easement, it may be that they are rateable in respect of it. But assuming that the conservators are rateable, are the plaintiffs rateable also? Mr. Patchett argues that they cannot be so, because the conservators cannot give an occupation. To this proposition I cannot assent. If the conservators assumed to give an occupation which the plaintiffs accepted, it would not be in the mouths of the plaintiffs, who would be mere encroachers, to say that they were not rateable. But it is clear, from all the cases, that for a man to be rateable, he must have exclusive possession of the soil, and a man having a mere licence to use the soil cannot be said to

have exclusive possession. The question, therefore, is, what is the true construction of the resolution of the conservators, and I think that by that resolution they merely gave a licence to use the soil, reserving to themselves the resumption of absolute power over it at any moment. The plaintiffs, therefore, having no exclusive possession, are not subject to the rate.

DENMAN, J.—It is material to look at the terms on which the plaintiffs occupied what is alleged to be the subject-matter of a rate. Looking at those terms, I can see nothing but a permission to lay down moorings, subject to the powers and duties of the conservators to remove them at any time under the 91st section of their Act. Our judgment must, therefore, be for the plaintiffs.

Judgment for plaintiffs.

Attorney for the plaintiffs, Mark Sheppard.
Attorney for the defendants, W. Bristolow.

COURT OF EXCHEQUER.

Reported by H. LEIGH, and CYRIL DODD, Esqs., Barristers-at-Law.

Jan. 20, 21, and May 8, 1875.

THE GUARDIANS OF HALIFAX UNION v. WHEELWRIGHT.

Treasurer to poor law guardians—Action against by guardians for negligence—Banker and customer—Payment of orders fraudulently altered—Payment of orders with forged indorsements—Negligent drawing of orders by guardians—Liability—16 & 17 Vict. c. 59, s. 19.

The defendant, the salaried manager of a bank, was treasurer to the plaintiffs, the guardians of the poor of the H. Union, and was appointed such by them in 1867, under the Poor Law Consolidated Order of 24th July 1847. At the time of his appointment the plaintiffs' account was kept in a common pass book, headed, "Guardians of H. P. L. Union in account with the H. Banking Company;" but it was afterwards kept in a treasurer's book according to the form prescribed by the Poor Law Board, but no change was made in the bank ledger. Moneys were from time to time paid in across the counter of the bank, of which the defendant was manager, to the bank clerks, to the credit of the account of the plaintiffs, and were dealt with by the bank in the same way as the moneys of other customers; and orders signed on behalf of the plaintiffs were cashed like cheques payable to order. The defendant received no remuneration or salary as treasurer, nor any profit from the use of the money left in his hands; but the plaintiffs, when their balance at the bank exceeded 3000*l.*, were allowed interest in respect of it by the bank.

It was the duty of L., a person in the service of the clerk to the guardians, to fill up orders, drawn on the defendant for payment of money, for signature by the guardians; and he drew a large number of orders in such a way as to enable himself, after they had been duly signed by two guardians and countersigned by the clerk, to increase the amounts for which they had been drawn by inserting words and figures in blank spaces left by him for the purpose, and he increased the amounts accordingly. He also forged the indorsements of the payees on some of the orders of which he had so increased the amounts, and also on some of which

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he had not altered the original amounts. Of all these orders he obtained payment at the bank, where, on presentation, they were paid in the ordinary way.

The arbitrator, on a case, stated in an action by the guardians to recover from the defendant the amount of the orders so paid, found, as a fact, that the payment of the excess by the treasurer's clerks was due solely to the fact that they were misled by want of proper caution on the part of the plaintiffs and their clerk, in signing the orders fraudulently prepared by L. for their signature, and that L. was enabled to make the fraudulent additions to the amounts by a similar want of caution on their part.

An action which the plaintiffs had brought against their said clerk for a negligent breach of duty with respect to the above mentioned orders, was compromised on payment by him of an agreed sum of money, and proceedings were stayed by a judge's order. The plaintiffs then brought a like action against the defendant as treasurer, to which (amongst other defences) he contended that the compromise of the plaintiffs' action against their clerk was a bar and an answer, on the ground that the treasurer and the clerk were joint wrongdoers in the matter.

Held, by the Court of Exchequer (Cleasby, Pollock, and Amphlett, BB.), that the negligence of the plaintiffs and their clerk, in drawing the orders, disentitled the plaintiffs to complain of the cashing of the fraudulent orders by the bank, on the principle that, as a man cannot take advantage of his own wrong, so he cannot complain of the consequences of his own default against a person who was misled by that default without any fault of his own.

Held also, as to the payment of the orders with the forged indorsements, that the account at the bank was in effect the plaintiffs' account, and that although the defendant as treasurer could not claim the protection given to bankers by sect. 19 of the 16 & 17 Vict. c. 59, yet the bank was entitled to the protection thereby afforded; and that as, by the plaintiffs' direction, the only receipt by the defendant was the receipt by the bank, he could not rightly be held liable where the bank without any act or default on his part were discharged.

THIS was a special case stated by an arbitrator for the opinion of the court under the following circumstances:

1. The plaintiffs are the Guardians of the Poor of the Borough of Halifax, and the defendant is their treasurer, appointed as such under the Poor Law Consolidated Orders of the 24th July 1847. His duties as treasurer were defined by the consolidated orders abovementioned, of which the following were considered by the arbitrator material to the decision of the case.

Article 203. The following shall be the duties of the treasurer of the union: No. 1. To receive all moneys tendered to be paid to the guardians, and to place the same to their credit. No 2. To pay out of any moneys for the time being in his hands belonging to the guardians all orders for money which shall be drawn upon him in conformity with Article 84, when the same shall be presented at the house or usual place of business of the treasurer, and within the usual hours of business. No. 3. To keep an account under the proper heads of all moneys received and paid to him as such

treasurer, to balance the same at Lady Day and Michaelmas in every year, and to render an account of such moneys to the guardians when required by them so to do. No. 4. Whenever there are not funds belonging to the guardians in his hands, as treasurer to the Union, to report the fact of such deficiency to the commissioners. No. 5. To submit a proper account together with the bonds of any officer which may be in his custody to the auditor at the place of audit, and at the times and in such manner as may be required by the regulations of the commissioners. No. 6. To receive the moneys payable to him as treasurer of the Union under any Act of Parliament or other authority of law.

By Article 204 it was provided that the regulations in Article 203 should not be applicable to cases in which the Governor and Company of the Bank of England might act as treasurer of the Union or bankers to the guardians. By Article 84, the guardians were to pay every sum greater than £5 by an order, which should be drawn upon the treasurer of the Union, and should be signed by the presiding chairman and two other guardians at a meeting, and should be countersigned by the clerk.

2. The defendant is, and, at the time of his appointment in Aug. 1867, was, known to be the salaried manager of the Halifax Commercial Bank; and it appeared, from an entry in the minute book of the guardians, that he was appointed treasurer because a majority of the guardians considered it desirable that the treasurer should be a bank manager.

3. The course of business between the plaintiffs and the defendant was as follows: Sums of money were from time to time paid into the account of the plaintiffs across the bank counter to the bank clerks, and the orders signed on behalf of the plaintiffs were cashed like cheques payable to order.

4. When the defendant was first appointed treasurer, the plaintiffs' account was kept in a common pass book, headed, "Guardians of Halifax Poor Law Union in account with the Halifax Commercial Banking Company (Limited)." The account was afterwards kept in a treasurer's book, according to the form prescribed by the consolidated order of the Poor Law Board (set out in Glen's Poor Law Board Orders, page 542), but no change was made in the bank ledger.

5. No express remuneration or salary was assigned to the defendant as treasurer.

6. Article 174 of the consolidated orders of the Poor Law Board is as follows: "If no remuneration or salary be expressly assigned to the treasurer, the profit arising from the use of money from time to time left in his hands shall be deemed to be the payment of his services."

7. The defendant never received any profit from the use of money left in his hands, and the sums deposited by the plaintiffs were dealt with by the Bank in every respect in the same manner as funds deposited with them by other customers; and it was understood that when the balance to the credit of the guardians exceeded 3000l. they should be allowed interest in respect of it by the Halifax Commercial Bank. During the period of the transactions hereinafter mentioned they were on several occasions credited with sums of money as interest, which were entered in the treasurer's book as payments to their credit by the bank.

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The orders drawn by the guardians were upon forms in the following words and figures:—

No. Halifax Union, Halifax, 187 .
To John Graham Wheelwright, Esq., Treasurer of the Guardians of the Poor of the Halifax Union, in the county of York, at the bank of the Commercial Banking Company, Halifax.
Pay to , or order, the sum of pounds, shillings and pence, and charge the same to the account of the said guardians.
A. B., Presiding Chairman.
C. D., Guardians of the Poor of the said Union.
E. F.,

Countersigned by
Clerk to the Board of Guardians.

N.B. The guardians request that this order for payment may be presented for payment within fourteen days from the date hereof, and within the usual hours of business.

They were in every case signed and countersigned in the manner required by sect. 84 of the Consolidated Orders of the Poor Law Board.

9. Charles Barstow was clerk to the board of guardians, and he had in his employment a clerk named Laidler. It was Laidler's duty to fill up the orders for the signature of the guardians, so that when filled up the whole of the writing and figures on them, with the exception of the signatures of the guardians and the counter signature of Barstow, were in Laidler's handwriting. Laidler drew a large number of orders in such a manner as to enable himself to increase the amount after they had been duly signed and countersigned; and he did increase them accordingly by various sums; in most instances by 10*l.*, the syllable "teen" being written after the word "four," "seven," "eight," or "nine," and the figure 1 being inserted before the figures 4, 6, 7, 8, or 9, in spaces left by him for the purpose. In some instances he increased the amount by a larger sum, as "twenty," "thirty," &c., by writing one of those words before a smaller sum, and making a corresponding alteration in the figures denoting the amount.

11. Laidler also found means to obtain the indorsements of the payees to a large number of these orders. No evidence was given as to the exact means by which this was effected; but it appeared probable that the amounts were increased after the indorsements were obtained. The orders so fraudulently increased in amount, but genuine in all other respects, were presented and paid at the bank in the ordinary way; and it was found as a fact by the arbitrator that the payment by the treasurer's clerks of the excess in these instances was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk in signing the orders fraudulently prepared by Laidler for their signature.

13. In other cases, the orders not being otherwise tampered with, Laidler forged the indorsements of the payees, and so obtained the amounts for which the orders were drawn, the total amount of such orders being 287*l.* 9*s.* 5*d.*

14. In other cases, Laidler both increased the amounts of the orders in the way before mentioned, and also forged the indorsements of the payees, and then presented and obtained payment of the full amount to which he had altered the orders, the original amount of them being 82*l.* 12*s.* 4*d.*; and the altered and increased

amount being 273*l.* 12*s.* 4*d.*, the fraudulent addition amounting to 191*l.* In every case Laidler was enabled to make these fraudulent additions to the original sums by a want of caution on the part of the guardians and their clerks as above described.

15. The guardians brought an action against Barstow, their clerk, for negligence and breach of duty (the pleadings and particulars to be taken as part of this case), and in their particulars they claimed 368*l.* 17*s.* 5*d.*, which included all the orders contained in the particulars in the present action. The action against the clerk was compromised by an agreement to stay proceedings, "on payment to the plaintiffs of the sum of 2320*l.* 4*s.* 6*d.*, the amount of certain of the orders or cheques enumerated in the particulars of the plaintiffs' demand," to be paid by instalments, as therein mentioned, "this sum to be accepted in full discharge of all claims, demands, and liabilities in this action, or otherwise, against the defendant as clerk to the board;" the plaintiffs engaging to assist Barstow in any proceedings to recover any money from Laidler, or his estate, or in prosecuting him, on being indemnified by Barstow.

16. The particulars delivered in the present action against the defendant claimed the sum of 2379*l.* 9*s.* 5*d.*, in respect of the different classes of orders above referred to. Of these orders as many as thirty-five, of which 1302*l.* had been fraudulently obtained, were orders payable to Barstow, and had been fraudulently increased; and as the plaintiffs considered that this compromise with Barstow deprived them morally, though not, may be, legally, of the right to recover upon them against the defendant, they abandoned that part of their claim; and claimed only against the defendant the balance of the total sum in respect of orders, some of them increased, some indorsed, and some both increased and indorsed by Laidler, as above mentioned.

The defendant contended, first, that the compromise with Barstow extinguished the plaintiff's claim to recover in respect of any of the items in their particulars; and, secondly, that as to 287*l.* 9*s.* 5*d.*, the defendant was within the 16 & 17 Vict. c. 59, s. 19(a); and that as to 273*l.* 12*s.* 4*d.* he was not liable to any part of it, or, at all events, only for 82*l.* 12*s.* 4*d.*, being the amount of the orders as originally drawn.

17. The questions reserved by the arbitrator for the opinion of the court were—(1) Does the settlement with Barstow in the action of the guardians against him prevent the plaintiffs from recovering against the defendant in the present action? If that question be answered affirmatively, then a verdict is to be entered for the defendant, and a plea is to be taken to have been added setting up this defence, to which the plain-

(a) The 16 & 17 Vict. c. 59, s. 19, enacts as follows: "Provided always that any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom such draft or order was or is made payable either by the drawer or any indorser thereof."

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[Ex.]

tiffs are to be taken as having demurred, and judgment thereon is to be deemed to have been given for the defendants. If that settlement does not so operate, then (2) are the plaintiffs entitled to recover from the defendant any and which of the following sums: 287*l.* 9*s.* 5*d.*, the amount of the cheques of which Laidler forged the indorsements; 273*l.* 12*s.* 4*d.*, the amount of those of which he both forged the indorsements and increased the amounts; or 82*l.* 12*s.* 4*d.*, the amount for which such last-mentioned orders were originally drawn; or 191*l.*, the amount of the fraudulent additions thereto? If the plaintiffs are entitled to recover any one or more of these sums, a verdict is to be entered for them for that amount; if otherwise, then for the defendant.

Field, Q.C. (with him was *Gibbons*), for the plaintiffs.—First, with respect to the whole action, the settlement of the plaintiffs' action against Barstow does not affect the present action in any way. The duties of Barstow, as clerk, and the defendant, as treasurer, to the guardians, were entirely distinct the one from the other; and as there was no joint tort committed by them, and the present action is for a separate tort by Barstow alone, the rule in *Brinsmead v. Harrison*, in the Exchequer Chamber (24 L. T. Rep. N. S. 790; L. Rep. 7 C. P. 347; 40 L. J. 281, C. P.) does not apply. Secondly, with respect to both the sums of 287*l.* 9*s.* 5*d.* and 273*l.* 12*s.* 4*d.*, paid on the orders with the forged indorsements, no negligence is found in the plaintiffs conducing to that forgery, and the defendant is not within the protection of the 19th section of the 16 & 17 Vict. c. 59, as he is not a "banker" within its terms. He is called in the case the "salaried manager" of the bank, and the enactment is in favour of bankers only: (*Ogden v. Benas and others*, 30 L. T. Rep. N. S. 683; 43 L. J. 259, C. P.; L. Rep. 9 C. P. 513.) The plaintiffs were acting under limited statutory authority, and they appointed a treasurer under a statutory duty in them so to do. The orders of the Poor Law Board would show that the relation between the guardians and the defendant was not that of customer and banker, but rather of master and servant, or principal and agent. The intention was that the guardians should not themselves have a banking account, but that a person to be appointed by them should keep and be answerable to them for all moneys paid to them. The plaintiffs had no banking account and no pass book. There was no other banking account than that of the defendant; and the orders of the plaintiffs were not on the bank, but on the defendant at the bank, and the defendant might have kept the account at any other bank. The bank were glad to have the advantage of the account by their manager being made treasurer, and that would account for his having no express remuneration or salary. But, thirdly, even if the 16 & 17 Vict. c. 59 protects the defendant, still, as to the 191*l.* excess by the forged indorsements beyond the amount for which the orders were originally drawn, the defendant is liable for the loss, and cannot put it upon the plaintiffs, his customers. He cannot discharge himself, except by showing payments made by the plaintiffs' authority, and for this the cases of *Hall v. Fuller* (5 B. & C. 750), and *Scholoy v. Ramsbottom* (2 Camp. 485), are authorities. The present case is not within *Young v. Grote* (4 Bing. 253; 5 L. J. 165, C. P.); and in *Robarts v. Tucker*

(16 Q. B. 560, at p. 580; 20 L. J. 270, Q. B.), Parke, B., said that the plaintiff, by signing a blank cheque, had given authority to anyone into whose hands it was to fill it up in any way that the blank permitted. The arbitrator has found want of caution merely, which is not sufficient. There is nothing here equivalent to an estoppel, which it is necessary there should be: (See per Parke, B. and Lord Cranworth, in the *Governors, &c., of the Bank of Ireland v. Evans's trustees*, 5 H. of L. Cas. 389, at pp. 410–413.) In *Swan v. The North British Australasian Company*, in error (2 H. & C. 175; 32 L. J. 273, Ex.), where blank forms of transfer of shares were executed by the plaintiff at the request of his broker, who filled them up by forgery, the Court of Exchequer Chamber held there was not such negligence as would create an estoppel. He cited also,

Coles v. The Bank of England, 10 A. & E. 487; 9 L. J. N. S. 36, Q. B.

A. Wills, Q.C. (with him was *J. W. Mellor*) for the defendant, *contra*.—For a loss happening through the negligence of the customer, the general rule is that he and not the banker is responsible. Now in *Hall v. Fuller* there was no negligence on the part of the customer, whereas in *Young v. Grote* there was, and that distinguishes the two cases. *Young v. Grote* has never been overruled, and its authority has been expressly recognised in *Ex parte Swan* (30 L. J. 113, C. P.; 7 C. B., N. S., 400) and also in the House of Lords in *Orr v. The Union Bank of Scotland* (1 Macq. H. L. Cas. 513). Lord Cranworth there says, "The principle is a sound one, that where the customer's neglect of due caution has caused his bankers to make a payment on a forged order he shall not set up against them the invalidity of a document which he has induced them to act on as genuine." The case here finds expressly that the payment was due solely to the bank clerks being misled by the plaintiffs' want of proper caution, and so negligence on their part or in the defendant is excluded. Then as to the forged indorsements; sect. 19 of the 16 & 17 Vict. c. 59, protects the defendant. That the statute was meant to protect all persons acting as bankers would appear from the schedule to the 55 Geo. 3, c. 18, exempting from duty "all drafts, &c., drawn upon any banker or any person or persons acting as a banker." That those latter words were omitted, *per incuriam*, from the 16 & 17 Vict. c. 59, which repealed the earlier Act of Geo. 3, is shown by the fact that in the subsequent Act of 17 & 18 Vict. c. 83, s. 7, the words are restored. The omitted words should, therefore, be read into sect. 19, as the exemption was meant to be as wide under the 16 & 17 Vict. as that under the repealed Act of Geo. 3. Again, the account at the bank was substantially and in effect the plaintiffs' account, and kept there by their direction. Lastly, the settlement of the plaintiffs' action against Barstow is an answer to the present action. But for the negligence of Barstow, the payments made by the bank, of which the plaintiffs complain, would not have been made. Substantially the tort was a joint one, and *Brinsmead v. Harrison* (*ubi sup.*) applies.

Gibbons, in reply, referred to—

Reg. v. Brantree Union, 1 Q. B. 130; 10 L. J. 71, M. C.; *Pott v. Clegg*, 16 M. & W., 321; 16 L. J. 210, Ex.; and the 22 Geo. 3, c. 83, s. 12.

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THE GUARDIANS OF HALIFAX UNION v. WHEELWRIGHT.

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May 8.—The judgment of the court (Cleasby, Pollock, and Amphlett, BB.), was now delivered by

CLEASBY, B.—In this case, which was argued before my brothers Pollock and Amphlett and myself, the question is whether the defendant, who was the treasurer of the plaintiffs, is liable to them for moneys received and not accounted for? The facts appear upon the special case, and it is unnecessary to recapitulate them. The question arises upon two items, that is, as was agreed to by the learned counsel on both sides, it is reduced to two items. The two items are, first, 273*l.* 12*s.* 4*d.* (composed of two amounts, 191*l.* and 82*l.* 12*s.* 4*d.*); second, 287*l.* 9*s.* 5*d.* The question upon the first item is, whether the defendant can claim the credit of payments made by him upon orders which had been signed by the plaintiffs, but had become forgeries by the amounts being increased. Under ordinary circumstances he could not claim the benefit of these payments, but it was said that the forgeries were attributable to the negligence and improper manner in which the drafts were drawn. The alleged negligence was the leaving blanks in the drafts, which admitted the insertion of increased amounts by the person who wrote them, and who committed the forgeries. Since they were signed by or on behalf of the plaintiffs in the improper form in which they had been drawn, the case is the same as if they had drawn them in their improper form, and the plaintiffs cannot, we think, avail themselves of the fact that the drafts were not drawn by themselves, but by some person in the office of their clerk.

We have, upon the consequences of the negligent drawing of the drafts, the following statement in paragraph 12 of the case: "The orders, thus fraudulently increased in amount, but genuine in all other respects, were presented and paid at the bank in the ordinary way, and I find that the payment, by the treasurer's clerks, of the excess in these instances was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk in signing the orders fraudulently prepared by Laidler for their signature." The question, therefore, which arises upon this item is, whether the negligent drawing of the drafts disentitles them to complain of the cashing of those drafts. Upon this question, the principal case cited before us is *Young v. Grote*, followed by several others—*Robarts v. Tucker* and *Swan v. The North British Australasian Company*. We think that the position taken by the defendant is made good by those authorities. It is true that there is some difference of opinion as to the proper legal ground for the conclusion, and perhaps some difficulty in determining which is the soundest. It is put on the ground of the negligence itself disentitling the party guilty of it in the first cited case (*Young v. Grote*), where the fault is said to be all on one side, and where the conclusion is justified, in the judgment of Best, C.J., by an apposite quotation from Pothier. In the case of *Robarts v. Tucker*, upon error from the Court of Queen's Bench, Parke, B., in no way impeaching the judgment in *Young v. Grote*, considered that it was founded on this, that the person who negligently drew the cheque, as it were gave authority to the party to fill up the cheque in the way it was filled up. In the last cited case, *Swan v. The North British*

Australasian Company, the present Lord Chief Justice of the Queen's Bench preferred putting the conclusion upon the ground of avoiding circuity of action, which is certainly the most exact ground, and agrees with what is said by Pothier in the passage referred to. But these various reasons for the conclusion only show how incontestable the conclusion itself is, and it is perhaps only an application of those general principles which do not belong to the municipal law of any particular country, but which we cannot help giving effect to in the administration of justice, namely, that a man cannot take advantage of his own wrong; a man cannot complain of the consequences of his own default against a person who was misled by that default without any fault of his own. So far, therefore, as regards this item of 273*l.* 12*s.* 4*d.*, we think the plaintiffs' cannot recover. As to the other item of 287*l.* 9*s.* 5*d.*, the question raised is one of some difficulty, and we thought proper to take time to consider it. This may be taken to be the amount of orders which were paid upon forged indorsements, and the negligent drawing of orders does not apply to it at all. The question raised is whether, under the circumstances of the case, the defendant can claim the protection given to bankers by the statute 16 & 17 Vict. c. 59, s. 19. Previous to that statute, if a banker paid a cheque with a forged indorsement upon it, he could not charge it to his customer, but the effect of that statute was to enable him to do so.

Two arguments were addressed to us upon this part of the case. First, it was said that, taking that statute together with several other statutes on the same subject, the word "banker" was not restricted to persons regularly engaged in the business of banking; but that any person who receives the money of another into his charge, and, according to the course of business between them, pays it out by having drafts drawn upon him payable to order, ought to be considered a "banker" within that enactment. We cannot accede to that argument. We think the Legislature had reference to a particular class, namely, persons carrying on the business of bankers, and conferred upon them a great privilege. Such a privilege can only be claimed (if conferred) in the clearest language. A confidence might well be placed in the integrity and character of persons carrying on the ordinary business of bankers which would not belong to every person entrusted with money. The other ground taken deserves more consideration. It was contended that all the facts of the case, taken together, showed that the account of the guardians ought to be regarded as a banker's account, kept by them with the Halifax Bank. The manner in which the orders were drawn is stated in paragraph 8 of the case—not being drawn upon the bank, but upon the treasurer, who was manager of the bank—was relied upon, and no doubt with some reason, to show that there was not a banking account between the guardians and the bank. And if there was no evidence on this part of the case it would be conclusive. But it appears, from paragraph 3 of the case that the course of business was for money to be paid to the credit of the plaintiffs across the counter. It further appears, from paragraph 4, that for some time the plaintiffs' account was kept in a pass book, in the usual manner; and that afterwards it was kept in

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a treasurer's book, in the prescribed form. It seems clear that, until that change, the bankers were the bankers of the plaintiffs, and though the statement is not so full as it might have been, the change was not for the purpose of altering the relation between the plaintiffs and the bank, but to comply with the rules as regards the treasurer. And this conclusion is fully warranted by the statement in paragraph 7, from which it appears that unquestionably, in point of fact, the guardians had for their own benefit an account of some sort with the bank, and the money was by consent of both parties regarded as theirs, and the plaintiffs received considerable sums of money from the bank as interest for their money. It was, therefore, a banker's account. But it was forcibly argued that, according to the Poor Law Regulations, this could not be. The guardians were to pay to the treasurer, and the treasurer ought to have had his own account with the bankers. The answer to this seems to be that the guardians chose to make use of a manager of a bank as treasurer, and in that way have the benefit of an account with the bank. We must, upon the question before us, deal with the facts as they are, not as they ought to have been. It follows that the plaintiffs, having chosen to keep and have the benefit of a banker's account, must take it with its incidents, and one of them is, that the payment of a genuine cheque with a forged indorsement is a discharge. It may be said that, though the bankers are discharged as against the plaintiffs, still the treasurer is not discharged, because he has bound himself to account for what he receives. But the proper answer to this seems to be that there was, in consequence of the manner in which the plaintiffs, who were the masters, chose to have the account kept, no receipt except by the bankers, and the defendant could not help himself; he can only, therefore, be regarded as receiving subject to the consequences of the manner of receiving. It may also further be said that, if the account must be regarded as the account of the treasurer with the bank, still it was an account kept by him with the bank by the order of the plaintiffs, and they ought not, therefore, to make a claim which he could not have enforced against the bank. The case is one of difficulty, in consequence of the parties having departed from the proper course; but we think the proper conclusion is that, as the only receipt by the defendant was the receipt by the bankers, under the circumstances stated in the case, he cannot rightly be held liable when they, without any act or default on his part, are discharged.

Judgment for the defendant.

Attorneys for the plaintiffs, *Le Riche and Son*, agents for *Wavell, Philbrick, Foster, and Wavell*, Halifax.

Attorneys for the defendant, *Jacobs, North, and Vincent*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Monday, May 31, 1875.

RALPH (app.) v. HURRELL (resp.).

Malicious injury—Ownership of property—Variance—Jervis's Act (11 & 12 Vict. c. 43), s. 1.

In an information for malicious injury to property under 24 & 25 Vict. c. 97, s. 52 where the ownership is laid in several persons, and it appears that only one of these is the legal owner, the justices ought not to dismiss the information, but ought to hear the case, or, if they think the variance likely to mislead, to adjourn the hearing.

CASE stated by justices under 20 & 21 Vict. c. 43.

An information was laid by the appellant, who was the manager of a club, against the respondent under 24 & 25 Vict. c. 97, s. 52, for wilfully and maliciously damaging a lamp fixed to the clubhouse. The property was laid in Edward Hammond Bentall, Stephen Clarke, and Frank Anderson, who were the trustees of the club. The appellant did not himself see the act done, but it was proved by other evidence to have been done by the respondent. Edward Hammond Bentall, being the lessee of the house, which he was anxious should be used as a club-house, had entered into a declaration of trust, made between himself of the one part, and Stephen Clarke and Frank Anderson (therein called the trustees) of the other part, whereby he declared that he would stand possessed of the house upon trust for the trustees for the time being. This declaration of trust was put in evidence on behalf of the prosecution. The justices were of opinion that the evidence did not sufficiently show that the appellant had the charge or custody of the lamp, and that the evidence given was not sufficient to show that the trustees were the owners of the lamp, or whether Mr. Bentall was not solely the owner thereof. They, therefore, dismissed the information.

By 24 & 25 Vict. c. 97, s. 52, "Whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace," be imprisoned with or without hard labour for not more than two months, or be fined not more than 5*l.*, and also pay a further sum as compensation, not exceeding 5*l.*

Philbrick, Q.C., for the appellant.—This would formerly have been a fatal variance, but it is now provided for by Jervis's Act (11 & 12 Vict. c. 43), sects. 1 and 9. The justices ought not to have dismissed the information, for no injustice could have been done by proceeding with the case. If they thought this would produce injustice, they ought to have adjourned. It is immaterial whether the appellant had charge of the property or not.

BLACKBURN, J.—I think the justices have made a mistake, and the case will have to go down again. The information was for damaging a lamp, the property of three persons, who were named. The first objection was that the person who preferred the charge was a servant, and that he should have seen the act done with his own eyes. I cannot understand this objection. The justices seem to have thought that the person in charge of the property was the only person who could prefer

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the information. The other objection was that the property was laid in three persons, of whom one only was the legal owner, for the declaration of trust to the other two made them only equitable owners. This would be a fatal variance at common law, where everything had to be proved as laid, "*secundum allegata et probata*," but by Jervis's Act (11 & 12 Vict. c. 43), sect. 1, "no objection shall be taken or allowed to any information, complaint, or summons for any alleged defect therein in substance or in form, or for any variance between such information, complaint, or summons and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint as hereinafter mentioned; but if any such variance shall appear to the justice or justices present and acting at such hearing to be such that the party so summoned and appearing has been thereby deceived or misled, it shall be lawful for such justice or justices upon such terms as he or they shall think fit to adjourn the hearing of the case to some future day." I think this can bear no other construction, but that the justices ought not to listen to such a variance as this; if there is a variance they may and ought to go on, unless it is a case in which to do so would produce injustice, then they may adjourn. I do not find that they have done this here. They do listen to a variance, which is just such a variance as the Act says the justices should not regard. They should have proceeded as if the right person had been named instead of the right person together with two others.

LUSH, J.—I am of the same opinion. I think there was a variance, because the deed did not convey the property, but it remained in Bentall. If the justices thought that injustice was likely to be caused by the variance they should have adjourned the case. If they did not think so, they should have gone on with it.

FIELD, J.—I am of the same opinion.

Case remitted to the justices.

Attorney for the appellant, F. A. Jones, Chelmsford.

Tuesday, June 1, 1875.

PYM v. HARRISON.

Grant of right of way by will before the Wills Act—Words of limitation—Way of necessity—Excessive user.

Plaintiff's and defendant's lands adjoined each other, and about the middle of the boundary was a gate into defendant's land at the end of a lane or road leading to this gate from the public street, and passing some tenements and entrances to closes on plaintiff's land. On the opposite side of defendant's land from the gate was a house in a ruinous state, which was once, in 1830, a dwelling house, and between this house and the gate was a separate building, then used as a kitchen for the house. The remainder of defendant's land has been partly and at different times garden, orchard, grass, &c.

The owner of plaintiff's and defendant's premises, who died in 1830, by his will devised to his nephew, the defendant's predecessor, the said premises now the defendant's, and he directed that his nephew should have the privilege or right of the said road for loading coals, dung, and other necessary things, through the said gate, to the said kitchen and garden. This was the only approach for a horse and cart to the said garden and back building, and the only approach on foot except through

the house. The defendant and his predecessors used this building as a pig-stye and as a stable, and the road for horse and cart, cattle, sheep, and pigs, and carrying hay, bricks, and mortar.

Held, that this grant of a right of way, being a way of necessity, was appurtenant to the premises, and not merely a personal privilege or for the life of the grantee; also that this was not an excessive user under the circumstances.

This was an action of trespass brought by the plaintiff against the defendant for the alleged trespasses complained of as follows; and also for the purpose of obtaining a writ of injunction to restrain the defendant from continuing and repeating the said alleged trespasses, and by order according to the Common Law Procedure Act 1852, a special case had been stated for the opinion of the court without any pleadings, of which the following is an abstract:

The two questions in dispute were, first, the right of defendant to use a private roadway over ground occupied by plaintiff; secondly, if he had the right whether his user was excessive.

The plaintiff's and defendant's lands adjoin each other along their greatest length, and about the middle of this side of the defendant's land is a gate at the end of a lane or road, which leads to this gate from the public street, passing some tenements and entrances to closes of the plaintiff. The land and buildings on both sides, and the soil of the roadway, all belong to the plaintiff.

On the defendant's land inside the gate is a separate building, and on the other side of it towards the public street is a house, and adjoining it there are some other buildings. These premises occupy about a fourth part of the land now occupied by the defendant, the remainder being partly and at different times garden, orchard, grass, &c.

In 1786 Abraham Harrison, the elder, surrendered a messuage, bakehouse, and garden (now part of the defendant's premises) to the use of himself for life, and after his death to the use of his son Abraham Harrison the younger, and Elizabeth his wife, for their lives, and after the death of the survivor, to the use of the heirs of the body of Abraham Harrison the younger, and in default of such issue, to the use of his own right heirs.

The said Abraham Harrison the elder died in or about the year 1787.

The said Abraham Harrison the younger, in addition to the life estate in the property to which he succeeded on the death of his father Abraham Harrison the elder, was also entitled to the copyhold property, forming the plaintiff's and the remainder of the defendant's present properties.

During the life of the said Abraham Harrison the younger, the separate building on the defendant's property was used by him as a kitchen, part of defendant's land as a garden, and part as a croft. Access to the garden was obtained over the road in dispute, which was used by the said Abraham Harrison the younger soon after he acquired the plaintiff's property, and which has been used since the death of the said Abraham Harrison the younger, in manner hereinafter mentioned.

Abraham Harrison the younger, by his will dated 25th Jan. 1830, the material parts of which are set out in this paragraph, devised to his wife Elizabeth Harrison for her life, with remainder to Thos. Richardson and the heirs of his body, the dwelling house, crofts, outbuildings, and appurtenances, and piece of land therein described,

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being the premises of the plaintiff, and after making several other devises, the testator gave and devised all his other freehold and copyhold hereditaments unto his executors thereafter named during the life of his wife, in trust to apply the rents and profits for the purposes of his will. And after the decease of his wife the testator gave and devised to his nephew John Harrison, and to his heirs and assigns for ever, all that kitchen standing behind a dwelling house wherein Thos. Herrod then lived (such kitchen and dwelling-house being now the premises of the defendant), and also the garden behind the said dwelling-house and premises occupied by the said Thos. Herrod, and so much of the upper and lower croft adjoining as would enlarge the garden so as to extend to the bottom of the lower croft, and so as to be eighteen yards in width from the top or kitchen and all the way down to the bottom. The said will then proceeds as follows:—"And I will and direct that my said nephew John Harrison shall have the privilege or right of a road for leading coals and dung, and other necessary things, through the large gate opening from Bridge-street near to the cow house in the said upper croft over the said upper croft to the said kitchen and garden."

The said testator, Abraham Harrison, died on the 6th Feb. 1830, and his will was proved in the same year.

The testator's widow, the said Elizabeth Harrison, entered into possession of the premises so devised to her, and died on the 9th Nov. 1839. Thereupon the said Thos. Richardson was admitted on the 2nd March, 1841, to hold as customary tenant in tail the lands and tenements devised to him as aforesaid (now the plaintiff's premises), according to the custom of the manor of Beaureper; and the said John Harrison entered into possession of the lands and tenements respectively devised to him in the said will.

Upon the death of Elizabeth Harrison, the tenant for life, John Harrison, became entitled as customary heir of Abraham Harrison the elder and entered into possession of the remainder of defendant's property, but was not formally admitted until the 17th July, 1852.

From the death of Elizabeth Harrison in 1839, down to the year 1860 or 1861, John Harrison, or his tenant, used the road in question in connection with their use and occupation of the building on his property as a kitchen, and of the remainder of the property as a garden and orchard in the manner hereinafter mentioned.

In 1860 or 1861 the said kitchen ceased to be used as a kitchen, and became a pig-stye, and from 1871 until the present time has been used as a stable. From and after such change of user in 1860 or 1861 down to the death of the said John Harrison, which took place on the 7th March, 1865, the said John Harrison or his tenants used the road in question in connection with their use and occupation of the said building as a pig-stye, and of the remainder of the property as a garden and orchard in the manner hereinafter mentioned.

John Harrison by his will dated 7th May, 1861, devised his property to Joseph Wright and Michael Jessop upon trust to sell the same; and the said Joseph Wright having disclaimed the property so devised to him, the said Michael Jessop was admitted alone on the 10th May, 1866.

On the same day Michael Jessop surrendered the property so devised to him in trust for sale to

Joseph Wright in fee, to whom he had sold the same. The defendant is and was at the time of the alleged trespass the tenant to Joseph Wright of this property.

From the death of John Harrison down to the sale to Joseph Wright by Michael Jessop, and from the sale to Joseph Wright down to 1871, Joseph Wright and their respective tenants used the road in question without interruption in connection with their use and occupation of the said building as a pig-stye, and from 1871 to 12th June, 1872, as a stable; and of the said remainder of the land as a garden and orchard.

From 1839 to 1848, whilst the defendant's premises were in the occupation of one Thos. Herrod, as tenant, the road in question was constantly used by him for the purposes of driving cows, sheep, and pigs, and for carrying cabbages, manure, straw, coals, firewood, and other things of like character, in a wheelbarrow. The said road was also used by him with his horse and cart at the time of hay harvest, when he carried his hay from some other grass land in his possession, and stacked it upon the said croft.

From 1848 to 1868, whilst the defendant's premises were in the occupation of one George Beresford, as tenant, the said road was constantly used by him for the purposes for which the said Thomas Herrod constantly used the same as in the last paragraph mentioned; bricks, sand, mortar, lime, and stone had also at one or more times been carried in a cart drawn by a horse along the said road, for the purpose of being worked up or used by him upon the said croft in the way of his trade as a stone mason; but such user was not shewn to be of a general or continuous character, but was of an exceptional and temporary character in connection with some temporary arrangements with regard to his said trade as a stone mason.

No interruption, interference, or dispute of any kind, had at any time arisen with respect to the said road until after the plaintiff had entered into possession in June, 1872, nor had any notice whatever been given to the owners from time to time of the premises now in the occupation of the plaintiff of any difference in, or enlargement of, the user of the said road until after the plaintiff had entered into possession in June, 1872.

Save the road in question, there is not now and never has been any access for carts, horses, or cattle, to the said defendant's property, and save the road in question, there is not and never has been any access for persons on foot to the said property, except through the sitting-room of the house. The said house is now in a ruinous state, and can be and has occasionally been used as a passage for persons on foot passing from the high street to the said property, and cows can be and have occasionally been driven down the said passage and through the said sitting-room. The said passage is too narrow to admit of the passage of a cart.

The property so as aforesaid devised to the said Thomas Richardson, now belongs to the plaintiff's landlords, viz., the Right Hon. Lord Belper, Anthony Radford Strutt, Esq., and George Henry Strutt, Esq., as tenants in common, they or their predecessors in title having purchased it from the said Thos. Richardson, who had previously made a surrender on the 6th July, 1852, of the premises with a view to cutting off the entail created by Abraham Harrison's will.

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The plaintiff became tenant to Lord Belper and Messrs. Strutt of these premises in 1872, and sues for the injury done to his occupation by the use of the road in question by the defendant as hereinafter mentioned.

The defendant, who is a coal higgler and stationer, uses the building upon his property as a stable for the horse kept by him in the way of his business, and places his cart in the garden, and the defendant makes use of the said road in question, passing over the same to and from the said stable and garden with his cart and horse.

The question for the opinion of the court is, whether under the circumstances hereinbefore stated, the defendant is entitled to use the said road in manner hereinbefore appearing, or in any other and what manner.

If the court shall be of opinion that the defendant is not entitled to use the road in question in any way, the verdict is to be entered for the plaintiff for 40s. damages.

If the court shall be of opinion that the defendant is entitled to use the road in manner hereinbefore appearing, the verdict is to be entered for the defendants.

If the court shall be of opinion that the defendant is not entitled to use the road in question in manner hereinbefore appearing, but is entitled to use it in some other way, a *set processus* shall be entered.

Mellor (with him J. G. Kennedy) argued for plaintiff.—The testator, Abraham Harrison the younger, died in 1830, so the 28th section of the Wills Act, 1837 (1 Vict., c. 26), has no application. The words directing that the nephew "shall have the privilege or right of a road," merely amount to the grant of a personal privilege, or at most of a right of way for the grantee's life. They are not sufficient to make the right of way appurtenant to the premises previously devised. In *Reay v. Rawlinson* (30 L. J. 330, Ch.), the Master of the Rolls held that a gift by will dated in 1838 to J.M., "of the house she lives in, and grass for a cow in G. field," part of another estate, passed an estate in fee in the house, but would not create a permanent interest in the land of the other estate. And according to *Nichols v. Hawkes* (10 Hare 342), even the Wills Act would not affect the extent of this mere direction. There it was held that the gift after the Wills Act of an annuity without words of limitation, out of a real estate devised to another person, did not carry more than a life interest, as it would have done before the statute. At all events this user of the right is excessive.

Wills, Q.C., appeared for the defendant.

BLACKBURN, J.—I think we need not trouble counsel for the defendant. The testator was the owner of all the premises now held both by plaintiff and defendant, and he left to the defendant's predecessor absolutely all the estate now enjoyed by him. He adds, "And I will and direct that my said nephew, John Harrison, shall have the privilege or right of a road for leading coals and dung, and other necessary things, through the large gate opening from Bridge-street, near to the cow-house in the said upper croft, over the said upper croft to the said kitchen and garden." This was clearly a way of necessity at the time of the devise, and it seems to be so now for the purpose of the devise. In the case cited, *Reay v. Rawlinson*, the Master of the Rolls based his decision upon the absence of necessity for the

easement. He said, "The testator gave the house absolutely to Jane Malcolmson in fee simple. The grass for a cow was not necessary for the enjoyment of the house; it passed no interest in the land, but merely gave a personal right, by way of easement, to pasture a cow on a field, given absolutely to another, as long as she thought fit." By implication, if necessary for the enjoyment, the easement would have been appurtenant to the gift of the house; and I have no doubt this gift of a right of way ought to be appurtenant to the estate devised to John Harrison. On the second point, I do not see under the circumstances that there has been any user of the right of way exceeding that intended by the words of the grant. The defendant, therefore, is entitled to the verdict. There is not the ground for a *set processus*.

LUSH, J.—I am of the same opinion on both points. I think common sense and reason require us to hold that the testator meant to give this right of way as appurtenant to the devise.

Judgment for defendant.

Attorney for plaintiff, H. G. Field, for J. G. Jackson, Belper.

Attorneys for defendant, Bevan and Daniel, for T. Worthington, Derby.

COURT OF COMMON PLEAS.

Reported by ETHELINGTON SMITH and J. M. LELY, Esqrs.
Barristers-at-Law.

Monday, May 31, 1875.

LOVERING (app.) v. DAWSON AND OTHERS (resps.) (1).

Municipal election—35 & 36 Vict. c. 63—Corrupt Practices (Municipal Elections) Act 1872—Who may be respondent—Unsuccessful candidate.

An unsuccessful candidate at a municipal election cannot be made a respondent to a petition complaining of the election, although he had coalesced for the purposes of the election with two successful candidates, so as to be responsible equally with them for any acts done by any of the three in furtherance of the common purpose.

Under the Act 35 & 36 Vict. c. 60, the only person who can be made a respondent to a petition is one whose seat is sought, or whose election is disputed.

This was a case under the Municipal Elections Act 1872, in which a question was raised for the opinion of the Court of Common Pleas arising out of the trial of a petition against the three respondents, who had been candidates for the office of Town Councillors for the Borough of Maidenhead, and two of whom had been returned as elected in Nov. 1874. The petitioner was also a candidate, and on the case coming on for trial before the barrister appointed under the Act to hear the petition, the respondent Poulton, who had been an unsuccessful candidate, objected to being joined as a respondent with the two other respondents, who had been returned as elected. The barrister stated the following case for the opinion of the court upon the objection so raised.

At the last Municipal Election of Town Councillors for the town of Maidenhead, there were several candidates, of whom Poulton, Dawson, and Walker were three. Dawson and Walker were duly elected, but Poulton was not. A petition was presented, under the Municipal Election (Corrupt Practices) Act 1872, against the return of the said Dawson

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and Walker, and Poulton was also included in that petition as respondent.

At the trial of the petition before me, a preliminary objection was taken by Mr. Biron, who appeared as counsel for Mr. Poulton, to that gentleman being joined with the other respondents in the petition, on the ground that the Act only contemplated a petition against those persons who were actually returned to office, and that the word "candidate," employed in the Act could not be said to apply to those who, although candidates for election, had not been returned to office, and relied upon several sections of the Act.

Mr. Griffiths, who appeared for the petitioner, contended that the word "candidate" extended to all persons who were candidates for election, and that wherever the word "candidate" was used in the Act, it must be used according to the interpretation clause of the Act.

Dawson, Walker, and Poulton coalesced for the purpose of canvassing the burgesses.

On the trial before me, I found that Dawson had been guilty of bribery through their agents.

Upon these facts I have, at the request of Mr. Poulton's counsel, to ask this honourable court to determine whether, under the Municipal Elections (Corrupt Practices) Act 1872, the respondent Poulton was properly made a respondent in the petition.

In the event of the court being of opinion that he was so properly joined, then he is under my order, to pay his proportion of the costs in common with Dawson and Walker, to the petitioner Wm. Lovering, of and incidental to the said petition; but in the event of the court being of opinion that the said Poulton was improperly joined as respondent, then I order that he do receive his costs of and incidental to his defence.

The prayer of the petition, which charged bribery, treating, and corrupt practices generally against the three respondents, was, "That it might be determined that the said election and return of the said Robert Walker and William Dawson was null and void, and they were not duly elected, and that the said Robert Walker and Wm. Dawson and Richard Swallow Poulton were and are disqualified for being elected to and for holding any municipal office in the borough, for which the said election was held, and that each of them is subject to the disqualifications in the said statute mentioned and set forth."

H. D. Greene (J. O. Griffiths with him), for the petitioner.—Mr. Poulton has been properly made a respondent to the petition. The Act 35 & 36 Vict. c. 60, defines who may be a respondent. The object of the Act and of the inquiry held by the court constituted under the Act, may be seen in ss. 4 and 5. There, "candidate" must certainly include unsuccessful candidates; and there is a case in this court where an unsuccessful candidate, one who was not returned as elected, was, nevertheless, held to be properly made a respondent, and made to pay the costs: (*Yates v. Leech*, 30 L. T. Rep. N. S. 790; L. Rep. 9 C. P. 605.) Then in the 9th sub-section of sect. 13, there is a provision that two or more candidates may be made respondents to the same petition, and nothing is said limiting them to successful or elected candidates. [Lord COLERIDGE, C.J.—Is not the position of a respondent summed up in sect. 18: "If he dies, resigns, or otherwise ceases to hold the office to which the petition relates"? This seems to contemplate his

holding office. BRETT, J.—If an election is not complained of nor the seat claimed, under what part of the Act could you petition and make an unsuccessful candidate respondent? The 13th section, sub-sect. 1, makes respondent to include a person against whose election a petition is presented. It is not, therefore, limited to it: (*The Launceston Election case, Drinkwater v. Deakin*, 30 L. T. Rep. N. S. 832; L. Rep. 9 C. P. 626.) There would be no means of obtaining otherwise a declaration of disqualification for a future time. By a reference to the practice of committees, it will be seen that unsuccessful candidates were sometimes made respondents: (*The Beverley case, Wolferstan and Bristowe, Elec. Cas. 77.*) *The Taunton case* (2 P. R. & D. 159.) [Lord COLERIDGE, C.J.—In that case Sir E. Colebrooke claimed the seat, and so the electors might make a recriminatory charge.] *The Pontefract case* (Wolf. & Dew. 68). [Lord COLERIDGE, C.J.—In *The Maldon case*, in 1853 (2 P. R. & D. 143), the reason of this is made plain; for there, when the original petition was withdrawn, the second recriminatory one was not allowed to proceed, because it did not affect the election.] It would manifestly be a great hardship that Mr. Poulton could be reported on and so disqualified in his absence; and yet, unless a respondent, he might be abroad and have no notice, so as to defend himself. The disqualification takes effect upon the report, and the court must report. [GROVE, J.—There seems to be no provision answering to sect. 45 in the Parliamentary Elections Act to be found in the Municipal Act.] No, that is so; and, consequently, the court cannot interpolate anything, and a man in the position of Poulton may be disqualified unheard. Another point is, that a man's conduct may be inquired into, and he may incur disabilities; yet if he do have notice of the charges, and appear and defend himself, and do so successfully, he still will have no means of having security for his costs, or of recovering them against those who have wrongly charged him, and he will have no means of compelling witnesses to attend. The wording of the 5th section of the Act seems to require the construction for which we contend. [BRETT, J.—That is no doubt a difficulty, but, probably, candidate there spoken of means an unsuccessful candidate, who is a petitioner.]

Biron, contra.—Part 1 of the Act, down to the end of sect. 11, is new legislation, and is dealing with corrupt practices, and assumes that the persons spoken of are parties to the petition, and so brought before the court. Those sections apply, as is manifest upon studying them, to parties to the petition, that is, to successful candidates or unsuccessful candidates who petition and claim the seat. The claim or occupancy of the seat is the test, and if an unsuccessful candidate claim the seat, a counter case may be opened and proved against him, to prove him disqualified also, and to this case he becomes a sort of respondent. It is true that there is no section like sect. 45 of the Parliamentary Elections Act, but although by sub-sect. 6, the court must report the names of persons proved at the trial to have been guilty of corrupt practices, yet it is submitted that all those provisions must be read with reference to sub-sect. 9 of sect. 15. [Lord COLERIDGE, C.J.—The 45th section in the Parliamentary Elections Act gives a description of proceedings in which the person charged has an opportunity of making his defence, and does not, as it seems to me, expressly

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enact that he shall have an opportunity of being heard. BRETT, J.—It is contrary to the principle of English law to impose disabilities upon a man without notice to him of the charge.] At any rate, in the 13th section, where there is an express definition of respondent, the words in sub-section 1, "against whose election a petition is presented," shows that the respondent contemplated by the Act must be a person in the position of one elected; and the case cited of *Yates v. Leech* (*ubi sup.*) is not in conflict with the present contention, as there Leech claimed and assumed to be elected, and acted. The form of petition given in the rules supports the same view, as it is directed against an election, disputing the validity of the return, praying for a declaration that A. B. was not duly elected, and that the election was void, or that someone else was duly elected and ought to have been returned.

Greene, in reply.—The form of petition is wider than has been suggested, for the words are added to the prayer, 'as the case may be.' If an unsuccessful candidate were respondent, the declaration prayed for is, that he is disqualified from being a candidate again for seven years. The Act would be very unequal if construed as has been argued on the other side, for it would enable a man to inflict costs by being a petitioner, but would not permit him to obtain costs if wrongly accused and compelled to defend himself.

Lord COLERIDGE, C.J.—I am of opinion that in this case our judgment should be for the respondent. This was a municipal election petition for the borough of Maidenhead, and the petition was presented against three persons who had been candidates at the election, two only out of the three having been elected, and the third having coalesced and stood with them, but having failed. As to the two who were returned as elected no question arises, the sole question for us here to determine is as to the third so-called respondent. At the trial before the barrister appointed to try the petition, this third person, the unsuccessful candidate, took the objection at once that he was not a respondent within the terms of the Act, that he had not been elected, that he had no seat to defend, and so was not properly joined with the other two. The commissioner, who states these facts in the case to us, heard the objection and let the case go on in the form in which it was, leaving for us the question whether it was a good objection or not, and he has found that if Mr. Poulton was properly joined as a respondent he will have to pay certain costs, but if improperly, then his own costs will be paid him by the petitioner. The whole question is to be decided under the Municipal Elections Corrupt Practices Act 1872 (35 & 36 Vict. c. 60), and I am of opinion that he cannot properly be so joined. If the question had been the converse of that which we decided in *Yates v. Leech* (*ubi sup.*), it may be that our decision would have been different. It may be that if Mr. Poulton had claimed to be a respondent, and had willingly appeared as such at the trial, we should not have struck him out; it is very possible that we should have allowed him in such a case to remain a respondent, and we are open so to hold if a case arises under such circumstances. Our decision now does not conflict with it, for he would then in the case supposed have taken upon himself the responsibility of being a respondent, he would have assumed to be a person against whose election a petition had been pre-

sented. But even if upon request he might be allowed to be a respondent, it by no means follows that the converse proposition is true, and that he can be made against his will a respondent when he has not assented and his conduct not having contributed in any way either to imply or to waive his consent. Now, can he be made a respondent? The Act of Parliament on which it turns has been fully brought before us, and all the sections bearing even remotely on the point elaborately argued; let us see, therefore, what the Act says. Part 2 begins with sect. 12, which sets out the form in which elections may be questioned, and enacts that it is to be by the court appointed by that Act, and in no other way. The 13th section enacts certain formal matters in reference to the petition, as to the parties to it, the time within which it shall be presented, the security, and so forth, and the prescribed form referred to is to be found in the rules made under the Act. Now, when the section speaks of a petition complaining of an undue election, it manifestly does not contemplate making any person a respondent except a party to the petition, or questioning anything at all except the election, and then the first sub-section goes on and speaks of a respondent as including any one or more persons against whose election a petition is presented. Now, that is quite different, as applied to the facts here, from the case in *Yates v. Leech*, where Leech asserted that he had been elected, and took the oath and acted; he was made a respondent properly, because the Act of Parliament says that his election could be questioned in no other way. There are other portions of the Act equally clear, of which I will mention sub-sect. 9 of sect. 13, which confirms the argument which arises on the provisions already commented on, where there may be two respondents to one petition, for that must mean in a petition complaining of the undue election of the persons against whom the petition is presented. On that short ground I am of opinion that it is only a person whose seat is sought, or whose election is disputed, who is a respondent within the meaning of the Act, or liable to be made such. The two arguments against so holding, which are fair ones for consideration, are, first, that derived from the interpretation clause; and, second, that founded upon the question of costs. The interpretation clause says: "Candidate means a person elected, or who has been nominated, or has declared himself a candidate for election to an office," and, no doubt, within the latter portion of the interpretation clause, Poulton was a candidate, for he had declared himself one. But the former part of the section says that the words shall bear the meanings assigned, except where the context otherwise requires; and in sect. 13, sub-sect. 9, the context requires that the second meaning be not assigned to the word candidate. Then there is a fair argument that if a person's acts are questioned, and upon inquiry he is accused of any corrupt practice, he might, by the finding of the commissioner upon such inquiry involving such accusations, be disqualified, and that without having been heard or even, perhaps, having had notice of the charges brought against him. And also that, supposing he is not made a respondent, but knows of the charges, and appears, and successfully defends himself against them, he would, nevertheless, be unable to get any costs from those who had thus wrongly accused him. This, no doubt, is so; but in the case of all elections, and

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inquiries into their circumstances and results, the subject can hardly be touched without involving some degree of personal injustice, as, for instance, in the case of the disfranchisement of a borough. But the question to consider is, what is the object of these inquiries? Now the chief one certainly is to detect corrupt practices and to punish them; and if in the attainment of a great general good individuals suffer, it is to be regretted, but it still must be so sometimes. The Legislature having this object, enacted these salutary provisions in the Act before us, and whether they be too severe or not does not concern us now; here they are, and we must give effect to them. One answer, therefore, to the suggestion of hardship arising by implication is, that the individual must give way to the public good, and a second answer is that, under the Parliamentary Elections Act 1868, the same injustice, which it is suggested might arise here, happens under the direct enactment of the Act of Parliament, when persons may find themselves disfranchised without any fault of their own, and without having been heard, and where they are totally incapable of recovering costs against any one if they do succeed in clearing their own characters by obtaining a hearing at very great expense. Now this is under the Act of 1868, though there is in that Act one expression, no doubt, "after he has had an opportunity of being heard," which causes some hesitation in my brother Grove's mind, because the same clause does not occur in the Municipal Elections Act 1872, and he doubts, therefore, whether the Legislature intended that a man might be disqualified without being heard. I am of opinion, speaking for myself alone, that the explanation which I gave during the argument, arising from a consideration of the 43rd and 44th sections is correct, but I will not insist upon it now, because the broader and better argument is that given by my brother Brett, viz., that it is impossible to construe the Act without having regard to the principles of common justice, and the Act of Parliament does not abrogate them merely because it does not specify them, and it is a principle of justice that penalties should not be brought down upon anyone's head without his having been heard in defence of himself. And so the Act of 1868 has no bearing on this question, for it is, as I read it, contradicted by the later Act. For these reasons I think judgment must be for the respondent.

BRETT, J.—In this case the petitioner by his own act made Mr. Poulton a respondent to the petition which he presented against the return at the municipal election for the borough of Maidenhead, and at the trial before the election barrister the case took this shape. It was alleged that there had been a coalition between Poulton and two other candidates, who had been returned as elected, so that any corrupt act of Poulton or his agent would invalidate the election of the others. On this point the barrister found that there had been a coalition, that Poulton had been guilty of corruption through his agent, and that the election of the other two was consequently void. He, therefore, found against Poulton upon this inquiry. Now we are not asked to say if the barrister had jurisdiction to enter on the inquiry, nor if the condition of a person not a respondent to a petition may be inquired into, nor whether if it may he must have notice; nor are we asked to determine

if the objection was made at the right time that Poulton was not a respondent. The only question for us is, was Poulton properly made a respondent or not; and the resulting question is, whether the petitioner who made him a respondent can obtain his costs against him. It is no part of our decision to say that if Poulton had been successful in clearing himself from the charge of corruption he could not have recovered costs against the petitioner. It may therefore be, that if he had been successful he could have got his costs, that may or may not be, but we have now only to decide whether, if not successful, he can be made to pay them. Now, it seems clear that this tribunal has no rights or duties other than those given to it by the Act of Parliament which creates it. The course of procedure is given by statute, and in the statute alone we must look for a definition of the persons who can properly be made petitioners and respondents. That being so, the argument turns entirely on the 13th section. The clauses there are, first, descriptive of a petition as complaining of an undue election, then declaring who may be petitioners, then prescribing the form of petition, and then the material part defining who can be made a respondent. The person, and only person, so far as I can see, who can be made a respondent, is a person "against whose election a petition is presented." Poulton, therefore, cannot be a respondent, whatever else he can be, for he has not been elected. Then, turning to the rules, we find that they do not enlarge the definition, nor does the prescribed form of petition given in them contemplate any enlargement; we are, therefore, bound by the words of the statute itself in the 13th section. The arguments against our holding it to be so limited were, that no meaning could be given to the 5th section unless we recognised that a candidate there spoken of might be a respondent; but I think that by applying to the words the explanation that candidate means unsuccessful candidate who is a petitioner, the section is perfectly good and intelligible. Then it is said, further, that a man like Poulton might have grave disqualifications imposed upon him in the course of an inquiry, and that unless he were a respondent a decision involving these disqualifications might be come to against him without any notice being conveyed to him at all. Now, I do not say that as between petitioner and respondent, and for the investigation of their case, the conduct of a third person may not be inquired into and decided upon without any notice being given to him, and, as would have been the case here, he might, if not a respondent, have been proved guilty of corrupt practices. Yet I entirely dissent from the conclusion of the argument, and would never agree that any disability could be fixed on a man in Poulton's position without his having had notice or being heard on the charge. I never would, myself, be a party to so holding, and I say so expressly, because, although the words are not in the Act of Parliament, to so hold would be contrary to the first principles of the English law; and so it must be taken to be implied in the Act that no such decision as is possible under the Act, involving a disqualification, could in fact be come to without notice being given to the accused, and his having an opportunity of being heard. Another argument that has been advanced is, that unless an unsuccessful candidate may be made a respon-

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dent, he must fight for the purpose of defending himself from disabilities involved in the accusation, and do so without any right to or means of obtaining his costs, if he be successful in disproving the accusation. That is perfectly true, and it is no doubt a hardship, but we cannot for that reason add to the Act of Parliament what is not in it. But after all he is in no greater position of hardship than a person, not a candidate, but against whose conduct imputations are made, so that it is inquired into in a Parliamentary petition, and yet such cannot recover or be made to pay costs in respect of the inquiry; and I agree with my Lord that public policy requires that corrupt practices at elections should be put a stop to, and this cannot be effected without some cases of individual hardship arising. That however, as I, repeat, is no reason upon which we can base a decision. We cannot go beyond our province, and I decide here that Poulton's name ought to have been at some time—I don't say when—taken off the petition, as he ought never, in the first instance, to have been made a respondent.

GROVE, J.—I agree with the rest of the court that judgment must be in Mr. Poulton's favour. I think the sects. 12 and 13 of the Act are too strong to be got over. They show that the object of a petition is not to complain of the misconduct of persons in the course of the election, but is to question the election of any person, in a petition against the return simply; and the terms petitioner and respondent are to include respectively "any person by whom a petition is presented, and any person against whose election a petition is presented." This seems to me to show that respondent is, except in one particular instance, provided for in sub-sect. 6 of sect. 13—a person against whose election a petition is presented, and who has therefore been or has assumed to be elected, and sub-sect. 9 merely means that it is unnecessary to have two separate petitions against two respondents in reference to the same election. The main difficulty which has struck me, but not sufficiently to alter in my mind the apparent meaning of the Act is, that I do not find in this Act anything equivalent to the 45th section of the Parliamentary Elections Act. Perhaps we must, as my Lord has said, incorporate something which is sometimes called natural justice into the Act; but I cannot help saying that it is rather a dangerous practice to incorporate into Acts of Parliament what we may think to be natural justice, or principles of English law. I notice that in the Parliamentary Elections Act the judge's report does not *ipso facto* disqualify the persons named in his report, they are only disqualified if, after notice, they are found guilty in any proceeding in which they have had an opportunity of being heard. Therefore, it is especially guarded against, that persons who do not know, and have had no opportunity, should be disqualified. But in the 1872 Act the disqualification attaches upon the report itself, and therefore, as far as candidates are concerned, an unsuccessful candidate would be disqualified, not on any proof that he had been heard in his defence, but on the report itself, and while the report is just the same as the report in the Parliamentary Election cases, it yet has a different effect. Now, I do not find in the Act or rules anything to fill up this blank, there is nothing to guard against the report doing an injustice which is specially provided against in the Parliamentary

Elections Act. It has presented a formidable difficulty to my mind, and was fairly urged upon us by Mr. Greene, in the argument, as of great weight. All I can say is, that it is not strong enough to overcome the general effect of the Act, and to yield to it would bring us in conflict with the other provisions in the Act. I agree, therefore, that respondent, with the one exception in sub-sect. 6 of sect. 13, is limited to a person who has been, or has assumed to have been, elected.

LINDLEY, J.—I am of the same opinion. I think, on principle, that the decision of the court is right, for three reasons. The object of the petition is defined by sect. 12, and the question to be tried is, whether a certain person was duly elected, or the election was void or some other person was elected. Who then on principle ought to be respondents in such an investigation? *Prima facie* those who are in the office, and it lies upon those who would enlarge the class, to show that others come within it. Reliance was placed in argument on sub-sect. 9, but on looking at its terms I fail to see how you could have a separate petition against a man like this respondent. No other reason was given but that arising on the 5th sub-section of sect. 15, by which the duty is imposed upon the court of reporting the names of all persons proved at the trial to have been guilty of a corrupt practice. But unless every person whose conduct might be reported is to be a respondent, why is a candidate, more than any one else, to be one. It is said that an unsuccessful candidate is liable in this way to be disqualified, but if it be the case that a man will not, in fact, be disqualified without being heard in his defence, that argument fails. For these reasons, I think that the only proper respondents to a petition are those persons who have been elected, and our judgment here must be for Mr. Poulton, who has been wrongly made a respondent.

Judgment for the respondent.

Attorneys for the petitioner, *Dangerfield* and *Blythe*, for *Rawson*, Marlow.

Attorneys for the respondent, *Nickinson*, *Pra* and *Nickinson*, for *Charles Brown*, Maidenhead.

[NOTE.—See the next case.]

Saturday, June 12, 1875.

LOVERING (app.) v. DAWSON AND OTHERS (resps.) (2)
Municipal election—35 & 36 Vict. c. 60, ss. 19 and 21—*Costs*—Discretion of the barrister.

The barrister appointed under the Corrupt Practices (Municipal Elections) Act 1872, has absolute discretion over the costs under sect. 19; and the 5th sub-section of sect. 21 does not give to the Superior Court power to review any exercise of that discretion by him.

The 19th section says that all costs, &c., shall be defrayed by the parties to the petition, in such a manner and in such proportions as the court by which the petition is tried may determine.

Held, that in a case where the petitioners had improperly made an unsuccessful candidate a respondent, they could not object that he was not a "party" to the petition, so as to deprive the barrister who tried the petition of jurisdiction to make an order upon them for his costs.

In the same case as the preceding one a rule was afterwards obtained, calling on the respondents to show cause why the order of the barrister who

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tried the petition, as to costs, should not be varied or discharged.

It appeared that after the municipal election for town councillors, in which Walker and Dawson were elected, and in which Poulton had been with them a candidate, there was an election for an alderman, in which Poulton was successful.

There were then two petitions filed, one against Dawson, Walker, and Poulton, in respect of the town councillor election, and one against Poulton in respect of the alderman election. A summons was taken out at chambers, and it was by agreement ordered that the second petition should depend on the result of the first, and the two should thus, in effect, be tried together. Lush, J., before whom the summons was heard, made an order that the costs should abide the event; the barrister made only the order set out above, not specifically mentioning the second petition.

The court having above decided that Poulton had been improperly made a respondent, he became under the order entitled to be paid his costs by the petitioners, but it was now pointed out that, though improperly joined as a respondent in the first petition, he was properly made respondent in the second, and the inquiry nominally, so far as Poulton was concerned, held upon the first, was really the inquiry which unseated him upon the second, and it could not be intended to give him costs when unsuccessful.

On this point the court granted a rule *nisi*, in the above terms, against which

Birn showed cause.—This point is not really open to the petitioners, because costs are absolutely in the discretion of the barrister by sect. 19. Here the barrister has ordered costs generally, and unless he was acting without jurisdiction the court cannot review. As in the case of *Yates v. Leech* (30 L. T. Rep. N. S. 790; L. Rep. 9 C. P. 605), it was held that the man who had assumed to act as elected could not, for the purpose of escaping costs, say that he was not a respondent; so here the petitioners, having wrongfully assumed Poulton to be a respondent, cannot now say that he was not, for the purpose of escaping the payment to him of his costs. It is a *quasi* estoppel, so far as the individual wrongdoer in each case is concerned. And here Mr. Poulton was a respondent in fact, though not in law, and was forced by the petitioners into the expense of the trial.

H. D. Greene, in support of the rule.—The barrister had no jurisdiction to give Poulton his costs. The statute throughout contemplates, with reference to costs, only the parties to the petition, and here Poulton has been adjudged to be not a party, and the witnesses, as to whom there are special provisions. Then, secondly, this court has full power to deal as it thinks fit with the case, and might return this to the barrister for review. The 5th sub-section of sect. 21 says: "The Superior Court shall, subject to the provisions of this Act, have the same power, jurisdiction, and authority with reference to an election petition and the proceedings thereon, as it would have if the petition were an ordinary cause within its jurisdiction." The certificate the barrister has sent anticipates the decision of the court on the case; and it is submitted he ought not to have made it till the court had decided the question of law raised.

Lord COLERIDGE, C.J.—I am of opinion that this rule must be discharged. In this case I may say, what I particularly dislike to say in most cases,

where we are ordinarily content with declaring the law upon the matter before us without any remarks upon the effect its application may have upon the particular case, that in discharging the rule I do it with regret. In most cases that we decide we do not know all the circumstances, and cannot always judge as to the deserts of the parties; but here we do know all, and by our decision the result will be attained that the person who has been unseated on petition, because of bribery by an agent by the judgment of the barrister who tried the case, will get the costs of his unsuccessful defence out of the pocket of his successful opponent. And, as I said before, if there was jurisdiction in the court to review the exercise of his discretion by the barrister in respect of his order as to costs, I would not hesitate a moment in reviewing it; but I am of opinion that we have no jurisdiction to do so. The provision as to costs is sect. 19 of 35 & 36 Vict. c. 60, and that gives an absolute discretion to the court that tries the petition to say how the costs, charges, and expenses of and incidental to the presentation of a petition, and to the proceedings consequent thereon, shall be defrayed; and it is to determine in what proportion and in what manner those costs are to be paid by the parties. Now, the circumstances here were that Poulton was joined with two others as respondents in what we may call the town councillor petition, and he was also singly respondent in what we may call the alderman petition, and he had undoubtedly coalesced with the other two respondents in the first election, so that each of them became in law agent for the other, and an act of bribery proved against one would involve also the other two. This being so, it is clear that the evidence which disqualified one respondent on the first petition would disqualify Poulton also on the second. In the first, however, this court held that Poulton was not a respondent under the Act, and that the petitioner in the town council petition had been wrong in making him one, and they came to this conclusion after full consideration, and decided that he was not properly a party to the petition. Mr. Coleman, the barrister, had referred this question to us, and had also made an order as to costs dependent on our decision of the question, in which, unfortunately, he said that if the court should be of opinion that Poulton was improperly joined as respondent, then he was to receive his costs of and incidental to his defence. So this order operates to give Poulton his costs, because we have decided the question of law in his favour as to the first petition. Whether the barrister intended his order to have the effect which it does have we need not inquire, because it is enough to know that if he had jurisdiction he has, as a fact, made the order. Then, had he jurisdiction? The only argument that could be adduced upon the section is, that the Act says the costs shall be defrayed by the parties, and as Poulton was not a party he cannot either pay or get costs. But I am of opinion that, although he was not for certain purposes a respondent, yet the petitioner made him a respondent against his will, and put him to expenses by so doing, with a view, then, of getting costs against him for themselves, and therefore now, as against themselves, for the purpose of his getting his costs, they cannot say he was not a respondent, and for such purpose I think that he is a party to the petition and the barrister had jurisdiction. He had, therefore, I

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think, jurisdiction under sect. 19, and the only other part of the Act brought to our notice upon which it was suggested that we might, notwithstanding the order of the barrister, interfere, was sub-sect. 5 of sect. 21. That, says the Superior Court shall, subject to the provisions of this Act, have the same power, jurisdiction, and authority with reference to an election petition, and the proceedings thereon, as it would have if the petition were an ordinary cause within its jurisdiction; and the argument is that the barrister's order is to be looked upon as if a judge at Nisi Prius had made an order, and it were brought brought before the court to be reviewed. But it is difficult to see how even this could be done—how, where discretion is to be absolute, there could be any power in the court to review the exercise of it. But there is another objection to the argument, which arises from the words of the section. There is the limitation, "subject to the provisions of this Act," and sect. 19, as I have said, gave the barrister jurisdiction. I confess that I arrive with regret at this decision, but I have no alternative but to say that the rule must be discharged.

BRETT, J.—In this case Lovering petitioned under the Act against Dawson, Walker, and Poulton, and made Poulton a respondent to that petition under the Act, assuming that he came within the terms of it. Poulton at once objected at the hearing, and no one has, so far as I know, questioned the fact that the barrister then had jurisdiction to say whether Poulton was properly made a respondent or not. Indeed, the matter was argued before him, and the question that arose was, not whether he had jurisdiction to decide, but whether he decided according to the true meaning of the Act. He decided, for the time, that Poulton was a respondent, and referred it to us to say whether he was right. It was argued before us, and decided in favour of Poulton, that he was improperly made a respondent. The court, upon that argument, acted as having a question of law referred to them under the statute, and so no question at all was made as to the barrister having jurisdiction to decide that point. Well, then he has decided also another point as to the costs, and it is said that he ought not to have given the respondent Poulton costs, because he ought to have decided that he was not properly made respondent. This seems to me to be reasoning in a vicious circle; it is as if a defendant were brought by writ into court, and then, when upon argument it had been decided that he was not legally before the court, it were said that the court had no jurisdiction to give him costs for the illegality by which he had suffered. Here there is no doubt a complication, because the order giving costs to Poulton includes not only those costs incurred by being wrongfully brought up as respondent to the first petition, but much more; because he fought the very questions, for eight days, upon evidence in the first petition which he would have had to fight on the second petition. He ought not, as we see now, to have been made a respondent to the first petition, and if he had not he would not have appeared or incurred costs. Then, too, he would not have been bound by anything proved against him on that trial, but upon the second petition the petitioners would have had to prove it all again, and he would have been unseated and had to pay the costs. So, on consideration of these circumstances, I cannot agree with the equity of the decision of the bar-

rist, because, though Poulton ought to have had the costs of being improperly made a respondent, he ought not to have had those of fighting unsuccessfully the evidence of his being involved in corrupt practices. But he had a discretion as to the awarding of costs, and he has exercised it, and I do not think that the 21st section, sub-sect. 5, takes away the discretion given by section 19. Therefore, I agree with my Lord, that if we had power to review his order we would do so, but, as we have not, the rule must be discharged.

GROVE and LINDLEY, JJ. concurred.

Rule discharged.

Attorneys for the petitioner, *Dangerfield and Blythe*, for *Rawson*, Great Marlow.

Attorneys for respondents, *Nickinson, Prall*, and *Nickinson*, for *Charles Brown*, Maidenhead.

Tuesday, June 7, 1875.

OLDHAM v. RAMSDEN.

Betting Houses Act—Action by betting agent for money paid—Plea that paid in contravention of act—Evidence—Club.

Money paid in discharge of a lost bet made for another person is recoverable at law from such other person.

A club whose members habitually bet is not within the meaning of the Betting Houses Act.

The plaintiff was a betting agent and member of a club, of which W. was also member, and in which bets were habitually made. For and at the request of the defendant, who was not a member of the club, the plaintiff made a bet with W., which he lost and paid. Suing the defendant to recover the money as paid to his use, he was met by the plea that the money was paid in discharge of a wagering contract, and also that the bet was made in a house used in contravention of the Betting Houses Act:

Held, that the plaintiff was entitled to recover, and a rule to enter a verdict for the defendant as to the wagering contract refused, and as to the alleged contravention of the Betting Houses Act, discharged.

DECLARATION for money payable by the defendant, for money lent and for money paid to the defendant's use, and for money due on accounts stated.

Material pleas: First, never indebted; fourth, as to money alleged to be lent and due on accounts stated, that the said money was lent after the passing of 16 & 17 Vict. c. 119, (a) and was lent, as the

(a) By 16 & 17 Vict. c. 119 (the Betting Houses Act), after reciting that "a kind of gaming has of late sprung up, tending to the injury and demoralisation of improvident persons, by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies," it is enacted as follows:—"No house, office, room, or place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed, or by acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business there of betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper,

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plaintiff then well knew, for the purpose of being paid to and received by or in behalf of the plaintiff, or of some other person then being the owner, occupier, or keeper of a certain house, office, room, or other place, opened, kept, and used for the purposes of betting with persons resorting thereto, and for the purpose of money being received as a deposit upon a bet, and upon an undertaking, promise, or agreement to pay or give thereafter money on the event or contingency of horse races by the plaintiff, or by such other person then being such owner, occupier, or keeper as aforesaid, or by some other person, and that the said money was to the knowledge of the plaintiff paid to and received by him, and by such other person then being such owner, occupier, or keeper as aforesaid, or to and by some person on his or their behalf, for the purpose of betting, or as a deposit upon a bet, or for some or one of the purposes prohibited by the said Act, and not otherwise; fifth, that the said money was paid by the plaintiff after the passing of the 16 & 17 Vict. c. 119, and was knowingly paid by the plaintiff and received by or on behalf of the owner, occupier, or keeper of a certain house, office, or room, or other place opened, kept, and used for the purposes of betting with persons resorting thereto, and for the purpose of money being received upon an undertaking, promise, or agreement to pay or give thereafter money in the event or contingency of horse races by the said owner, occupier, or keeper, or by some other person, as the plaintiff well knew, and that such money was knowingly paid by the plaintiff to and received by such owner, occupier, and keeper for the purpose of betting, or as a deposit upon a bet, or for some or one of the purposes prohibited by the said Act, and not otherwise; and sixth, that after the passing of 8 & 9 Vict. c. 109 (a) the defendant authorised the plaintiff in his own name, but on account of the defendant, to lay bets on horse races, and that the plaintiff, in pursuance of such authority, laid bets on horse races and lost them; that the plaintiff afterwards voluntarily and without any request by the defendant, paid to the persons to whom he had lost such bets divers moneys on account of the money which had been so lost, which said moneys are the moneys now sought to be recovered by the plaintiff, and that the said bets were contracts or agreements by way of gaming or wagering, and not otherwise.

The plaintiff joined issue, and also demurred to the fourth plea as not showing any grounds

or person, as aforesaid, as or for any consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing, on any event or contingency of or relating to any horse race, fight, game, sport, or exercise, or as or for the consideration for securing and paying and giving, by some other person, of any money or valuable thing, on any such event or contingency as aforesaid, and every house and office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance, and contrary to law."

(a) By 8 & 9 Vict. c. 109, s. 18, it is enacted that "all contracts or agreements, whether by parole or in writing by way of gaming or wagering, shall be null and void," and that "no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

for avoiding the loan, nor that the money was lent for or applied to any illegal purpose; to the fifth as not showing that the money was paid by the plaintiff at the defendant's request in execution of an illegal purpose; and to the sixth plea as not disclosing any answer to the cause of action to which it was pleaded, as being bad, as a plea in denial, because admitting the authority of the defendant to the plaintiff to lay bets and pay money for the defendant, and, as a plea in confession and avoidance, because not admitting the cause of action to which it was pleaded.

The cause was tried before Mr. Temple, Q.C., sitting as Commissioner at the Liverpool Summer Assizes, 1874. The evidence given for the plaintiff sufficiently appears from the judgment of the Lord Chief Justice. No evidence was given for the defendant, whose case was sought to be made out from the cross-examination of the plaintiff. It was admitted that the plaintiff's claim arose out of a balance arising due on account of a series of bets made by the plaintiff for the defendant, and not otherwise, and that such balance amounted to 80l.

The learned commissioner directed a verdict to be entered for the plaintiff for 80l. reserving a general leave to move.

Ambrose, Q.C., in Michaelmas Term last, moved for a rule to set aside the above verdict, and enter a verdict for the defendant on the ground that the pleas were proved. He cited:

Clayton v. Dilly, 4 Taunt. 165;

Eastwood v. Miller, 30 L. T. Rep. N. S. 716.

The Court referred to:

Rosewarne v. Billing, 33 L. J. 55, C. P.; 9 L. T. Rep. N. S. 441;

Knight v. Cambers, 15 C. B. 562; 1 Jur. N. S. 525; 24 L. J. 121, C. F.

and refused the rule, so far as the motion was based on 8 & 9 Vict. c. 109, (a) but granted a rule to set aside the verdict and enter a nonsuit instead thereof, on the ground that the plaintiff's evidence proved the defendant's first, fourth, and fifth pleas, and showed that the plaintiff was not entitled to recover; also for a new trial on the ground that there was evidence which ought to have been left to the jury in support of the said pleas.

Charles Russell, Q.C. now showed cause.—The question is whether the bets in respect of which the plaintiff paid the money which he now seeks to recover were illegal, for unless the illegality of betting can be shown, the defendant must reimburse the plaintiff the debt contracted and discharged by the defendant's authority. Now betting has never been made illegal in itself. The Act 8 & 9 Vict. c. 109, merely makes wagering contracts "null and void," which is a very different

(a) In *Rosewarne v. Billing* (*ubi sup.*), Erle, C. J., observed: "No one can sue upon a gaming contract, and the plaintiff (a broker, whose legal position was the same as that of the plaintiff in the present case, so far as 8 & 9 Vict. c. 109 is concerned), would not have been liable in an action brought against him by the parties with whom he had made the contract, and to whom he had lost. But when he paid them he was acting as the defendant's agent and at his request, and where a person who has lost a wager requests another person to pay it for him, and that person does pay it, an action lies at the suit of the person so paying to recover the amount from the person for whom he pays." But the learned judge doubted whether, if after the loss, the principal gave notice to the broker not to pay, the broker, though bound by the rules of the market to pay the amount himself, could recover it, when paid, from his principal.

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thing. Neither does the Betting House Act, commonly called Cockburn's Act, make betting illegal in itself. The object of that Act was to put down certain houses of a very different character from the club in which the bets here were made—houses where money was received in advance by betting agents—a practice which had become very common, and was deemed by the Legislature to give greater facilities to betting than ordinary bets leading to mere debts of honour. Moreover, a house to be within the Act must be kept or used for the purpose of betting with the persons resorting thereto. There is no evidence of such a keeping or using here where the betting was with the members *inter se*. The case falls within the authority of *Bubb v. Yelverton* (24 L. T. Rep. N.S. 822). There a testator had requested a friend to bet for him on certain horses, and the friend had paid the amount lost by the bets. It was held by Lord Romilly, M. R., that the request to bet implied an authority to pay the bets if lost, and that the friend was entitled to prove against the testator's estate for the amount paid by him in respect of the bets. He also cited:

Hall v. Fox, 4 H. & N. 359;
Bous v. Fenwick, L. Rep. 9 C. P. 389; 43 L. J. 160,
 M. C.; 30 L. T. Rep. N. S. 524;
Doggett v. Catterns, 34 L. J. 46, C. P.; 10 Jur.
 N. S. 1236; 11 L. T. Rep. N. S. 422; reversed on
 appeal, 34 L. J. 159, C. P.; 12 L. T. Rep. N. S. 355;
Hatjia v. Town Council of Sheffield, L. Rep. 10 C. P.
 102; 44 L. J. 17, M. C.; 31 L. T. Rep. N. S. 536.

"When this Act was passed," said Brett, J., in *Bous v. Fenwick*, "the Legislature had not made up its mind to prohibit betting altogether, nor has it yet gone so far; but what it had made up its mind to do is expressed in the preamble. . . . It desired to prevent fixed places being established, to which the unwary might resort for betting."

Ambrose, Q.C., for the defendant, supported the rule.—Neither in *Doggett v. Catterns*, *ubi sup.*, nor in any of the other cases cited, was the point decided which is raised in the present case, which point is whether the Betting House Act applies to betting in clubs systematically used for betting. It is submitted that the Act has such an application; the words are large enough, and the preamble is ambiguous. The evidence shows that the club was "used" for purposes prohibited by the Act. [Lord COLERIDGE, C. J.—Does not "using" mean using as occupier? GROVE, J.—The intention of the Legislature seems to have been not to prohibit betting, but to prohibit the allowing persons to collect for the purpose of betting. ARCHIBALD, J.—Is the bet illegal because it is made in an illegal place? In *Eastwood v. Miller* (L. Rep. 9 Q. B. 440; 30 L. T. Rep. N. S. 716) it was distinctly held that to support a conviction under the Act it is not necessary to prove abetting either by owner or occupier. [Lord COLERIDGE, C. J.—That case, so as I understand it, undoubtedly supports your contention in some degree. If that decision be right, our suggestion that the betting must be by the dominus of the place was incorrect. ARCHIBALD, J.—It appeared there that money was taken by the dominus.] No stress was laid upon that part of the evidence in the judgments. Section 3 makes it illegal to use a place for the purpose of betting with persons resorting thereto. The betting is the using, and the offence is committed by betting in a place systematically used for the purpose of betting, as the

place where this bet was made was used. [Lord COLERIDGE, C. J.—It is for the defendant to prove the fifth plea.] That plea may perhaps have averred too much, but it substantially sets up the Betting House Act, and the defects of the plea (if any) would be very proper subjects of amendment. The plaintiff was one of many joint owners. [GROVE, J.—We cannot judicially assume that the members of a club are joint owners of it.] The plaintiff appears to have habitually acted for outsiders. If he be allowed to recover in this action, the result will be that localised betting will become legalised, and a wagering contract becomes practically a valid contract, and enforceable at law.

Lord COLERIDGE, C. J.—I am of opinion that this rule ought to be discharged. The action was brought to recover the sum of 80L, which the plaintiff, as agent, had lost upon the balance of a number of bets, which bets, it was admitted, had been entered into and paid with the authority of the defendant. The defence was that the whole of these bets were illegal, and that no action could be brought upon a contract, express or implied, to repay the plaintiff, by reason of the operation of ss. 1, 3 of 16 & 17 Vict. c. 119; and that inasmuch as the bets took place under circumstances which made them illegal by the terms of the statute, the plaintiff must lose his money, and the defendant is entitled to take advantage of the statute to defeat the claim. The action was tried at Liverpool, and there was no evidence called on behalf of the defendant. The motion of Mr. Ambrose was to enter a verdict for the defendant or a nonsuit, mainly upon the ground that the evidence called on behalf of the plaintiff proved this fifth plea, or for a new trial upon the ground that the evidence should have been at all events left to the jury. I am of opinion that the evidence did not prove the fifth plea, and I would hold Mr. Ambrose to the evidence reported by the commissioner in this case, for if a number of the facts which he has stated, and of which he has asked the admission, could have been proved, he should have called witnesses to prove them. He has been content to rely upon the evidence given for the plaintiff, to which, therefore, it is not only legal but perfectly just that we should confine him. The fifth plea was based not on all the terms, but on many of the terms of the 1st section of the statute, and states that the action is brought for money paid by the plaintiff for the defendant at his request; and that the money was paid after the passing of 16 & 17 Vict. c. 119, and was knowingly paid by the plaintiff to and received by or on behalf of the owner, occupier, or keeper of a certain place kept and used for the purpose of betting with persons resorting thereto. These are the material allegations, and if there is no evidence in support of them, Mr. Ambrose must fail. The whole of the evidence upon the commissioner's notes is that the plaintiff says, "I am a member of the Ellesmere Club; so is Olmer and Wormald" (the persons with whom the bets were made). The club is held in Lever-street, and is a limited company, with 1400 or 1500 members who pay a subscription. It is an ordinary club. All the members bet at the place. These bets were made there." Mr. Wormald says: "I cannot say where the bets were made. I was paid the money at the club." There is no other evidence upon the subject. On that evidence it appears to me that there is nothing to go to the jury in support of these material allegations

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in the plea, that this was a place kept and used for the purpose of betting by persons resorting thereto. The sole evidence amounts to this, that there was a club at which there were bets made, but it was hardly proved even that these bets were made at the club. It is an ordinary club at which bets were made. There are very important questions which have been raised in the course of the argument, questions which it may be desirable to be set at rest if ever the point is raised and is necessary to be decided, questions upon which members of the Bench may entertain strong opinions, but it is not necessary to decide them on this occasion. I believe that we are all agreed that upon these material allegations there is no evidence to go to the jury; and upon this short point the rule must be discharged.

GROVE and ARCHIBALD, JJ. concurred.

Rule discharged.

Attorney for the plaintiff, A. T. H. Evans.

Attorneys for the defendant, Le Riche and Son.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

June 11 and 25, 1875.

(Present: The Right Hons. Sir BARNES PEACOCK, Sir M. SMITH, Sir ROBERT COLLIER, and Sir H. S. KEATING.)

INGRAM v. DRINKWATER.

ON APPEAL FROM THE COURT OF THE STAFF OF
GOVERNMENT, ISLE OF MAN.

Rate—Real estate—Rentcharge in lieu of tithes.

Whenever it is sought to impose a rate, the burden lies on those seeking to enforce it to show that the words used by the Legislature are clear and unambiguous in order to charge the subject. An Act of the Legislature imposed a rate on lands "and other real estate."

Held (reversing the judgment of the court below), that although these words were large enough to include a rentcharge in lieu of tithes, they would not necessarily do so if it appeared from the general wording of the Act that it was not intended to apply to incorporeal rights.

THE question in this appeal was, whether the bishop and clergy of the Isle of Man were liable to be rated, under an Act to provide a lunatic asylum, in respect of the sums paid to them as rentcharge in lieu of tithes.

The appellant, the Vicar of Michael, in the Isle of Man, disputed his liability, and the respondent, as Chairman of the Lunatic Asylum Committee of the Island, brought this action against him to recover the rate alleged to be due from him.

The Deemster's Court, sitting at Ramsay, gave judgment in favour of the Vicar; but that judgment was reversed on appeal. The present appeal was from that reversal.

The facts, which were undisputed, and the sections of the Act in question, appear in the judgment of their Lordships.

Manisty, Q.C., The Attorney-General of the Isle of Man (Gell, Q.C.) and B. Shaw, appeared for the appellant.

J. Brown, Q.C. and Sherwood (of the Manx Bar), for the respondent.

[Cur. adv. vult.]

June 25.—Their LORDSHIPS delivered judgment.

—This is an appeal against a judgment of the Court of the Staff of Government of the Isle of Man, reversing a judgment of the Deemster of the Island in a suit by the respondent against the appellant to recover the amount of a rate made upon him as Vicar of Michael, under the provisions of an Act passed by the Legislature of the Isle of Man, in the year 1860, intitled, "An Act to provide an Asylum for Lunatics and Insane Persons." The facts of the case were not disputed between the parties, the only question being whether, in point of law, the rate made upon the appellant was a valid rate. In the year 1839 an Act was passed by the Island Legislature, entitled "An Act for the Commutation of Tithes in the Isle of Man." It recited an agreement that the sum of 5575*l.* was a fair compensation to be paid annually for all tithes, moduses, and prescriptive payments in lieu of tithes. &c., and provided that the amount should be apportioned by way of rentcharge amongst the owners of the lands then liable to tithes, who should pay the same to an agent appointed by the parties entitled, who was to distribute it amongst such parties in certain proportions specified in the Act, which proportions, however, did not correspond with the amounts previously received by them from the tithes. To the vicar of the parish of Michael the Act directed the sum of 141*l.* 8*s.* to be paid. In 1860 the Act was passed which gives rise to the present question. It is an Act to provide an Asylum for Lunatics and Insane Persons, and directs (sect. 2) the appointment of "three competent persons to value the lands and other real estates within the said Isle (except the real estates and properties in towns), and two competent persons to value the real estates and properties within the towns thereof." It then directs the valuers to make a separate valuation, "at their net annual value, of all lands and other real estate held by each proprietor or tenant within their respective parishes or towns; the particulars of such valuations shall be entered in a book to be provided for that purpose, in the form set forth in schedule A, which book, when complete, shall be delivered to the Clerk of the Rolls," and copies deposited with various officers, and to be open "to the inspection of every person whose property is included in such valuation." Sect. 2*s* directs, "That the valuers of the houses, real estate, and property in towns, shall describe the same by the street or place where the same is situate, and shall state the name of the proprietor and occupier of each house and place separately valued." Directions are then given for conducting the valuation, and sect. 4 provides an appeal by "the proprietor or occupier of any lands or other such real estate" aggrieved by the valuation. Sect. 6 (the rating clause) provides that as soon as the valuation is completed as aforesaid, the Tynwald Court is to lay a rate on the proprietors "of all lands and other real estate, according to such valuation." Provided that the rate is to be a charge upon the property rated "in priority next after the lord's rent and tithes, and be paid by the person in the actual occupation of the rateable property at the time of the rate made for the current year, and in his default then by the person subsequently in the occupation of the property for that year, from whom such rate shall be demanded, and the person so paying shall be entitled to deduct the sum from his rent." The rate may be recovered before the deemster as a

debt (sect. 48). Provided that if unpaid "under any execution, and there be no sufficient distress liable to the payment thereof, it shall be lawful for such deemster to issue his order to put such committee of management into possession of the house or lands chargeable with such rate or arrears, and the same to hold" till satisfied. The valuation which was actually made under this Act did not include the sums payable to the parties entitled to the rentcharge under the Act of 1839, the valuers apparently considering that they were not liable to be rated under it. The governor, however, ordered such sums to be included in the valuation, and the proportion assessed upon the sum of 141l. 8s., the amount paid to the appellant under the Act, having been demanded, was refused by him to be paid, whereupon a suit was instituted against him before the deemster, who was of opinion that the Act did not authorise the rating of that payment, and dismissed the suit. On appeal, however, to the Court of the Staff of Government, the decision of the deemster was reversed, and the question to be decided on the present appeal is, whether such reversal was right. It is clear that under the 6th section of the Act of 1860, the rate can only be laid on property legally liable to be included in the valuation under the 2nd section, and the only words in that section, or throughout the Act, which the respondent relies upon to make the amount paid to the vicar rateable, are the words "real estate," which, doubtless, are large enough to comprehend it, if intended to do so, but which have not necessarily that effect unless so intended; and looking to the collocation of those words in the different sections, as well as to the whole frame and general wording of the Act, their Lordships are of opinion that the rating powers were not intended to include or apply to the amounts payable to the appellant, and others similarly circumstanced under the Act of 1839, but that the later Act contemplated the rating of lands "and other real estate" of the same corporeal nature; and not of a mere incorporeal right to a proportion of a sum of money, though arising from a rentcharge in lieu of tithes. The particulars of the "lands and other real estate" valued, are directed to be entered according to forms set forth in the schedule to the Act, one for lands, &c., not in towns, and the other for properties in towns—both are applicable exclusively to corporeal property, and even assuming they were not intended to be literally binding so as to exclude several descriptions of corporeal property, not expressly specified, they still give a meaning to other parts of the Act which appear to point to the exclusion of mere incorporeal hereditaments. The rating clause itself (sect. 6), with its proviso, the terms of which have been already referred to, seems inconsistent with the notion of rating a payment such as that in question, whilst the 48th section, giving the remedy for non-payment of the rate, appears equally to exclude it. It is observable that the Act of 1839 (the Commutation Act) contains no enactment similar to that found in the English Tithe Commutation Act (6 & 7 Will. 4, c. 71, s. 69), expressly making the rentcharge rateable, and although it was suggested that the omission arose from there being no rates at that time existing in the Isle of Man, yet, when the Legislature in 1860 came to impose rates, they knew of that omission, and knew also of the mode in which the commutation of the tithes had been effected,

and of the distribution of the rentcharge amongst the different parties specified in the Act; yet their Rating Act not only does not contain apt words applicable to the rentcharge, but is framed so as to apply in terms to corporeal property, without any express reference to incorporeal hereditaments. The cases of *Reg. v. Nevills* (8 Q. B. 466), and *Colebrook v. Tickell* (4 A. & E. 928), show clearly that when it is sought to impose a rate, the burden lies on those seeking to enforce it, to show that the words used by the Legislature are clear and unambiguous, in order to charge the subject. In the present case such words are not to be found; their Lordships are, therefore, of opinion that the rate made upon the appellant was invalid, and that the judgment of the Court of the Staff of Government was erroneous. They will, therefore, humbly advise her Majesty that the judgment appealed from be reversed, and that the judgment of the Deemster's Court be affirmed. The respondents will pay the costs of this appeal.

Solicitors for the appellant, *Park Nelson, and Co.*
Solicitors for the respondent, *Johnston and Co.*

V.C. MALINS' COURT.

Reported by F. GOULD and JAMES E. HORN, Esqrs.,
Barristers-at-Law.

Wednesday, July 21, 1875.

ETHERINGTON v. WILSON.

*Christ's Hospital—Election of candidates—
Parishioner.*

A scheme settled by the court, for the election of candidates for admission to Christ's Hospital, provided that the parent of a candidate "shall be or shall have been" a parishioner of the parish electing.

Prior to an election for the parish of T. the father of a candidate, in order to qualify as a parishioner, took an unoccupied house in the parish, paid a month's rent, paid the rate payable in respect of the house (before it was demanded), and had his name inserted in the rate book.

The father did not reside in the parish: he did not put any furniture into the house, or sleep there, until after the election.

Held that the father was not a parishioner within the meaning of the scheme; since, in order to be a parishioner, a man must be a bonâ fide holder of property in the parish, though he need not reside there.

MOTION for decree.

This was a bill filed by Edward Duggan Etherington, an infant, by his father and next friend against Henry Arthur Wilson, an infant, the Rev. Henry F. Limpus, John M. Stedwell, and William Bryant (the vicar and churchwardens of the parish of Twickenham), and the corporation of the City of London (as Governors of Christ's Hospital), praying (amongst other things) for a declaration that at the time of a certain election into Christ's Hospital (which took place on the 31st Dec. 1874), the defendant Henry A. Wilson was not eligible for election.

By indentures of lease and release dated 18th and 19th Nov. 1720, John West and Frances his wife conveyed certain hereditaments in London and elsewhere to the Governors of Christ's Hospital upon trust to receive into Christ's Hospital, and out of the clear rents and profits to maintain

and educate so many poor boys and girls as the same clear rents and profits should suffice to maintain at the rate of 10*l.* per annum for each child . . . one-fifth part of the said children "to be such as the minister, churchwardens, and parishioners of the parish of Twickenham in the county of Middlesex, or the major part of them, shall (being in vestry assembled) for that purpose choose and present or cause to be presented according to the directions" therein contained. The deed also provided that such children should be born in the parish, and if there should be no such children found in the parish when such election and presentation ought to be made, then the electors were to elect and present any other poor boys or girls born in any other contiguous or adjoining parish. The deed also provided that in all such elections regard should be had to those children related by consanguinity to John West and Frances his wife, or either of them, and that such relations should (if poor) be preferred to all others.

In the year 1806 an Act was passed enabling the Governors of Christ's Hospital to apply by petition to the Court of Chancery for a scheme to regulate the charity. Pursuant to this Act a scheme was, on the 11th Dec. 1868, settled by the court, regulating the claims of children claiming to be admitted to Christ's Hospital, as being related to the Founders:

Clause 2 provided that, in the event of two or more poor children claiming on one and the same occasion to be admitted, the election should be determined by the majority of votes of the vestry "taken according to the Acts or Act for regulation of vestries for the time being in force in that particular parish."

Clause 9 was as follows: Each claimant shall, three days at least before the day appointed for the vestry meeting, deliver to and leave with the vestry clerk or one of the churchwardens, a statement in writing containing the name, age, and pedigree of the claimant, . . . and such statement shall be open to the inspection of the parishioners at all reasonable times until the holding of the vestry meeting.

Clause 12 was as follows: No child shall be considered eligible to partake of the benefits of this charity unless he or she shall have been born in, or unless his or her parents or one of them shall be or shall have been parishioners or a parishioner of the parish for the time being exercising the right to elect or present: or, in the event of there not being any candidate for election and presentation within such parish, then unless he or she shall have been born in, or unless his or her parents or one of them shall be or shall have been parishioners or a parishioner of a parish contiguous to or adjoining the parish whose turn and right it is to elect and present; nor unless such child shall comply with and fulfil the general regulations for the time being in force for the regulation of the admission of children to Christ's Hospital.

On the 7th Nov. 1874 the defendants, the Churchwardens of Twickenham, received notice from the Governors of Christ's Hospital that there was a vacancy in the hospital to be filled up by the parish of Twickenham.

On the 19th Dec. 1874 the churchwardens affixed a notice on the doors of the parish church that a vestry would be held on the 31st Dec. then next, to take steps for the purpose of electing a boy into Christ's Hospital upon the gift of John West and Frances his wife. The plaintiff and the defendant Henry A. Wilson were the only two candidates for election at the vestry meeting held on the 31st Dec. 1874; a poll was demanded, which was held on the 7th Jan. 1875. At the poll 177 votes

were given for the plaintiff, and 233 votes were given for the defendant Henry A. Wilson; so that, on the poll, the defendant Henry A. Wilson was elected. It was admitted that both the plaintiff and the defendant Henry A. Wilson were of kin to the founders; and that the plaintiff's father was a parishioner within the meaning of clause 12 of the scheme.

On the 27th April 1875, the plaintiff filed his bill, submitting that the defendant Henry A. Wilson was not at the time of the election a child, one of whose parents was a parishioner of Twickenham within the meaning of clause 12 of the scheme; and prayed for a declaration that at the time of the said election the defendant Henry A. Wilson was not eligible to partake of the benefits of the charity; and for a declaration that at the said election the plaintiff was or ought to be deemed to have been elected for presentation and admission into Christ's Hospital. The main question in argument was whether Henry Wilson, the father of the defendant Henry A. Wilson, was, on the 31st Dec. 1874, a parishioner of Twickenham within the meaning of clause 12 of the scheme. It appeared from the evidence that Wilson was a tailor's foreman, carrying on business in St. James's-street, and living in Pimlico; that, in order to qualify himself as a parishioner, Wilson, with the aid of Lane, the vestry clerk of Twickenham, in the month of Nov. 1874, took a small house in Back-road, Twickenham, from one Stroud for three months certain, at a rent of thirty shillings a month, subject to a month's notice to quit in case the tenancy continued beyond that period; and that, on the 18th Dec. 1874 (the day before the notice of the vestry meeting was put on the church door) Wilson paid Stroud thirty shillings for one month's rent of the house in Back-road. It further appeared from the evidence that on the 18th Nov. 1874, Wilson gave Lane a written notice to insert his name in the rate-book in respect of the house in Back-road; that a rate for the parish of Twickenham was made on the 21st Nov. 1874; that on the 18th Dec. 1874 Lane entered Wilson's name in pencil in the rate-book; that at some time between the 19th Dec. and the 31st Dec. 1874, Wilson paid to Lane the sum of 17*s.* 6*d.* as the rate in respect of his house, and received a receipt for the same; and that Lane thereupon entered Wilson's name in ink in the rate-book. It further appeared from the evidence that on the 31st Dec. 1874, the shutters of the house were up, and the house was then unoccupied; that Wilson had never resided in the house, or slept there previous to the 7th Jan. 1875 (the day of the poll being taken), but that since that day he had put a bed and some chairs in the house, and occasionally slept there; and that letters written by the plaintiff in Feb. and March 1875, and addressed to Mr. Henry Wilson, Back-road, Twickenham, had been returned through the post office endorsed "not to be found."

Glasse, Q.C. and Rawlins, for the plaintiff.—On the 31st Dec. 1874, the defendant Henry A. Wilson was not qualified to be a candidate, because his father was not then a parishioner within clause 12 of the scheme. We admit that a parishioner need not be resident within the parish: (*Jeffrey's case*, Coke's Rep. last ed. pt. 3 p. 135; *Attorney-General v. Parker* 3 Atk. 577.) The definition of "parishioner" given in the latter case is adopted in Steer's Parish Law, 3rd edit. p. 20. But he must be a *bonâ fide* occupier of property within the parish,

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paying rates and taxes. Henry Wilson, the father of the defendant, never was a *bonâ fide* occupier of the house in Back-road, Twickenham. This evidence shows that Henry Wilson has unfairly attempted to bring himself within the words of the scheme by a colourable qualification. As on the day of election the defendant Wilson was not qualified to be a candidate, all the votes given for him were thrown away; and the plaintiff was, therefore, duly elected. They also referred to

Tomlin's Law Dict.: "Parishioner;"

Attorney-General v. Bovill, 1 Ph. 762;

58 Geo. 3, c. 69, s. 3;

59 Geo. 3, c. 85, s. 1;

The Public Worship Regulation Act 1874, s. 6, definition of "parishioner."

J. Pearson, Q.C. and Phillimore, for the vicar and churchwardens of Twickenham.—The vicar and churchwardens have put the only possible construction on the scheme, by holding Henry Wilson to have been a parishioner on the 31st Dec. 1874. Occupation, without residence, is quite sufficient (*Gosling v. Veley*, 7 Q. B. 436), if coupled with payment of rates. The word "parishioner" must have the same meaning throughout the scheme. Clauses 2 and 9 show that a "parishioner" means a person entitled to vote at a vestry meeting "according to the Acts or Act for regulation of vestries for the time being in force." In this sense Henry Wilson was clearly a parishioner within clause 12. A rate was made on the 21st Nov. 1874. Prior to the 31st Dec. 1874, Henry Wilson had been put on the rate-book, and paid a rate; or, at any rate, had "become liable to be rated" (58 Geo. 3, c. 69, s. 4) since the rate last made. He would, therefore, have been entitled to vote at a vestry meeting held on the 31st Dec. 1874; and was consequently, on that day, a parishioner within the meaning of the scheme. In the scheme the word "parishioner" must be taken to have been used in its ordinary legal sense; or else its meaning would have been defined in an interpretation clause, as in the Public Worship Regulation Act 1874. As far as the vicar and churchwardens are concerned, this is a suit to administer the trusts of the charity; we, therefore, are entitled to have our costs paid by the Governors of Christ's Hospital. They also referred to

2 & 3 Will. 4, c. 45, s. 30;

19 & 20 Vict. c. 112, s. 4;

Carter v. Cropley, 6 De G. M. & G. 680;

Phillimore's Eccles. Law p. 1577.

Simmonds, for the defendant Henry A. Wilson.

—Henry Wilson had a perfect right to act as he did, to obtain the qualification of a parishioner. If the court should hold the defendant disqualified, there must be a new election: (*Reg. v. The Mayor of Tewkesbury* 18 L. T. Rep. N. S. 857; L. Rep. 3 Q. B. 629.)

Freeling, for the Governors of Christ's Hospital.

—Our duty simply is to admit the candidate, whom the court shall decide to be duly elected. We are, therefore, entitled to be paid our costs.

The VICE-CHANCELLOR (after stating the facts of the case, and coming to the conclusion, that the plaintiff's father was beyond all doubt a parishioner, though not resident in the parish of Twickenham) considered that the only thing to be decided was, whether Henry Wilson, the father of the defendant Henry A. Wilson, was a parishioner of Twickenham, within the meaning of the scheme on the 31st Dec. 1874. The authorities were clear

upon the point, that for a man to be a parishioner, in the ordinary meaning of the term, it was not necessary for him to reside in the parish, but he must be a rate-payer of it. The word "parishioner" was correctly defined by Lord Hardwicke in the case of the *Attorney-General v. Parker* as follows: "Parishioner is a very large word, takes in, not only inhabitants of the parish, but persons who are occupiers of land, that pay the several rates and duties, though they are not resident, nor do contribute to the ornaments of the church." It was clear that the plaintiff had the two qualifications, being of kin of the founder, and having his father a parishioner. With regard to the defendant Henry A. Wilson, it was admitted that he was of kin of the founder, but it was denied that his father was a parishioner. The question, therefore, was whether, within the meaning of the scheme, the court could consider Henry Wilson a parishioner of Twickenham, the intention of the court being that the scheme should be acted upon in a fair, *bonâ fide*, and honest manner. Henry Wilson was a tailor's foreman, and a respectable man, living in Pimlico. It appeared that, for some time before the election, he had been in communication with those who had to do with the election; and that, in order to qualify himself as a parishioner, he had been in communication with Mr. Lane, the vestry clerk of Twickenham. Wilson was clearly favoured by Lane, who had done his best to procure a house for him, in order to make him a parishioner. It appeared that in the early part of Nov. 1874, Lane went to one Stroud, and bound himself to take a house in Back-road, Twickenham, for three months certain, subject to a month's notice to quit in case the tenancy was continued, and the rent was to be thirty shillings a month. Neither Stroud nor Lane could remember the day in Nov. on which the house was taken; however, on the 18th Dec. (the day before the notice of the vestry meeting was put upon the church door) Wilson paid Stroud 30s. for one month's rent of the house down to that day, and showed great anxiety to be put on the rate-book. On the same day Wilson applied to Lane to be put on the rate-book. Lane said that on the 18th Dec. he entered Wilson's name in pencil in the rate-book. Lane would have entered Wilson's name in ink, if he had thought that Wilson was in truth at that time a parishioner. Lane afterwards entered Wilson's name in ink. Wilson then paid Lane the sum of 17s. 6d. for rates before they were demanded, so that it was only by the aid of Lane that Wilson's name was put upon the rate-book before the 31st Dec., the day of the election. On that day the shutters were up, and the house was unoccupied. Since the 7th Jan. 1875, the day on which the poll was taken, Wilson, to give colour to his qualification, had put a bed and some chairs into the house, and had occasionally slept there. It was quite clear that he was unknown as a resident in the parish, as the post office authorities could not find him; for the letters written to him by the plaintiff would never have been returned through the post office, if anybody had ever heard of him as a parishioner. Although he said he took the house in Nov., the post office authorities could not find him in April 1875. By these colourable transactions he had been the occupier of a house in the parish since Nov.; and though a man might be a parishioner without residing in the parish, that could not be said unless he was a *bonâ fide*

Q. B.]

CARUS (app.) v. EASTWOOD (resp.).

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holder of property there. The words "shall be, or shall have been" in clause 12 of the scheme must mean shall be or shall have been a parishioner in the proper and honest sense of the word. The court must look at the honesty of the transaction. This was a mere attempt, from beginning to end, to get up a colourable qualification for the father of another boy, because the father of the plaintiff was not liked. Wilson had never been a parishioner within the meaning of clause 12 of the scheme. With regard to the question whether there ought to be a new election: as, at the time of the poll, the parishioners knew the facts of the case, and that the defendant Wilson was not qualified to be a candidate, all the votes given in favour of the boy Wilson must be considered as thrown away, and the court must declare the plaintiff to have been duly elected. It had been argued that the court ought to order a new election on the authority of *Reg. v. The Mayor of Tewkesbury*, but in that case, the notice, necessary to invalidate the votes, was not given. The decree would, therefore, be for the plaintiff; and his costs must be paid by the vicar and churchwardens. The defendant Wilson must bear his own costs. The Governors of Christ's Hospital, as stakeholders, must have their costs from the plaintiff, and he must add them to his own. As the suit had been unnecessarily expensive, the costs would be taxed on the lower scale.

Solicitors: *Montagu Scott; Wright and Pilley; Beachcroft and Thompson.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKILLAN, Esqrs.,
Barristers-at-Law.

Thursday, May 27, 1875.

CARUS (app.) v. EASTWOOD (resp.).

Evidence of contract of service—Rules posted—Custom—Master and Servants' Act 1867.

The appellants were proprietors of a mill in which the respondent had been a weaver, paid by the piece. Rules were posted so that the workpeople passed them on going to their work; amongst them, one required fourteen days' notice before termination of employment. The respondent left his work without notice, but it was not proved that his attention had been called to the rules, or that he had seen them or assented to them, or was able to read. The justices held that there was not sufficient evidence of a contract to justify a conviction of the respondent under The Master and Servants' Act 1867 (30 & 31 Vict. c. 141), s. 9 and they refused to admit evidence of custom.

Held, upon a case stated (although the questions were not so raised that the case could be remitted,) that the rules as they were posted, or a well known custom in the district, might be sufficient to establish a contract if found as a fact to exist.

THIS was a case stated by three of Her Majesty's Justices of the Peace in and for the borough of Blackburn, in the county of Lancaster, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before them as hereinafter stated.

At a petty sessions holden at the borough of Blackburn aforesaid, on the 30th Sept. 1874, an

information and complaint preferred by Carus and White hereinafter called the appellants, against John Thomas Eastwood, hereinafter called the respondent, under sect. 9 of the Master and Servants' Act 1867, charging "for that he, the said respondent, being the servant of the said appellants in their trade or business of cotton manufacturers, under a certain contract of service for a period then unexpired, did, on the 20th July last, at the said borough, unlawfully neglect and refuse and had ever since neglected and refused to fulfil the said contract," were heard and determined by the said justices, the appellants and respondent respectively being then present, and upon such hearing they dismissed the said information and complaint.

The said justices in compliance with the application of the appellants and the provisions of the said statute, stated and signed the following case.

Upon the hearing of the said information and complaint it was proved on the part of the appellants, and found as a fact that they were power-loom-cloth manufacturers in the borough of Blackburn, and employed a large number of workpeople.

That the respondent was a weaver in their employment, and was paid by the piece.

That the rules hereto annexed (marked A.) were posted on the wall of the watchhouse of the appellants' mill, through which the workpeople passed on going to their work.

That on the 20th July last the respondent left his work without notice, and the appellants had sustained a loss of 9s. in consequence of the looms standing on account of his absence.

It was not proved that the attention of the respondent had ever been called to the rules, or that he had seen them, or assented to them, or was able to read.

It was proposed on the part of the appellants to submit evidence of the custom in certain mills in the district, to give and require fourteen days' notice, but the justices refused to receive it on the ground that the appellants proceeded upon an alleged contract, and that therefore evidence of custom was inadmissible.

It was contended on the part of the respondent that he did not know of the rules, and that the fact of the rules being posted in the watch house of the mill was not sufficient evidence of a contract, but that the attention of the respondent ought to have been called to them in order to constitute one.

It was contended on the part of the appellants that the fact of the rules being posted as before mentioned was evidence of a contract, and that therefore there was no necessity to call his attention to them.

The justices, however, being of opinion that upon the foregoing facts there was no sufficient evidence of the alleged contract between the parties, gave their determination against the appellants in the manner before stated.

The questions of law arising on the above statements for the opinion of this court, therefore, are: First, whether or not, the rules being posted in the watch house of the appellants' mill, was sufficient evidence of a contract between the appellants and respondent; secondly, whether on the hearing the said justices were justified in refusing to receive evidence of custom in the mills in the district with regard to notice.

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And the court was humbly prayed, according to the power vested in the court by the said statute (20 & 21 Vict. c. 43), to remit the case to the said justices with the opinion of the court thereon, or to make such other order as the court might seem fit.

The rules marked A were printed in large characters, and headed "Rules to be observed by the persons employed at Atlantic Mill:" they had the appellants' names at the bottom of the placard; those material to this case were:

"1. Fourteen days' notice in writing (to be given any Friday) is required from every person before leaving our employment, and we agree to give fourteen days' notice to every person previous to discharging him or her from our employment, except in cases of dishonesty, damage to machinery or cloth, misconduct, refusal, or failing to comply with orders or rules."

"17. Every overlooker is requested to see that the above rules are strictly attended to, and it is hoped that the workpeople generally will so conform thereto, that neither fines nor penalties will have to be inflicted."

J. Edwards, Q.C. (with him Sims), argued for appellant, the complainant.—There is no limitation in the Act to the mode by which an offence may be proved; the 9th section of 30 & 31 Vict. c. 141 (The Master and Servant Act 1867), enacts that "Upon the hearing of any information or complaint under the provision of this Act, two justices, or the magistrate or sheriff, after due examination, and upon the proof and establishment of the matter of such information and complaint, by an order in writing under their respective hands in their or his discretion, as the justice of the case requires," may make certain directions therein mentioned. The matter of this information and complaint might well be proved and established in respect of the contract of service between the parties by the posting of these rules. [BLACKBURN, J.—The justices find that on the facts the evidence of a contract was not sufficient; we are not asked if, and we cannot say that, this evidence is conclusive against the respondents. They only ask if the evidence was sufficient for a finding to which they have not come.] The second point reserved is whether, assuming no express contract to have existed, evidence of custom ought to have been excluded. [BLACKBURN, J.—The appellants proposed to submit evidence of the custom in certain mills in the district. That would not be enough.] If the case be remitted, as the justices request, they may decide the value of the custom.

Herschell, Q.C. and Baylis, who appeared for the defendant, were not heard.

BLACKBURN, J.—The questions which we are asked are not raised upon this special case. Of course it would be very cogent evidence of a contract based upon these rules, if a copy of them were proved to be posted in a prominent place, and it is not to be assumed, even if the servant could not read, that such rules would not be binding upon him. They might well be brought to his knowledge by other means. The justices, however, find that the respondent did not enter into this contract. A well known custom in the district might also be sufficient to establish a contract, but the effect of the justices' finding is that there was no such custom suggested. These findings need not be affected by our answers to these questions, so the judgment must be affirmed.

MELLOR, J.—I am entirely of the same opinion.—The liability of a servant under this Act need not depend either upon his being able to read rules, nor upon the custom of the district, if care were taken to point out the rules to him when he is hired.

QUAIN, J.—I am of the same opinion. Although there is no reason for sending the case back, I think we could not have interfered if the justices had convicted the respondent upon either of the grounds contended for by the appellants.

Attorneys for appellants, *Bandall and Angier*, for *Wheeler, Deane, and Fletcher*, Blackburn.

Attorneys for respondent, *Shaw and Tremellen*.

Saturday, June 5, 1875.

WATT (app.) v. GLENISTER (resp.).

Bona fide traveller—Sale of intoxicating liquors—Belief of publican—35 & 36 Vict. c. 94, ss. 24 and 51.

A policeman found some excursionists and some persons living about a mile off in the appellant's hotel during the forbidden hours on Sunday. The manager stated that he knew they were all excursionists, to his knowledge no one was served with refreshment who had not a ticket, and he asked all if they had tickets. Upon the policeman naming one of the persons before whom some drink was standing, that person said he was not an excursionist, but, seeing the door open, he thought it no harm having a glass of ale.

Held, that a conviction of the appellant under the Licensing Act 1872, was justified by this evidence. This was a case stated under 20 & 21 Vict. c. 43, for the opinion of the Court of Queen's Bench.

At a petty session held at the Town Hall, in and for the Borough of Hastings, in the county of Sussex, on the 25th June 1874, an information under sect. 24 of 35 & 36 Vict. c. 94, preferred by Wm. Glenister, superintendent of police of the borough of Hastings, hereinafter called the respondent, against Frederick Watt, of York Buildings, Hastings, aforesaid, licensed victualler, hereinafter called the appellant, charging that "the said Fredk. Watt, on the 21st of June then instant, at the parish of St. Mary-in-the-Castle, in the said borough, then being a licensed victualler, and the said day being Sunday, unlawfully did open his house there situate called the York, for the sale of intoxicating liquor before the hour of six o'clock in the afternoon of the said last mentioned day, to wit, at five minutes to three o'clock in the afternoon, otherwise than as refreshment for travellers or lodgers in the said house, contrary to the provisions of the Licensing Act 1872, in such case made and provided," was heard and determined by two justices of the peace, the appellant being then and there present, and upon such hearing the appellant was convicted.

Upon the hearing of the said information James Payne, a police constable of the said borough, was examined on behalf of the respondent, and stated as follows:

Last Sunday, about five minutes before 3 p.m., I was on duty at the Memorial. I saw several people going into the public bar of the York Hotel, next York-buildings. I followed them in, and I said to Mr. Maw, "I suppose you are aware that they are not all excursionists?" there were six people in front of the bar, two of them I knew had been in Hastings three or four days, and the other was a resident; there were two or three

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glasses on the counter with liquor in them, and Maw was drawing a pint of ale; he said, "I know they are all excursionists!" I then spoke to the resident and called him by name, and said, "You are not an excursionist, Martin?" he said, "No, I am not, but seeing the door open I thought it no harm having a glass of ale." There was a glass of beer in front of him; he went away without drinking it. I told Mr. Maw I should report him, he said, "I know what I am doing." There were excursion trains in on Sunday, I believe the last got in at 11.30 A.M. I went in again about 3.45 P.M., and saw a man named Murdock there, a native of Hastings, but he showed me an excursion ticket."

Cross-examined:

I told Mr. Maw Murdock was a native of Hastings; I did not know Murdock had left Hastings; Martin lives at High Bank, Ore, which is about one mile over the hill from the defendant's, and the artilleryman and his friend live at St. Leonards, which is also a mile from the defendant's.

On the part of the appellant, it was objected that upon the evidence of the constable there was no evidence to support an information for opening the house for the sale of liquor at an unlawful hour, and the following evidence was given on behalf of the appellant:

Robert Maw:

I am manager to the defendant, I live at the York Hotel, which is at the bottom of the road leading to the railway station. Last Sunday a great many excursionists came into the town, about 800 to 1000. I did not open the York before any travellers arrived; I believe the first train came in about 11.15 A.M.; I supplied them on their showing their tickets. To my knowledge I did not serve anyone who had not a ticket, I asked all if they had tickets. The constable asked if they all had tickets, I told him "Yes." I asked him to come and see, but he would not; he came back about three-quarters of an hour afterwards, and again asked me if they had all tickets, I said "Yes." The constable looked at the tickets that time. I do not know that I served a man named Martin, living at Ore, I took every precaution to serve only travellers.

Silas Robert Harris:

I live at 65, Cannon-street, London. I am a wine merchant, and have been lodging at the York. I was there last Sunday afternoon in the bar, Mr. Maw asked everyone who came in to show their tickets; I was not there when the constable came. I did not see anyone served who had not a ticket.

Charles Seeley:

I live at 24, Great Queen-street, London, I am a cigar manufacturer; I am lodging at the York Hotel; I was in the bar at the York last Sunday afternoon, when the constable came in, Mr. Maw asked him to see if every one had tickets, but he would not; Mr. Maw asked every one who came in if they had tickets; he served those who had, and refused to serve those who had not; he used every precaution to distinguish those who were, from those who were not excursionists.

The justices having duly considered the evidence, and the objection raised by the attorney for the appellant, and believing the evidence of the police constable, and that there had been an actual sale and delivery of beer to other than travellers, and that the consumption of the beer by Martin was only prevented by the entry of the police constable, were satisfied that the said house was in fact opened on the day charged in the information for the sale of intoxicating liquors to other than travellers and lodgers; and the justices therefore convicted the appellant in the sum of 2*l.* penalty, and 1*s.* for costs.

The question of law arising on the case for the opinion of the Court of Queen's Bench is

Was there any evidence to support the information as laid?

If the court should be of opinion that the conviction was legal then it is to stand, but if otherwise, it is to be quashed.(a)

Forsyth, Q.C. (with him *Cooper Wyld*), argued for the appellant.—This was a conviction under the same Act of 1872 as the decision of *Roberts v. Humphreys* (L. Rep. 8 Q. B. 483). It cannot be now denied that the onus of showing that persons come within the exception of the 24th section lies on the defendant. A query, however, was expressed in that case, which it is essential to answer in the negative before this conviction can be supported; the formal order of the court there was, "The Court is of opinion that the onus of proof is upon the defendant. The case is remitted for the justices to determine, as a question of fact, whether the defendant had an honest though mistaken belief that the persons were all *bonâ fide* travellers. If the justices find in the affirmative the case is to be returned to the court, who will then decide whether such belief does or does not constitute a good defence. Otherwise, conviction to be affirmed." Here the statement of the manager of the hotel was that he believed he served only travellers. This was repeatedly decided under the previous Acts to be sufficient ground for quashing a conviction: (*Copley v. Burton*, L. Rep. 5 C. P. 489.) [MELLOR, J.—The question here is whether there was any evidence to justify the magistrates in finding as they did. We are not asked if we should find the same way on the evidence stated in the case.] In *Peplow v. Richardson* (L. Rep. 4 C. P. 163), it was held that a man who had walked two miles and a half from his residence was a traveller within the exception to a similar provision. There is no reason why these guests who lived a mile off should not be travellers.

Francis supported the conviction.—Under the Act 37 & 38 Vict. c. 49, passed after this conviction, many of these guests would not be *bonâ fide* travellers; they could not be so unless they were three miles from their lodgings of the night before. Even if the provision on this subject in the 10th section may be taken to be the legislative exposition of what the justices should do under the previous Act, the defendant in this case was rightly convicted:—"If in the course of any proceedings which may be taken against any licensed person for infringing the provisions of this Act or the principal Act, relating to closing, such person (in this section referred to as the defendant) fails to prove that the person to whom the intoxicating

(a) By the Licensing Act 1872 (35 & 36 Vict. c. 94, s. 24), "Any person who sells or exposes for sale, or opens or keeps open any premises for the sale of intoxicating liquors during the time that such premises are directed to be closed by or in pursuance of this section, or, during such time as aforesaid, allows any intoxicating liquors to be consumed on such premises, shall for the first offence be liable to a penalty not exceeding 10*l.*, and for any subsequent offence to a penalty not exceeding 20*l.*"

"None of the provisions contained in this section shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor to *bonâ fide* travellers, or to persons lodging in his house."

By sect. 51, sub-sect. 4, "Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant or complainant."

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liquor was sold (in this section referred to as the purchaser) is a *bonâ fide* traveller, but the justices are satisfied that the defendant truly believed that the purchaser was a *bonâ fide* traveller, and further that the defendant took all reasonable precautions to ascertain whether or not the purchaser was such a traveller, the justices shall dismiss the case as against the defendant, and if they think that the purchaser falsely represented himself to be a *bonâ fide* traveller, it shall be lawful for the justices to direct proceedings to be instituted against such purchaser under the 25th section of the principal Act." The evidence of the policeman is found to be true, and that is sufficient under either Act. The man, Martin, when he was asked, admitted that he was not an excursionist, and that he had been received without difficulty. The hotel was opened for the double object, to receive travellers, and also to receive other persons, not travellers. This is exactly *Roberts v. Humphreys*, except that the justices find that the manager did not believe the guests were all travellers.

Forsyth, Q.O. in reply.—If the justices had finally found that to be the fact, they would not have sent the case here.

COCKBURN, C.J.—I think under this Act a publican may open his house for the reception of *bonâ fide* travellers; but, if he gives refreshment in the forbidden hours to other people, the onus is upon him to show at least a well founded belief that none of his guests are neighbours. The justices have found that the manager entertained no such belief, and the evidence set out in the case seems to me to afford at all events some ground for the finding.

BLACKBURN, J.—I am of the same opinion. We are only asked if the evidence is sufficient in law to justify the conclusion to which the magistrates came. I should think from what the witnesses said that the house was opened for the purpose of receiving all manner of persons. At all events it was open for the reception of travellers; some persons, not travellers, were there, and it is by no means clear that the manager did not know who the guests were. In my opinion it matters not whether he knew who they were, or believed them all to be *bonâ fide* travellers; this state of things, however, is altered under the new Act.

MELLORE and FIELD, JJ. concurred.

Judgment for respondent.

Attorney for appellant, O. Divenport Jones.

Attorneys for respondent, S. F. Langham and Son.

Monday, June 7, 1875.

SMITH AND ANOTHER (apps.) v. THE OVERSEERS OF SEGhill (resps.)

Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41), s. 19—Occupier.

The appellants, workmen in a colliery, lived rent free in houses owned by their employers, who filled up their houses with their workmen, giving preference to married men. Married men for whom there was no house received allowance for rent, but single men did not. A married man could be called on to go into a house when one was vacant, and if he did not would forfeit his allowance. Notice to quit the work was notice to quit the house. It was not necessary to live in a house to perform the work. The owners did not compound for their rates

under 32 & 33 Vict. c. 41, but paid the full amount.

Held that the appellants were entitled to have their names entered in the occupiers' column of the rate-book under 32 & 33 Vict. c. 41, s. 19, and that the overseers were liable to a penalty under that section for omitting to enter them.

Hughes v. The Overseers of Chatham (5 M. & G. 54) followed.

Cross v. Alsop (23 L. T. Rep. N. S. 589; L. Rep. 6 C. P. 315; 40 L. J. 53, J. P.) distinguished, and dicta in that case disapproved.

This was a case stated by a justice of the peace under 20 & 21 Vict. c. 43. An information had been laid against the respondents for negligently wilfully and without reasonable cause omitting and refusing to enter the names of the appellants in the occupiers' column of the rate-book of Seghill, contrary to the provisions of the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41) s. 19. The justices dismissed the complaint.

The appellant resided in a house belonging to his employers, the owners of Seghill colliery; he received no notice to quit, nor did he claim to be entitled to any; the occupation of his house ceased, at the moment when his service ceased, and the notice to quit his work was a notice to quit his house. The owners of the colliery have about 340 houses at Seghill, and they fill these up with their workmen at their discretion, giving preference to married men; a workman cannot go into a house without the owner's concurrence. Some of the workmen are single men, and no house is given to them; these get the same wages as all the other workmen, but no allowance for rent. If there are not sufficient houses an allowance is made to the married men to assist them in paying their rent; if a house is vacant the owners could call upon a married man to go into it, and if he did not go his allowance would cease. It is not necessary for a workman to live in a house to perform his work. The owners of the colliery do not compound for their rates under 32 & 33 Vict. c. 41, but pay upon the full amount, and are entered in the rate-book as the occupiers of the houses. By the Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict. c. 41), s. 3. "In case the rateable value of any hereditament does not exceed a certain value, varying in different places, and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding twenty-five per cent. on the amount thereof." By sect. 4 "The vestry of any parish may, from time to time, order that the owners of all rateable hereditaments to which sect. 3 of this Act extends, situate within such parish, shall be rated to the poor-rate in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; . . . Provided that this clause shall not be applicable to any rateable hereditament in which a dwelling house shall not be included." If the owners are rated under this section they are allowed an abatement or deduction of 15 per cent.

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By sect. 7 "Every payment of a rate by the occupier, notwithstanding the amount thereof may be deducted from his rent as herein provided, and every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which, as regards rating, depends upon the payment of the poor rate."

By sect. 19 "The overseers in making out the poor rate shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid; and if any overseer negligently or wilfully and without reasonable cause omits the name of the occupier of any rateable hereditament from the rate, or negligently or wilfully misstates any name therein, such overseer shall, for every such omission or misstatement, be liable on summary conviction to a penalty not exceeding two pounds. Provided that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted." The questions for the opinion of the court were—whether the appellants were or were not the occupiers within the meaning of 32 & 33 Vict. c. 41, s. 19. And whether they were or were not entitled to be entered in the occupiers' column of the rate-book for the township of Seghill. And whether the occupation was that of a servant, and incidental and subsidiary thereto, and incidental to the service.

Herschell, Q.C. (C. F. Jemmett with him), for the appellants.—The appellants are occupiers within the meaning of sect. 19, and as such are entitled to have their names entered in the occupiers' column of the rate-book. The occupation is not that of a servant, nor is it essential for the purposes of the service that they should occupy. It is true that a notice to quit the work is a notice to quit the house, but in every other respect they are in the position of tenants at will. In *Hughes v. The Overseers of Chatham (Burton's case)* (5 M. & G. 54) an appeal from a revising barrister, the house occupied by the claimant was situated in the dockyard at Chatham; the claimant was master rope-maker, and as such had the house for his residence; he paid no rent in money for it, but had it in part remuneration for his services, and no part of it was used for public purposes, the office in which he performed his public services being away from it; if he had not been allowed the house he would have had an allowance for a house in addition to his salary. The court there held that the claimant occupied as tenant within the meaning of 2 Will. 4, c. 45, s. 27, and was, therefore, entitled to vote at parliamentary elections. This case, and the principles on which it was decided, are in point here, and in *Parker's case* which was decided at the same time (5 M. & G. 73, 80) the facts are still more analogous to those of

the present case. *Dobson v. Jones* (5 M. & G. 112) is distinguishable, for there the claimant was required to occupy the house with a view to the more efficient performance of the duties of his office as surgeon of Greenwich Hospital. *Fox v. Dalby* (31 L. T. Rep. N. S. 478; L. Rep. 10 C. P. 285; 44 L. J. 42 C. P.), the case of a serjeant on the permanent staff of the militia, is distinguishable on the same ground. It cannot be said that sect. 19 applies only to cases within sects. 3 and 4, for the words are "in every case," and "the occupier of every rateable hereditament." The proper name to appear on the rate-book is the occupier's, unless there is some statute to the contrary. *Cross v. Alsop* (23 L. T. Rep. N. S. 589; L. Rep. 6 C. P. 315; 40 L. J. 53, C. P.) does not apply, and the *dicta* in that case as to the construction of sect. 19 were not essential to the decision.

Little, Q.C. (John Mellor with him), for the respondent.—*Cross v. Alsop* (*ubi sup.*) is directly in point, for all the judges who decided that case held that sect. 19 applies only to cases coming within sects. 3 or 4; the whole question which came before the Common Pleas there was identical in spirit and letter with the present case. Sect. 19 is a penal section, and the penalty is only intended to apply to breaches of sects. 3 or 4. It cannot be said that the appellants are occupiers. *Hughes v. The Overseers of Chatham* (*ubi sup.*) does not apply, or if anything is in favour of the respondent, for it is enough to prevent the appellants from being "occupiers" if the occupation is incidental to their service, and in that case it was found in effect that this was not so; but here the houses are provided as part of the machinery of the colliery, and are all occupied in order to the performance of the works, and are conclusive to the purpose more than other houses would be (see 5 M. & G. at p. 78). According to the judgment of Lord Coleridge, C.J. in *Fox v. Dalby* (L. Rep. 10 C. P. at p. 294). "If either ingredient exists, if the occupation be necessary for the better performance of the duties required to be performed by the party," or if he is required to reside, "the occupation is not an occupation as tenant." It is clearly an advantage, and tends to the better performance of the work, that the men should reside near, and not be obliged to walk a long distance to their work. The settlement cases are favourable to the contention of the respondent. *R. v. The Inhabitants of Minster* (3 M. & S. 276); *R. v. The Inhabitants of Kelstern* (5 M. & S. 136); *R. v. The Inhabitants of Cheshunt* (1 B. & A. 472); and *Bertie v. Beaumont* (16 East, 33) is to the same effect. [MELLOR, J.—Do you say that one of these cottages could be laid as the house of the masters in an indictment for burglary?] As to that point see *Brown's Case*, 2 East P. C. 501. The occupation here was subservient to the service *R. v. Spurrell*, L. Rep. Q. B. 72. The preamble of 32 & 33 Vict. c. 41 recites that "it is expedient to amend the law relating to the collection of poor rates assessed upon occupiers of hereditaments held for short terms." This shows that the Act does not apply to such a case as the present.

Herschell, Q.C. in reply.—The settlement cases were dealt with in *Hughes v. The Overseers of Chatham* (*ubi sup.*), and the Act must be taken as having been passed with reference to that decision. All the observations made here would apply to that case. The preamble may be looked at where the words of an Act are doubtful, but it cannot control absolute words. The object of sect. 19 is

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remedial, for it is intended to benefit those who are entitled to the franchise.

MELLOR, J.—In this case we are all agreed that the magistrate has arrived at a wrong decision. By 32 & 33 Vict. c. 41, s. 19 the occupiers of rateable hereditaments are entitled to have their names entered in the occupiers' column of the rate-book, and a penalty is imposed upon the overseers if they negligently, or wilfully and without reasonable cause, omit the name of any such occupier from the rate. The question is whether the appellants here are occupiers. There have been many nice distinctions drawn in the cases, both in those as to settlement and in those relating to the franchise, and the cases are not all strictly reconcilable with one another. I think that we must be governed by the principle of *Hughes v. The Overseers of Chatham (ubi sup.)*, which is shown by the expressions used in the judgment; in the present state of the authorities we must extract the governing principle from that case. Now it appears that where a servant has a house which he resides in, and which he is required to reside in for the purpose of performing his services, on the ground that in this way he is required to reside he is not to be considered as an occupier; but in the case of the master ropemaker the decision was the other way, because there he occupied in the capacity of tenant. That seems to be the governing principle. It is true that the appellants in this case occupied in one sense for the purpose of their service, because their masters were the owners of the cottages, and naturally desired that the workmen whom they employed should reside in them. In that sense they were required to reside, but that is not the sense in which the word "required" is used in the judgment in *Hughes v. The Overseers of Chatham (ubi sup.)*, for there it was held that the residence must be necessary to the performance of the servant's duties in order to make it such a residence as would prevent him from being an occupier. If it is only by an arbitrary rule, that he is compelled to reside in a certain place, that does not prevent him from still being occupier as tenant at will, though he has not a fixed term. It has been contended that, because if a married man did not go into a vacant house when called upon he would be deprived of his allowance, the workmen were required to live in these houses. It is true that the masters preferred they should live there, but this does not change the relation between the parties, nor convert an occupier into a mere servant who resides for the purposes of his special duty. As to the other matter I had at first some difficulty, but on the whole I am satisfied that the opinions expressed by the Judges of the Court of Common Pleas on the construction of 32 & 33 Vict. c. 41, s. 19 in *Cross v. Alsop (ubi sup.)* were unnecessary to the decision of the case. It was enough there to say that a separate rating was necessary, and that, the appellant being rated jointly as occupier, this was not sufficient within the meaning of the Representation of the People Act 1867 (30 & 31 Vict. c. 102), s. 61. We do not wish to interfere with the principle which was necessary for the decision of that case, but we cannot arrive at the conclusion there adopted as to the construction of sect. 19. The section is an enfranchising one, and the words "in every case" are so general and so large that I think the construction put upon the section by the Court of Common Pleas was too narrow. We

ought not to limit the words of the section, but ought to give it its full effect. On these grounds, although there is no doubt a difficulty in drawing the line, I think that the magistrate ought to have decided that the appellants were occupiers, and therefore, entitled to have their names entered in the occupiers' column of the rate-book.

LUSH, J.—The first question is in what character the appellants occupied. The statute (32 & 33 Vict. c. 41, s. 19) provides that the overseers shall, in every case, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise, and a penalty is inflicted in case of omission to enter the names. From the facts as stated it appears that these were houses belonging to the owners of the colliery, which the workmen were permitted to occupy, and in certain cases were called upon to occupy, being liable in case of refusal to forfeit the allowance which was made to them for rent in case there was no house for them to occupy. There was nothing further than this to compel them, and they were not obliged to occupy if they preferred to live at their own expense elsewhere. I think that this is within the cases in which it has been held that the house was held not in the capacity of a servant, but as occupier. In *Hughes v. The Overseers of Chatham (ubi sup.)* Tindal, C.J. says "There is no inconsistency in the relation of the master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will or for any other estate or interest; and if he do so the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration. But it may be that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not permitted to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy in the performance of his contract to serve his master. The settlement cases cited in argument, established and proceeded on this distinction." Now that is exactly applicable to the case here. The workmen were not required to occupy the houses, and the occupation was no part of their service, and was not indispensable to the work which they had to do; this brings it within the class of cases where it has been held that the occupation was not an occupation as a servant. It is true there was no fixed term, but still during the continuance of the service the workmen would be occupiers of the houses. The case of the surgeon, *Dobson v. Jones (ubi sup.)*, and that of the staff-serjeant in the militia *Fox v. Dalby (ubi sup.)* proceeded on exactly the same principle. In the latter case the respondent occupied as a servant, because he was required to live where he did to take care of the stores. Lord Coleridge, C.J., there says, after quoting the authorities, "It appears that the voter here is ordered by his commanding officer to reside in the house in question in order to perform the duties which are imposed upon him; and it is manifest that it is a convenient thing that he should reside near to the stores which he has to look after. . . . I am of opinion that the occupation in this case has no one of the incidents of an occupation either as owner or as tenant."

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(L. Rep. 10 C. P. at p. 294). That case is entirely consistent with *Hughes v. The Overseers of Chatham* (*ubi sup.*), and our decision in this case is in accordance with both. The appellants do not occupy in the performance of their duty, and are not required to occupy. As to the second point, whether the overseers are liable, no question has been made about the omission having been made negligently or wilfully and without reasonable cause, but it has been contended that sect. 19 is confined to cases within sects. 3 and 4. I confess I cannot follow the reasoning of some of the Court of Common Pleas in *Cross v. Alsop* (*ubi sup.*) on the construction of sect. 19, but the meaning of the earlier part of the section was not then before them, for there the person who claimed to be entitled to the franchise only occupied part of a house, and the question really was whether that could be cured by anything in sect. 19; this turned upon the proviso at the end of the section, for the name there had not been omitted. Although there were some strong observations made as to the scope of sect. 19, they were not necessary for the purposes of the decision, and there could be no appeal. We are bound to form our own judgment here, and to say what we think is the proper construction. Sects. 3 and 4 only apply to cases where the owner is rateable instead of the occupier, but some of the other sections go far beyond these. There is nothing in the earlier sections (1 and 2) about any agreement, and nothing is sect. 7 as to any term. The words of sect. 19, which include every case whether the rate is collected from the owner or occupier, and whether the owner or occupier is liable for the rate, so far from being limited, apply to every case. The object of the section is to secure that voters shall not be in jeopardy of being deprived of the franchise by the negligence of the overseers.

QUAIN, J.—I am of the same opinion. I think that the appellants here were occupiers within the meaning of sect. 19, and not, as was contended, that they resided in these houses as servants. The governing facts are these: The men are paid by piece work, and their occupation of the houses has nothing to do with their wages; they are not required to occupy as one of the conditions of their service, but married men are permitted to occupy, and the inducement held out to them to do so is that they reside rent free, or, if there is no house in which they can so reside, they receive an allowance for rent, but it is no necessary part of their service that they should live in the houses. The case is clearly distinguishable from that of a coachman or gardener or the case of a surgeon which has been cited *Dobson v. Jones* (*ubi sup.*) where Tindal, C.J. distinguishes between cases where officers or servants are permitted to occupy houses as part remuneration for their services, and those where they are required to occupy with a view to the more efficient performance of duties or services imposed upon them. Here the workmen were clearly not required to occupy, and the occupation was not essential or necessary to their service, but only convenient. It appears to me that the facts of this case come within the first part of the distinction drawn by Tindal, C.J., and the case appears to be within *Hughes v. The Overseers of Chatham* (*ubi sup.*), and not within *Dobson v. Jones* (*ubi sup.*). I am, therefore, of opinion, that the appellants are occupiers. As to the second question, the decision in *Cross v. Alsop* (*ubi sup.*) has

no bearing on the present case. No doubt the opinions there expressed must be understood as going far enough to support the respondents' contention here, but they were not necessary for the decision of the case. There the court had to decide under the Representation of the People Act 1867 (30 & 31 Vict. c. 102) whether the occupier was distinctly and separately rated. Then it was tried to bring the case within the proviso at the end of sect. 19 of 32 & 33 Vict. c. 41. To that contention it was clearly a sufficient answer that the appellant's name was put in as a joint occupier, and therefore, the case was not within the proviso. But I cannot read sect. 19 as confined to cases where there is an agreement under sect. 3 or an order of the vestry under sect. 4, for I think it applies to the simple case of an occupier. It applies whether the rate is collected from the owner or occupier or whether the owner is liable instead of the occupier, which includes this very case within the express terms of the section. For these reasons I am opinion that the magistrate was wrong. *Cases remitted to the justices.*

Attorneys for appellants, Bell, Brodrick, and Gray.

Attorney for respondents, John Tucker for W. S. Dalglish, Newcastle-upon-Tyne.

COURT OF COMMON PLEAS.

Reported by ETHERINGTON SMITH and J. M. LELY, Esqrs.,
Barristers-at-Law.

Tuesday, June 22, 1875.

GWINNELL v. EAMER.

Nuisance to highway—Defective grating—Demise of premises—Obligation on tenant to repair—Whether landlord liable.

The lessor of demised premises adjoining the highway is not liable for a nuisance to the highway existing on such premises at the time of the demise, if the lessee occupies under an obligation to repair.

The defendant in 1873 demised a house abutting upon a public street to W, the lease containing a covenant whereby W. bound himself to "repair and keep in repair" the demised premises. At the time of the demise there was upon the premises a grating opening into the street, which grating was, unknown to the defendant, in a defective state of repair, and dangerous. In 1874 the grating gave way, causing damage to the plaintiff while lawfully using the highway. The jury found that the defendant could not have known of the defective condition of the grating by the exercise of ordinary care.

Held, that the defendant was not liable, and a rule to set aside a nonsuit discharged.

Pretty v. Bickmore (L. Rep. 8 C. P. 401; 28 L. T. Rep. N. S. 704) affirmed.

DECLARATION that the defendants were possessed of an area and excavation, under a certain way and passage, covered by an iron grating for the purpose of protecting persons using the said way and passage from falling into the said area and excavation, and which grating the defendants had taken upon themselves the duty of keeping in repair, and were bound to put in repair, yet the defendants, well knowing the premises, and wrongfully and unjustly, and contrary to their duty in that behalf, permitted the said iron grating over the said hole to be and continue, and the same was

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unsafe, and in bad and insufficient repair, by means of which premises, and of the mere carelessness, negligence, and improper conduct of the defendants in that behalf, the said way and passage was dangerous to persons using the same, and the said grating fell and gave way whilst the plaintiff was lawfully passing in, and along, and using the said way and passage, and over the said hole, and the plaintiff fell into the said hole and excavation and was hurt, &c.

Material pleas (1) that the defendants were not possessed of the area, and (2) that they had not taken upon themselves the liability of keeping the grating, and were not bound to keep it in repair.

Issue thereon.

The cause was tried before Quain, J., and a common jury at the Gloucester Spring Assizes 1875, when the following facts were proved:

The plaintiff was a grocer living at Cheltenham, and the defendants marine store dealers living at Gloucester. The defendants owned a house in St. George's-square, Cheltenham, which they had let in 1873 to a Mr. Workman, under a lease containing a covenant that the tenant would "repair and keep in repair" the demised premises. Through the square was a roadway and path, much used by the public. Adjoining the footpath in front of the house was an iron grating, not fenced. One of the iron bars of this grating gave way as the plaintiff stepped upon it in the act of conversation with an inmate of the house. The cause of the bar giving way was improper riveting and rust. Four other bars were found to require repair. The jury found that the grating was unsafe at the time of the demise, and that the plaintiff was making no improper use of it at the time of the accident, and they gave 50*l.* damages. They further found that the female defendant to whom the house belonged, was not to blame for not knowing the state of the grating at the time the house was let.

A nonsuit was then directed with leave reserved to move, pursuant whereto a rule was afterwards obtained to set the nonsuit aside and enter a verdict for the plaintiff, or for a new trial on the ground of misdirection, and on the ground that the last finding was against evidence.

Jelf (J. J. Powell, Q.C. with him) for the defendant now showed cause, and cited the case of *Pretty v. Bickmore* (L. Rep. 8 C. P. 401; 28 L. T. Rep. N.S. 704). In that case the defendant let premises to a tenant under a lease by which the latter covenanted to keep them in repair. Attached to the house was a coal cellar under the footway, with an aperture covered by an iron plate, which was at the time of the demise out of repair and dangerous. A passer by on the highway fell into the aperture and was injured. It was held that the obligation to repair being by the lease cast upon the tenant, the landlord was not liable for the accident. "In order to render a landlord liable in a case of this sort" observed Keating, J., "there must be some evidence that he authorised the continuance of this coal-shoot in an insecure state; for instance, that he retained the obligation to repair the premises, might be a circumstance to show that he authorised the continuance of the nuisance. There was no such obligation here. The landlord had parted with the possession of the premises to a tenant, who had entered into a covenant to repair." *Gandy v. Jubber* (5 B. & S.

78; 32 L. J. 151, Q. B.; 9 B. & S. 15 n.), upon the authority of which the present rule was obtained was cited, but the court refused a rule to set aside a nonsuit. [He was then stopped.]

Sawyer (H. Matthews, Q.C., with him) for the plaintiff, supported the rule.—*Pretty v. Bickmore* (*ubi sup.*) is distinguishable, because in that case the tenant knew of the defective state of the coal-shoot. "The tenant" says Bovill, C.J., "knowing that the coal-shoot wanted repair, was bound to put it in a safe and proper state." However, that may be, *Pretty v. Bickmore* was wrongly decided, and is at variance with the previous authorities upon the subject.

Gandy v. Jubber (*ubi sup.*);

Rosewell v. Prior, 2 Salk. 459;

R. v. Pedly, 1 A. & E. 822;

Thompson v. Gibson, 7 M. & W. 456.

[DENMAN, J., referred to *Cheltham v. Hampson* (4 T. R. 318), *Russell v. Shenton* (3 Q. B. 449), and *Payne v. Rogers* (1 H. Bl. 351), as showing that an action on the case for not repairing can only be maintained against the occupier and not against the owner, who is not in possession.] In *Gandy v. Jubber* (*ubi sup.*), the owner of a messuage and premises, attached to which was an area, let the same to a tenant from year to year, and died, having demised the property with an iron grating over the area improperly constructed, and out of repair, so as to amount to a nuisance, to the defendant. Then the defendant, having no notice of the nuisance, suffered the tenant to remain in the occupation of the premises, upon the same terms as before, receiving rent. The plaintiff's wife having sustained damage by reason of the dangerous condition of the grating, it was held that the defendant, as reversioner, was liable to an action for the damage thereby occasioned. An appeal was brought (see 5 B. & S. p. 485) to the Exchequer Chamber, which, court recommending the plaintiff to accept a *stet processus*, no actual judgment was ever delivered. A written judgment had been prepared however, and from this, which was printed three years afterwards (see 9 B. & S. 15 n.) it appears that the Exchequer Chamber had been prepared to reverse the judgment of the court below. But it is submitted that the reversal was upon grounds favourable to the plaintiff's case. "In a great deal of what fell from the learned judges in the judgment below," observed the court, "we entirely concur. We agree that to bring liability home to the owner, the premises being let, the nuisance must be one which was in its very essence and nature a nuisance at the time of letting, and not something which was capable of being thereafter rendered a nuisance by the tenant, and that is a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on his premises at the date of the demise; but that wherein we differ is, that a landlord from year to year having the power of giving the ordinary notice to quit, and not giving it, is thereby to be held as reletting the premises, and that such forbearing to give notice is equivalent to a reletting." He also argued that the last finding was against evidence.

BRETT, J.—This was an action against the defendant, as owner of property, to recover damages for injuries sustained by the plaintiff by reason of a nuisance upon that property causing the injuries after the defendant had demised the property to

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a third party. The evidence and findings show that the premises were let when the grating was so out of order as to be a nuisance, but it also appears that the defendant neither had nor could have had knowledge of its defective state. By the demise to a tenant, the defendant had put that tenant under the obligation to repair the premises, and to keep them in repair. We have, therefore, a case where the owner has put on the occupier, and the occupier has accepted from the owner, the obligation to keep in repair. *Pretty v. Bickmore* (*ubi sup.*) is in point in every particular. There the court held that where there is no obligation upon the landlord to repair, a party injured by a want of repair cannot look to the landlord for a compensation for his injuries. By that case we are bound here, whether it is likely to be overruled in a court of error or not. But I have heard neither reason nor authority to show that it is bad law. It may be that if the knowledge of the landlord could be proved, he might be liable, although he had by lease cast the duty to repair upon another person. I doubt much whether the landlord would be liable in such a case, but I cannot say that he would not. It is clear that the landlord would be liable in a case where he had undertaken to repair himself, and the defective state of repair amounted to a nuisance. In this case, however, if there be any remedy, as to which I say nothing, the remedy is against the tenant.

DENMAN, J.—I am entirely of the same opinion *Pretty v. Bickmore* (*ubi sup.*) is in point, and I see no reason to doubt it. *E. v. Pedley* was cited there and much considered, but this court refused to grant a new trial. In order to make a landlord liable, such a state of circumstances must be shown as that which is described by Erle, J., at the close of his judgment in *Todd v. Flight* (9 C. B., N. S., 377; 30 L. J. 21, C. P.)

LINDLEY, J.—I am of the same opinion. I not only think that this case cannot be distinguished from *Pretty v. Bickmore*, but that *Pretty v. Bickmore* is right. As to *Gandy v. Jubber* (*ubi sup.*), it appears that the tenant in that case was under no obligation to repair, so that any difficulty which that case may at first sight suggest ceases to arise.

Rule discharged.

Attorneys for the plaintiff, T. J. Pullen, for Boodle, Cheltenham.

Attorneys for the defendant, Doyle and Edwards, for Taynton, Gloucester.

June 19, 21, and July 9, 1875.

WOODWARD (pet.) v. SARSONS AND SADLER (resps.).
BIRMINGHAM MUNICIPAL ELECTION PETITION.

Municipal election—Number of voters on Burgess roll marked on ballot paper by presiding officer—Folding up of ballot papers, with declarations of inability to read—Irregular filling up of ballot paper by voter—Double or imperfect crosses—Ballot Act 1872, how far imperative and how far directory.

The body of the Ballot Act is imperative, and the schedules directory.

It is not essential to the validity of a ballot paper that a voter should have placed a cross thereon after the exact fashion prescribed by the schedule to the Ballot Act. Any mark which designates that the voter means to vote, and for whom, and by which he will not be identified, is sufficient.

By sect. 2 of the Ballot Act 1872, "any ballot paper on which anything, except the number on the back, is written or marked by which the voter can be identified, shall be void and not counted." By sect. 28, the schedules to the Act are to be construed as part of it, but by sect. 13 no election is to be declared invalid by reason of a noncompliance with rules contained in the first schedule, or "mistake in the use of" the forms contained in the second, "if it appears to the tribunal having cognisance of the question," that the election was conducted in accordance with the principles laid down in the body of the Act, and that such noncompliance or mistake did not affect the result of the election.

At a municipal election, the presiding officer at one of the polling stations marked on the face of 294 ballot papers the numbers on the Burgess roll of the voters using them. Such numbers might have been, but were not in fact, seen by the agents of the candidates at the counting of the votes. The returning officer rejected all the ballot papers so marked:

Held, that the votes were bad.

At another polling station, twenty ballot papers having been marked by the presiding officer by the direction of voters unable to read, were placed by him in the ballot box, wrapped up in the "declarations of inability to read," and were not made up into a separate packet. Each of the votes so given would have been, but were not in fact, identified by the returning officer, nor were such twenty ballot papers rejected by him:

Held, that the votes were good.

The ballot papers having been inspected on behalf of the petitioner, it was found that twenty-two ballot papers marked for the respondent, to which no objection had been made at the counting of the votes, contained certain departures from the statutory cross, on the strength of which the petitioner claimed that they should not have been counted. A similar inspection on behalf of the respondent disclosed ten ballot papers marked in a like imperfect manner. The departures objected to were, *inter alia* (a), the writing of the favoured candidate's name; (b), the writing of the voter's name; (c), the placing of more crosses than one; and (d), the placing of a cross on the wrong side:

Held, that departures (a) and (b) were fatal, but that departures (c) and (d) were not:

Held, further, that none of the irregularities above set forth, nor the aggregate of them, avoided the election, either at common law or under the Ballot Act.

The Wighton case (1 Sess. Cas. 4th series, 925), partially dissented from.

SPECIAL case stated under the Corrupt Practices (Municipal Elections) Act 1872, sect. 15, subsect. 6.

1, 2. An election for the office of town councillor for the Nechell's Ward of the Borough of Birmingham was held in the said ward on the 2nd Nov. 1874. The ward is divided into nine polling districts (numbered 123, 124, 125, 126, 127, 128, 129, 130, and 131), in each of which there is a polling station, where the votes of the burgesses appearing on the ward list rated in that district are taken.

3, 4. Upon the ward list in force at the time of the said election there are 4405 voters, and upon the list for polling district No. 130 (which is the largest

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of the said nine polling districts), there are 564 voters. The petitioner and the respondent Sarson were candidates, and the respondent Sadler (being the alderman of the said ward) was returning officer.

5. A poll became necessary and was held, and the number of votes given was declared by the respondent Sadler to be, for Sarsons, 965 votes; for Woodward, 775 votes, whereupon the respondent Sarsons was declared elected.

6, 9. The respondent Sadler appointed certain persons to act as presiding officers at each of the said polling stations. At station No. 130, the respondent Sadler appointed one Smith, a solicitor, presiding officer. Upon an elector attending to vote, and applying for a ballot paper at polling station No. 130, the said Smith first marked upon the face of the ballot paper the number of such voter appearing on the burgess roll, and then delivered the same out so marked to the voter as and being a ballot paper to be used by him, and the same was accordingly used by him for the purpose of voting. This course the said John Smith followed in the case of every ballot paper used or attempted to be used at the said polling station No. 130, at the said election. The returning officer was not aware of this being done, or having been done, until after the polling was closed. The number of ballot papers so marked by the said Smith was 294, of which 234 were given in favour of the petitioner, and the remainder in favour of the respondent Sarsons. The burgess roll numbers so marked by the said Smith upon the said ballot papers were, in fact, not seen so as to be identified, but they could have been seen by the persons present at the counting of the ballot papers, who were the returning officer and his assistant, the petitioner, the respondent, and their respective agents, one for each, and by referring to the burgess roll such persons could have identified the voters who had made use of such ballot papers.

9. The said Smith did not make out any ballot paper account or statement, showing the number of ballot papers entrusted to him, and accounting for them under the heads of ballot papers in the ballot box, unused, spoilt, and tendered ballot papers or any account or statement to that or the like effect.

10. At polling station No. 125, about twenty ballot papers were marked by the presiding officer at that station by the direction of voters who were unable to read. Each of such ballot papers was placed by the said presiding officer in the ballot box, wrapped up in the "Declaration of inability to read," made by the voter for whom such votes were so marked as aforesaid. The declarations of inability to read of the said voters by the said presiding officer as aforesaid, were not made up into a separate packet sealed with the seal of the said presiding officer, and so delivered to the returning officer, but were delivered to him in the ballot box with the ballot papers as aforesaid. Each of the votes so given and so marked by the said presiding officer as aforesaid, could have been, but were not in fact, identified by the returning officer at the counting of the votes by comparing the declarations of inability to read in which each such ballot paper was wrapped as aforesaid with the ballot paper.

11. Subsequently to the presentation of the petition, the petitioner having obtained inspection of the ballot papers, observed certain marks upon

them, and now contends that the twenty-two votes hereinafter mentioned ought to have been rejected by the said returning officer, by reason of the ballot papers by which the same were given bearing writings or marks by which the voter could be identified, or because they were void for uncertainty. The following are particulars of the writings or marks on the said ballot papers, and of the facts alleged to have rendered them void for uncertainty:

(1) Two ballot papers, Nos. 844 and 889, bearing the name "Sarsons" opposite the name of the respondent "Sarsons" printed upon such ballot papers.

(2) Five ballot papers, Nos. 433, 926, 928, 1364, (a) 1426, marked with two crosses instead of one.

(3) One ballot paper, No. 1726, marked with three crosses instead of one.

(4) One ballot paper, No. 2140, marked with a straight stroke in addition to the cross.

(5) One ballot paper, No. 3562, marked with the letter [F], in addition to the cross.

(6) One ballot paper, No. 878, marked with a straight line instead of a cross.

(7) One ballot paper, No. 641, marked with a star instead of a cross.

(8) One ballot paper, No. 911, having the name of Woodward nearly struck out. (b)

(9) One ballot paper, No. 638, bearing the voter's signature.

(10) Eight ballot papers, Nos. 117, 155, 190, 505, 174, 183, 842, 1413, marked with a cross placed on the left, instead of on the right hand side of the candidate's name. Exact illustrations of the marks appearing on the said twenty-two ballot papers were contained in an Appendix to the case. The respondent Sadler did not reject any of the said ballot papers as invalid, but allowed the whole as good and valid votes, and counted them for the respondent Sarsons. No objection was made thereto at the counting of the votes, and in fact the petitioner's present contention was based on information obtained on inspection of the ballot papers.

12. On a similar and subsequent inspection of the ballot papers on behalf of the respondent Sarsons, it appeared that the ten ballot papers hereinafter mentioned had been dealt with in a manner similar to that shown in the case of some of the twenty-two ballot papers previously referred to. Exact illustrations of the marks were contained in a further Appendix B. (c) No objection was made thereto at the counting of the votes.

13. The respondent Sadler rejected all the ballot papers used at polling station No. 130. As to certain of the said ballot papers, there were in addition to the burgess roll other objections to them.

14. The respondent Sadler, in rejecting the ballot papers mentioned in paragraph 13, and in rejecting other ballot papers, making with these rejected papers 308 rejected ballot papers, did not indorse upon any of the ballot papers so rejected by him the word "rejected," or any similar word, but as he came to each rejected ballot paper, he put the same aside, and after he had finished the counting, placed all the rejected ballot papers together in a brown paper parcel, which he then

(a) Nos. 928 and 1364 had been marked in ink and folded up, thereby making a corresponding mark on the other part of the paper.

(b) In No. 911 the name Woodward had a pencil through it diagonally across the paper.

(c) Of the ballot papers in Appendix B, each resembled one or other of those set out in Appendix A. Only one is noticed in the judgment, and was disallowed as containing the letters C. N.

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sealed up and endorsed "Rejected ballot papers, Nechell's Ward 1874," and handed with the ballot papers and accounts connected with the election to the Town Clerk of Birmingham. Before rejecting the said ballot papers, the respondent Sadler consulted the town clerk, and acted upon his advice.

15. The respondent Sadler did not make any report of the ballot papers rejected and not counted by him, save as above appears, but he filled up a return in conformity with No. 9 of the printed instructions supplied to him as returning officer. [A copy of these instructions was made part of the case.]

The petitioner contends that the respondent Sarsons was not duly elected.

The respondent Sarsons contends that he was duly elected.

The respondent Sadler contends that the election was not rendered invalid by any act or default on his part for which he is responsible.

The question for the opinion of the court is, whether the election of the respondent Sarsons was invalid on any of the grounds raised by the said petition and particulars.

Costs to be in the discretion of the court.

Charles Russell, Q.C. (E. C. Leigh with him), for the petitioner.—First, the facts disclosed upon this case, especially those appearing from paragraphs 7 and 9, show that the election has not been conducted according to the principles laid down in the body of the Ballot Act (a), within

(a) The following sections and rules of the Ballot Act were continually referred to during the arguments:—

Sect. 2. "In the case of a poll at an election the votes shall be given by ballot. The ballot of each voter shall consist of a paper (in this Act called a ballot paper) showing the names and description of the candidates. Each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number written on the face. At the time of voting the ballot paper shall be marked on both sides with an official mark, and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil; and the voter having secretly marked his vote on his paper, and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding at the voting station (in this Act called the presiding officer) after having shown to him the official mark at the back. Any ballot paper which has not the official mark on the back, or on which votes are given to more candidates than the voter is entitled to vote for, on which anything except the said number on the back is written or marked by which the voter can be identified, shall be void and not counted; after the close of the poll the ballot boxes shall be sealed up, so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall, in the presence of such agents (if any) of the candidates as may be in attendance, open the ballot boxes and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given, and return their names to the clerk of the Crown in Chancery. The decision of the returning officer as to any question arising in respect of any ballot paper shall be final, subject to reversal on petition questioning the election or return."

Sect. 13. "No election shall be declared invalid by reason of a noncompliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that noncompliance or mistake did not affect the result of the election."

Sect. 28. "The schedules to this Act, and the notes

the meaning of sect. 13 of that Act. Secondly, even if this be not so, there has been such a failure in the machinery provided for ascertaining the wishes of the electors, as to avoid the election at common law, and the onus is on the respondent to show that the result of the election was not affected. [BRETT, J.—According to your argument, one single mistake might avoid an election. DENMAN, J., referred to *Northcote v. Pulsford* (32 L. T. Rep. N. S. 602).] From sect. 2 it appears that secrecy of voting is the main purpose of the Ballot Act, to carry out that purpose certain rules and forms are prescribed by the schedule. [ARCHIBALD, J.—The question is one of degree, but the Act nowhere says what are its principles.] How strictly matters of form must be complied with in an election appears from the *Harwich* (No. 2) case (1 P. R. & D. 314), in which the election was declared void on the ground that the poll had been closed four or five minutes before 4 p.m., contrary to 5 & 6 Will 4, c. 36, s. 8, the mayor having refused to take a vote tendered before that time. He also cited on this point

Belfast Municipal Election, 7 Ir. C. L. Rep. 30;

The Drogheda case, 21 L. T. Rep. N. S. 402; W. & D. 306;

The Bolton case, 81 L. T. Rep. N. S. 194.

As to the folding up of the ballot papers of the illiterate voters in the declarations of inability to read, this amounts in effect to a clear breach of the enactment, by sect. 2 that "the votes shall be given by ballot." As to imperfect marking, he cited *Haswell v. Stewart* (*The Wigton case*) (1 Sess. Cas. 4th series, 925). There it was decided that it is essential to a valid vote that the ballot paper be marked with a cross, and not a mere line, although a badly formed cross, or a cross with the addition of small strokes, so as to resemble the letter X, will not render the vote null; that (*dissentiente* Lord Benholme) a ballot paper with the cross decidedly to the left of the candidate's name must be rejected; and that any substantive or separate mark on the face of the ballot paper, in addition to the cross, such as a superfluous cross, will render the vote null; but that it is not essential that the cross be made with the pencil provided in the compartment, but that it may be made with any pencil or any ink not peculiar. He then went in detail through Appendix A, and tested the validity of the ballot papers therein

thereto and directions therein, shall be construed and have effect as part of this Act.

By Rule 29 of Schedule 1: "The president of each station shall make up into separate packets" (*inter alia*) "the declarations of inability to read."

Schedule 2 opens thus:—"Note. The forms contained in this schedule, or forms as nearly resembling the same as circumstances will admit, shall be used in all cases to which they refer and are applicable, and when so used shall be sufficient in law." After giving forms of writ, nomination paper, ballot paper, and directions as to printing ballot paper, the schedule proceeds as follows:

"Form of directions for the guidance of the voter in voting, which shall be printed in conspicuous characters, and placarded outside every polling station, and in every compartment of every polling station.

"The voter may vote for candidate

"The voter will go into one of the compartments, and, with the pencil provided in the compartment, place a cross on the right hand side, opposite the name of each candidate for whom he votes, thus X" [After giving further directions as to the manner of voting, the form proceeds:]

"If the voter votes for more than candidate, or places any mark upon the paper by which he may be afterwards identified, his ballot paper will be void and will not be counted."

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described by the rules laid down in the *Wigton* case.

Sir H. James, Q.C. (with him *Reginald Brown*), for the respondents.—It is unnecessary to decide the third question raised in this case, as to the validity of those ballot papers which are objected to for imperfect marking. The objections by the petitioner are substantially the same as those by the respondent. The question is, whether the election is to be avoided by the mistake of a presiding officer who had no intention to violate the Ballot Act. If the court decide for the petitioner, it is hard to say on what ground an election may not be avoided. It could never have been the intention of the Legislature that the mistake of an official should avoid an election, and in fact sect. 13 was inserted in committee *ex abundante cautela*. A trifling irregularity has never been held to avoid an election: (*Leigh & Le Marchant's Election Law*, p. 96, citing *Warrington case*, O'M. & H. 44.) "It would be, in my opinion," said Martin, B., in the *Warrington* case, "ridiculous to say that because at one booth there was an irregularity, the whole of the rest of the borough should be put to the trouble of a new election, and all that has taken place declared null and void. I adhere to what Willes, J., said at Lichfield, that a judge to upset an election ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter, and not to be lightly set aside."

Giffard, Q.C. (with him *J. O. Griffiths*), for the respondent Sadler, the returning officer, argued that the returning officer had done nothing for which the court ought to order him to pay costs.

Leigh was heard in reply on the whole case, and referred to

Stowe v. Jolliffe, 30 L. T. Rep. N. S. 299; L. Rep. 9 C. P. 446; 43 L. J. 178, C. P.;

Davies v. Lord Kensington, 30 L. T. Rep. N. S. 610; Ballot Act 1872, rule 41.

and argued that 294 electors had been virtually disfranchised by the act of the presiding officer.

Our. adv. vult.

July 9.—The written judgment of the court (Brett, Archibald, and Denman, JJ.) was delivered as follows by

Lord COLERIDGE, C.J.—In this case a petition had been presented, praying that the election of the respondent, Mr. Sarsons, to the office of town councillor, should be declared void, and a case was stated for the opinion of the court. At the election the petitioner Woodward and the respondent Sarsons were the candidates, and the respondent Sadler was the alderman of the ward and returning officer. The returning officer appointed one Smith to be the presiding officer at polling station No. 130. Upon the electors applying for a ballot paper at such station, the presiding officer marked upon the face of the ballot paper given to each of them, the number of the voter appearing on the burgess roll. This he did to every ballot paper handed out by him. The number of ballot papers so marked and given out by him was 294, of which 234 were given in favour of the petitioner Woodward, and 60 in favour of the respondent Sarsons. The burgess roll numbers so marked were in fact not seen, so as to be identified; but they could have been seen by the persons present at the counting of the ballot papers. At polling station No. 125 about twenty ballot papers were marked by the presiding officer, by the direction of voters

who were unable to read. Each of such ballot papers was placed by the presiding officer in the ballot box, wrapped up in the declaration of inability to read made by the voter for whom such vote was marked. Each of the votes, so given and so marked by the presiding officer, could have been, but was not, in fact, identified by the returning officer at the counting of the votes, by comparing the ballot papers with the declarations of inability to read in which they were wrapped. Twenty-two ballot papers, which had been counted as valid, were, on inspection after the presentation of the petition, found to be marked in a manner to which objection was now taken. It was contended that they ought all to have been rejected. The returning officer declared the number of votes thus: For Sarsons, 965; for Woodward, 775—majority for Sarsons, 190; and thereupon declared Sarsons (the respondent) to be duly elected. The petition, without praying for a scrutiny, prayed that it might be determined that Sarsons was not duly elected, and that the election was void. Upon these facts it was argued, on behalf of the petitioner, that the election was void, because it had not been conducted in accordance with the Ballot Act; that it was void on that account according to the common law of Parliament, because the deviation from the Act was so great that the election could not be said to be an election by ballot; that it was void under the Ballot Act itself, according to sect. 13, because it had not been conducted according to the rules in the schedules, nor in accordance with the principles laid down in the body of the Act, and the noncompliance with the principles of the Act had affected the result of the election. And as to the last allegation, it was said that the petitioner was not bound, in order to prove it, to show that on a scrutiny the respondent would be in a minority, but that it was enough if he could show that so large a body of electors as those who did not vote or who might have voted at the polling station No. 138, were or might have been virtually disfranchised. On behalf of the respondents, it was urged that the admitted error of the presiding officer at the polling station No. 130, was not of sufficient importance to avoid the election at common law, because the election was, notwithstanding such error, substantially conducted as an election by ballot; that in this case it could be demonstrated that the mistake relied on had not affected the result of the election; that a breach of the Ballot Act, however extensive, cannot as such avoid an election, for there is no enactment in the Act to that effect; that no such enactment is contained in sect. 13; that it is an enactment to save certain elections, and not to invalidate any; that it is an enactment of extreme caution, stating as law that which was equally the law before. Arguments were then gone into as to the alleged validity or invalidity of different classes of votes which had been counted. This was not done as by way of scrutiny, but in order to determine whether the alleged mistakes had or had not affected the result of the election. The questions raised for discussion seem to be; First, what is the true statement of the rule under which an election may be avoided by the common law of Parliament? secondly, is the present case brought within the rule? and, thirdly, whether a breach of the Ballot Act can, as such, be a ground for avoiding an election? fourthly, if yes, can this election be thereby avoided? As to the first, we

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are of opinion that the true statement is, that an election is to be declared void by the common law applicable to Parliamentary elections, if it was so conducted that the tribunal, which is asked to avoid it, is satisfied, as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e., that there was no real electing by the constitution at all, if it were proved to its satisfaction that the constituency had not, in fact, had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively, according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes, or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think that the same result should follow, if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reason to believe that a majority might have been prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament. This, we think, is the result of comparing the judgments of Grove, J., at *Hackney* (31 L. T. Rep. N. S. 69), with the judgment of Martin, B., at *Salford* (20 L. T. Rep. N. S. 120; 1 O'M. & H. 139), and with that of Mellor, J., at *Bolton* (31 L. T. Rep. N. S. 194), all which judgments are in accordance with, but express more accurately, the grounds of the decisions in Parliament, in the older cases of *Norfolk* (9 Journ. 631; Heyw. Co. 546), *Morpeth* (1 Dougl. 147), *Pontefract* (1 Dougl. 227), *Coventry* (15 Journ. 276), *New Ross* (2 P. R. & D. 198), and *Drogheda* (W. & D. 306), all which are mentioned in Rogers on Elections, 10th edit., p. 365. As to the second, i.e., that the election was not really conducted under the subsisting election laws at all, we think, though there was an election in the sense of their having been a selection by the will of the constituency, that the question must in like manner be, whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as matter of fact, that the election was not an election under the existing law. It is not enough to say that great mistakes were made in carrying out the election under those laws, it is necessary to be able to say that, either wilfully or erroneously, the election was not carried out under those laws, but under some other method. For instance, if during the time of the old laws, with the consent of a whole constituency, a candidate had been selected by tossing up a coin, or by the result of a horse-

race, it might well have been said that the electors had exercised their free will; but it should have been held, that they had exercised it under a law of their own invention, and not under the existing election laws, which prescribed an election by voting. So now, when the election is to be an election by ballot, if either wilfully or erroneously, a whole constituency were to vote, but not by ballot at all, the election would be a free exercise of their will, but it would not be an election by ballot, and therefore not an election under the existing election law. But if, in the opinion of the tribunal, the election was substantially an election by ballot, then no mistakes or misconduct, however great, in the use of the machinery of the Ballot Act, would justify the tribunal in declaring the election void by the common law of Parliament. We agree upon this point with the answer attributed to Martin, B., before a Committee of the House of Commons, with his decision at Salford, and with the decisions of Mellor, J., at Bolton, and of Barry, J., at Drogheda. If the rule be, as thus stated, then the next question is, whether we can say, upon the facts stated in the present case, that a majority of the electors have been, or that there is, reasonable ground to believe that a majority have been, by misconduct or error of the presiding officer, prevented from recording their votes with effect. Now there is no evidence, as it seems to us, that any elector was prevented from recording his vote, or induced not to record it by what occurred. All who went to vote at the polling station No. 130, did vote. It was agreed that a report of the error being there perpetuated might have prevented others from going to vote, but this was answered by showing that the case finds that no one noticed the error until after the election was over. The result is, that all the electors who desired to vote did vote. And as to the votes which were given, and which were objected to, it is now known for whom each of them was in fact given. In this case, therefore, when the objections to the particular votes have been determined, the effect of the mistakes on the result of the election will be exactly known. If so, there is no room for speculation or doubt as to whether a majority may or may not have been prevented from voting with effect. Those who did not vote were not prevented by the errors which occurred, it will be seen how the majority of those who did vote was affected by such errors. In this case, therefore, it becomes necessary, not by way of scrutiny, but in order to determine whether the majority has been prevented from voting with effect, to determine upon the validity or invalidity of the votes which were given, and to which objection has been taken, and in order to determine this part of the case, it is necessary to consider and determine the construction of the Ballot Act. Now, first, the Act is divided into the principal part, which contains certain sections, and two schedules which contain certain rules and forms. By sect. 28: "The schedule and the notes thereto and directions therein, shall be construed and have effect as part of this Act." The rules and forms, therefore, are to be construed as part of the Act, but are spoken of as containing "directions." Comparing the sections and the rules, it will be seen that for the most part, if not invariably, the rules point out the mode or manner of doing what the sections say shall be done. And in schedule 2, the first note states: "The forms contained in this schedule, or forms as nearly resem-

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bling the same as circumstances will admit, shall be used." And in the ballot paper, as given in the schedule, we find "directions as to printing ballot paper and form of directions for the guidance of voters in voting," &c. These observations lead us to the conclusion that the enactments as to the rules in the first schedule, and the forms in the second schedule, are directory enactments, as distinguished from the absolute enactments in the sections of the body of the Act. And in such case, in order to determine the preliminary question, which is, whether there has been a material breach of the Act, and which must be determined before determining what effect such breach has upon a vote or the election, the general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially. The 2nd section enacts as to what the voter shall do,—that "the voter, having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in an inclosed box." This is all that is said in the body of the Act about what the voter shall do with the ballot paper. That which is absolute, therefore, is, that the voter shall mark his paper secretly. How he shall mark it is in the directory part of the statute. By rule 25: "The elector, on receiving the ballot paper, shall forthwith proceed into one of the compartments in the polling station, and there mark his paper and fold it up so as to conceal his vote, and shall then put his ballot paper so folded up into the ballot box." This rule, it will be observed, does not yet say how the paper is to be marked. But in schedule 2 is given the "form of ballot paper." And appended to the form is a note, which by sect. 28 is to be construed and have effect as part of the Act. This note contains the form of directions for the guidance of the voter in voting: "The voter will go into one of the compartments, and with the pencil provided in the compartment place a cross on the right hand side, opposite the name of each candidate for whom he votes, thus X." This is the only enactment throughout the statute as to the manner and form in which the voter is to mark the ballot paper. And, therefore, by the general rule before mentioned, it would be necessary that the absolute enactment that the paper should be marked secretly should be obeyed exactly; but it would be sufficient that the manner of marking the paper should be obeyed substantially. If these two enactments be so obeyed, there is no material breach of the Act. The extent of error which is to vitiate, so as to annul, the ballot paper, is further to be gathered from the statute itself. By sect. 2: "Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is written or marked, by which the voter can be identified, shall be void and not counted." It is not every writing or every mark, besides the number on the back, which is to make the paper void, but only such a writing or mark as is one by which the voter can be identified. So in rule 36: "The returning officer shall report, &c., the number of ballot papers rejected and not counted by him, under the several heads of (1), want of official mark, (2) voting for more candidates than entitled to, (3) writing or mark by which voter could be identified, (4) unmarked or void for uncertainty. And then in schedule 2, in the note to the form

before referred to, we have the heading, "If the voter votes for more than candidate, or places any mark on the paper by which he may be afterwards identified, his ballot paper will be void, and will not be counted." The result seems to be, as to writing or mark on the ballot paper, that if there be substantially a want of any mark, or a mark which leaves it uncertain whether the voter intended to vote at all or for which candidate he intended to vote, or if there be marks indicating that the voter has voted for too many candidates, or a writing or a mark by which the voter can be identified, then the ballot paper is void, and is not to be counted. Or, to put the matter affirmatively, the paper must be marked so as to show that the voter intended to vote for some one, and so as to show for which of the candidates he intended to vote. It must not be marked so as to show that he intended to vote for more candidates than he is entitled to vote for, nor so as to leave it uncertain whether he intended to vote at all or for which candidate he intended to vote, nor so as to make it possible by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted. If these requirements are substantially fulfilled, then there is no enactment and no rule of law by which a ballot paper can be treated as void. If these requirements are not substantially fulfilled the ballot paper is void and should not be counted, and if it is counted, it should be struck out upon a scrutiny. The decision in each case is upon a point of fact, to be decided first by the returning officer, and afterwards by the election tribunal on petition. Applying these views to the votes in question before us, it is clear that the 294 ballot papers marked by the presiding officer at the polling station No. 130 were void, and ought not to be counted. There was a mark on them by which on reference to the Burgess Roll the way in which the voter had voted could be identified. As to the twenty ballot papers at the polling station No. 125, there was a breach by the presiding officer of the directions in rule 26, but there was no breach for which by enactment the ballot papers can be rejected. The votes were given in the way prescribed, but the presiding officer dealt with the declarations erroneously. We are of opinion that those votes were properly counted. As to the ballot papers in Appendix A., No. 638 is clearly bad, void, and must be disallowed. With some hesitation we disallow Nos. 844 and 889. There is no cross at all, and we yield to the suggested rule that the writing by the voter of the name of the candidate may give too much facility, by reason of the handwriting, to identify the voter. But we cannot think that the mere fact of two crosses being placed, as in Nos. 433 or 928, ought to vitiate the ballot paper. There can be no doubt as to the intention to vote and no doubt as to the intention to vote emphatically for the one candidate. If there were evidence of an arrangement that the voters should place two marks, so as to indicate that it was he, that voter, who had used that ballot paper, then by reason of such evidence, such double mark would be a mark by which the voter could be identified, and then the papers, upon such proof being given, should be rejected. But the mere fact of there being two single crosses is not in our judgment a substantial breach of the statute. Neither is the mere fact of an additional mark, such as is found in No. 926, nor the mere fact of the peculiar forms of cross in

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Nos. 1364 and 641, nor the marks on Nos. 1726, 2140, 3562, or 911, though in these cases also extrinsic evidence might make such peculiarities indications of handwriting. We think that, inasmuch as the ballot paper was handed in by the voter as a vote, the mark on No. 875 substantially indicates that the voter intended to vote for the candidate against whose name it is placed, and that the paper ought to be allowed. And we think that the same reasoning applies to Nos. 117, 155, 190, 505, 174, 183, 842, 1413 in which the cross is placed on the left hand side of the candidate's name, instead of on the right hand side. The substance of the directions in the note in schedule 2 is fulfilled, which is, in our opinion, that the voter should clearly indicate the candidate for whom he intends to vote. If this be done substantially, and the absolute enactments as to secrecy be obeyed fully, we think that the statute is satisfied. For the same reasons in Appendix B. we disallow No. 410, but allow the rest. We are aware that in so applying the principles which we have deduced from the statute, we are acting apparently in opposition to some of the decisions in the *Wigton case* (*Haswell v. Stewart*, 1 Sess. Cas. 4th Series, 925) but there may have been evidence in that case which does not exist in the present one, and which made many of the marks there marks of identification, which the mere presence of such marks here does not. If this was not so, we respectfully differ from the strict view taken by the majority of the learned judges who decided that case, and adhere to the view of Lord Benholme given in that case. It follows from our decision as to the different ballot papers, that if the 60 which were given for Sarsons, but properly disallowed at the counting by the returning officer, had not been rendered void by the presiding officer, they would have made the votes for Sarsons 1025, striking from which three disallowed papers in Appendix A., his numbers would have been 1022. And adding the 230 for Woodward, but striking off one disallowed in Appendix B., his numbers would have been 1008. The twenty, being properly in our opinion allowed, do not affect the result. Inasmuch, therefore, as no voter was prevented from voting, it follows that the errors of the presiding officers at the polling stations Nos. 130 and 125 did not affect the result of the election, and did not prevent the majority of electors from effectively exercising their votes in favour of the candidate they preferred, and, therefore, that the election cannot be declared void by the common law applicable to Parliamentary elections. But then it is urged that there has been a breach of the Ballot Act, and, therefore, the election is, by virtue of the Act itself, void. This was the third question which was raised in argument before us. It is said that sect. 13, though it is in a negative form, assumes as an affirmative proposition, that a non-compliance with the rules, or any mistake in the use of the forms, would render an election invalid, unless it appeared that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake did not affect the result of the election. If this proposition be closely examined, it will be found to be equivalent to this—that the non-observance of the rules or forms, which is to render the election invalid, must be so great as to amount to a conducting of the election in a manner con-

trary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of voters, or in other words, the result of the election. It, therefore, is, as has been said, an enactment *ex abundante cautela*, &c. declaring that to be the law applicable to elections under the Ballot Act which would have been the law to be applied if the section had not existed. It follows that, for the same reasons which prevent us from holding that this election was void at common law, we must hold that it is not void under the statute. As between the petitioner and the respondent we, therefore, hold that the petition must be dismissed with costs. As between the petitioner and the respondent Sadler, we are of opinion that inasmuch as there was no personal default by the respondent, and the result of the election was not affected, the petition must be dismissed on the terms that each party bear his own costs.

Judgment for the respondents.

Attorneys for the petitioner, *Sharpe, Parkers and Co.*

Attorneys for the respondent *Sarsons, Maples, Teesdale, and Co.*

Attorneys for the respondent *Sadler, Robinson and Preston.*

COURT OF EXCHEQUER.

Reported by H. LIND and CYRIL DODD, Esqrs., Barristers-at-Law.

Thursday, June 3, 1875.

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Revenue—Inhabited House Duty—Building occupied for purposes of trade only—Part of a tenement or building—Exemption—57 Geo. 3, c. 25, and 32 & 33 Vict. c. 14, s. 11—Construction.

A building occupied and used in the daytime only partly as offices and counting houses by merchants and others "for the purposes of trade only," and partly as chambers and offices by professional men for other than trade purposes, the housekeeper only occupying two rooms on the top story as a residence rent free, is not exempt from assessment to inhabited house duty under sect. 11 of the 32 & 33 Vict. c. 14; nor is the owner entitled to claim an abatement in respect of those parts of the building occupied and used for the purposes of trade only.

So held by the Court of Exchequer (Kelly, C.B. and Bramwell and Cleasby, B.B.), Kelly, C.B. doubting whether the facts stated sufficiently raised the question as to the exemption of any parts of the building from the duty.

THIS was a case stated by the Commissioner of Taxes for the City of London for the opinion of the Court of Exchequer under the 37 & 38 Vict., c. 16, s. 9, as follows:

At a meeting of the committee for the general purposes of the Income Tax Acts and for executing the Acts relating to the inhabited house duties for the City of London, held at the Land Tax Rooms, Guildhall-buildings, on Thursday, 8th Oct. 1874, for the purpose of hearing appeals, Mr. Thos. Newson appeals against an assessment to the inhabited house duties for the year ending 5th April 1873, upon the premises known as the Weavers' Hall, No. 70, Basinghall-street, in the ward of Bassishaw, and contends that the premises were exempt under the 32 & 33 Vict., c. 14, s. 11,

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upon the grounds that they were occupied as offices and counting houses for merchants and professional men, except the two rooms occupied by the housekeeper and his family, who lived on the premises solely for the protection thereof.

The premises are occupied by four accountants, two solicitors (stated also to be scriveners), thirteen merchants, one wine shipper, and one shorthand writer, all of whom use the rooms they separately occupy as offices, and by the housekeeper, his wife, two children, and a servant, who occupy two rooms on the top story as a residence, rent free.

The housekeeper and his wife are employed by the various occupiers to clean the offices, for which they are remunerated by them.

The surveyor contended that, as the premises were partially occupied by solicitors and other professional men, they were not used solely for trade, and were therefore liable to inhabited house duty. He referred the commissioners to the judges' case 2848, respecting the assessment on the same premises in the year 1869, ending April 1870, when they were held to be liable, and the appellants admitted that the facts of the case in the years 1869, 1870, 1872, and 1873 were identical.

The commissioners discharged the assessment, on the grounds that the greater portion of the premises was occupied for the purposes of trade, whereupon the surveyor for the Crown declared his dissatisfaction with their decision, and duly required them to state and sign a case for the opinion of the Court of Exchequer, which they stated and signed accordingly.

The following sections of the Acts relating to the subject, and referred to, are material:

The 57 Geo. 3, c. 25, s. 1, after reciting that it is become usual, in cities and large towns, and other places, for one and the same person, or for each person where two or more persons are in partnership, to occupy a dwelling house or dwelling houses for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings, for the purposes of trade, or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting houses, and to abide therein in the daytime only for the purposes of such trades respectively, which have been charged with the said recited duties, although no person shall inhabit or dwell therein in the night time; and that it is expedient in such cases to exempt from the said duties such tenements or buildings, or parts of tenements or buildings, as are or shall be solely employed for the purposes before-mentioned, enacts that on due proof . . . to the satisfaction of the respective commissioners . . . that any person, or any number of persons in partnership together respectively, occupy a tenement or building, or part of a tenement or buildings which shall have previously been occupied for the purpose of residence wholly, as a house for the purposes of trade only or as a warehouse . . . no person inhabiting, dwelling, or abiding therein, except in the daytime only for the purpose of such trade, such person, or each of such persons, in partnership respectively, residing in a separate and distinct dwelling house, or part of a dwelling house, charged to the duties under the said Act, it shall be lawful for the said commissioners, according to the provisions of the said Act, to discharge

the assessment made for that year in respect of such tenement or building which shall be so used for the purposes of trade," &c.

The 32 & 33 Vict. c. 14, enacts:

Sect. 11. From and after the 5th April 1869, any tenement or part of a tenement occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting house, or being used as a shop or counting house, shall be exempt from the inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof.

The *Attorney-General* (Sir R. Bagge, Q.C., with whom was *Pinder*) for the Crown, contended that the commissioners were wrong in discharging the assessment and in the grounds on which they had done so. These premises were not premises solely used for the purposes of trade. It was one single and entire house, and as such it should be assessed. The facts here were identical with those in the judges' case No. 2848, but, notwithstanding that that was so the commissioners had nevertheless arrived at a different decision upon the matter.

Finlay (with him *Day*, Q.C.), for the respondent *contra*, contended that every portion of this building came within the exemption of sect. 11 of the 32 & 33 Vict. c. 14. [*BRAMWELL*, B.—That is not so. Some persons occupy portions of it, who, without doubt, are not traders.] Admitting that that is so, still the Crown are not warranted in assessing the whole building as one house, for by so doing they sweep into their net those portions of the building which undoubtedly are occupied and used for the purposes of trade only within the words of both the statutes referred to in the case. The argument on the part of the Crown goes to the extent that, if only one office in the whole building were used by a professional man, and every other part of it was devoted solely to trade purposes, yet nevertheless the exemption in favour of merchants and traders would have no operation or effect at all. Such a construction would be obviously unjust. By the 57 Geo. 3, s. 1, provision is made with regard to "parts of tenements," and only those parts therefore of this building which are occupied by professional men, or for purposes other than trade, should be assessed to these duties. The respondent is entitled to an abatement, at all events, from the assessment in respect of those portions of the building which are "occupied solely for trade purposes."

KELLY, C.B.—This case, as it seems to me, does not raise the question whether or not some portion of the building called "Weavers' Hall" is exempt from assessment. There is no statement in the case which enables us to determine whether the assessment complained of by the respondent was made in respect of the whole building or of a part of it only, or whether the complaint has reference to a portion which may be exempt from, or to a portion which is liable to, the duty. Speaking for myself alone, I confess that I regret to have to decide the case on a partial and somewhat insufficient statement of facts. Nevertheless, as there can be no doubt that the building is liable to assessment for some amount—whether for the whole amount which is claimed by the Crown or not, I do not now pretend to determine—I am content to say that our judgment must be in favour of the Crown.

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[Ex.]

BRAMWELL, B.—I am of opinion that this case raises every question and states every fact which is necessary to enable us to come to a decision upon it. True it is that the question is not raised whether there should be a separate assessment on each of the occupiers of the various parts of the building, but that point was not made before the commissioners. It is admitted by the learned counsel for the respondent that the building is not used "for the purposes of trade only," but then he says that an argument in the respondent's favour may be drawn from the use of the words "any tenement or part of a tenement," in sect. 11 of the 32 & 33 Vict. c. 14, and that it follows from the use of those words that the part or parts of this particular building which are used for the purposes of trade only are intended by the statute to be exempted from duty, and that the commissioners ought to make an abatement of a portion of the duty in respect of the part or parts of the building so occupied and used for trade purposes solely, although the whole of the building is not so occupied. I am clearly of opinion that that contention is wrong; and that the Act of Parliament should be read as though the words "part of a tenement or building" were not in the Act at all. In my opinion they are unnecessary and unmeaning words, and have no operation and effect. If they mean anything, they refer to a part of a tenement separately assessable to house duty; and the subsequent words of the clause, "although a servant or other person may dwell in such tenement or part of a tenement, for the protection thereof," fortify me in that construction, which is confirmed also, I think, by the prior Act of 57 Geo. 3, c. 25. No doubt sect. 6 of that Act contains a recital which, if it stood alone, would assist the respondent's constructions—namely, "Whereas . . . it is expedient in such cases" [that is, in cases where no person inhabits the tenement at night] "to exempt from the said duties such tenements or buildings, or parts of tenements and buildings, as are or shall be solely employed for the purposes herein mentioned;" and then the section goes on to provide that, in certain cases there specified, "it shall be lawful for the commissioners to discharge the assessment made for that year in respect of such tenement or building." Now the words "part of a tenement or building" are wholly omitted here, although the subject matter of the enactment is the same; and that shows, I think, that the words "parts of tenements or buildings" were used *per incuriam*, and were not intended to mean anything different from the words "tenements or buildings." This view is confirmed, too, by the 2nd section of the Act of Geo. 3. The words "parts of tenements or buildings," are nowhere to be found in that section, although the words "such tenements and buildings" occur many times in that section. Then it is said that this is a harsh construction to put upon the statute. In one sense it may seem to be so, but in reality I do not think that it is; and, if it were, the effect would be to make the court examine the Act the more carefully, to see if what seemed a harsh conclusion must necessarily follow from the words of the Act; for of course, *primâ facie*, a harsh construction is not likely to be the true construction of an Act of Parliament. It must be remembered also that we are dealing with an exemption. After the passing of the Act which

imposed an inhabited house duty, Parliament determined to grant relief in certain cases in aid of the taxpayers. Now houses not occupied at night, but used only for trade purposes by day, are an instance in which relief was granted. But the Legislature did not enter into details, and did not exempt a building such as this is, that is to say, a single building occupied and used by different persons for different purposes. The statute could not deal with such nice questions. Then Parliament afterwards, in passing the 32 & 33 Vict. c. 14, s. 11, determined to exercise a further act of liberality, and extended the exemption to cases where a servant remained all night on the premises for the purpose of protection. That section, then, was the extension of a boon; so, in such a case as the present, where, speaking roughly, nine-tenths of a building may be occupied solely for trade purposes, and the remaining tenth for some other purpose, it would seem a fitting and reasonable thing that the commissioners should make some abatement or allowance. But the construction of the Act, I think, is clear, and the Crown is in strictness entitled to the judgment of the court for the full amount claimed without any abatement.

CLEASBY, B.—I am of the same opinion. We are here dealing with a claim to exemption from duty, and we have to construe the sections of the Act very strictly. The facts here are similar to those in the case before the two judges to which reference has been made, and the commissioners, have, on a similar state of facts, differed from the conclusions of the learned judges. The commissioners, I think, are wrong, and their view cannot be upheld. The exemption applies only where the subject matter of the assessment is that to which the exemption refers. Now the language of the Act of 57 Geo. 3, to which my Brother Bramwell has so fully referred, is very clear on the point, and, when read carefully, shows the intention of the Legislature and the construction of the statute to be such as he has already stated.

Judgment for the Crown.

Attorney for the appellant, *the Solicitor to the Inland Revenue.*

Attorneys for the respondent, *W. and J. Flower and Nussey.*

June 25 and July 7, 1875.

LUCAS v. MASON.

Assault—Chairman of public meeting—Duty of to keep order—Order by to remove disorderly persons—Liability of for consequent removal—Mistaken identity of person removed—Relation of master and servant—Authority—Exercise of discretion.

The plaintiff was present at a public meeting convened by members of the Church Liberation Association, of which meeting the defendant acted as chairman. In the course of the proceedings an interruption occurred near the spot where the plaintiff was standing, whereupon the defendant said, "Bring those men to the front who are making the disturbance," and thereupon the plaintiff, who was making no disturbance, was laid hold of by a man with a white ribbon in his coat, and by two policemen, and dragged over some benches to the front part of the gallery. In

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an action against the defendant for such assault, the learned judge, being of opinion that there was no evidence for the jury of the liability of the defendant for the acts of the persons who so seized the plaintiff, directed a nonsuit to be entered.

Held by the Court of Exchequer (Bramwell, Cleasby, and Pollock, BB.), that the nonsuit was right, and that the defendant was not liable for the acts of those persons.

Although it must be assumed that the man with the white ribbon was in the position of a steward, whose duty it was to assist the chairman in keeping order, and that he and the policemen acted in the honest though mistaken belief that the plaintiff was making a disturbance, there was no evidence for the jury of a general or implied authority by the defendant going beyond the limit of that which was created by the express words used, or of any authority to the person ordered to "bring the disturber to the front" to exercise a discretion as to who were the disturbers.

Seymour v. Greenwood (7 H. & N. 354), and the cases of master and servant and principal and agent distinguished.

The plaintiff brought an action against the defendant for an assault, under the circumstances set forth in the judgment hereunder, at the trial of which, before Pollock, B., at the last spring assizes at Manchester, the plaintiff was nonsuited, the learned judge being of opinion that there was no evidence for the jury of the defendant's liability for the acts of the persons who committed the assault. A rule nisi having subsequently been moved for and obtained on the part of the plaintiff to set that nonsuit aside,

Pope, Q.C. and Edwards, Q.C., for the defendant, showed cause against, and

Torr, Q.C. and B. H. Collins, for the plaintiff, supported the rule. *Cur. adv. vult.*

The facts of the case and the arguments of counsel on the rule need not here be stated, as they sufficiently appear in the judgment of the court (Bramwell, Cleasby, and Pollock, BB.), which was now read by AMPLETT, B., as follows:

July 7.—The plaintiff in this case by his declaration alleged that the defendant assaulted and injured him, to which the only plea material to the question now before us is "not guilty." The cause was tried before Pollock, B., at the last Manchester Assizes, when the plaintiff, being called as a witness, proved that he was present in the gallery of a large hall where there was a meeting, convened by members of the Church Liberation Association, and of which the plaintiff acted as chairman. In the course of one of the speeches there was an interruption in the gallery near to the place where the plaintiff was standing, upon which the defendant said, "I shall be obliged to bring those men to the front who are making this disturbance. Bring those men to the front." The plaintiff was making no disturbance. The plaintiff stated that upon this a man with a white ribbon in his coat and two policemen seized him and dragged him over some benches to the front part of the gallery, whereby he was bruised and injured. The learned counsel for the defendant at the trial submitted that there was no evidence which ought to be left to the jury of the liability of the defendant for the acts of those who so seized the plaintiff, and

the learned judge being of that opinion nonsuited the plaintiff. It was not shown at the trial what was the position or duty with relation to the meeting, either of the man with the white ribbon or of the two policemen, or that instructions had been given to them by the defendant, or any one else, before the act complained of, as to keeping order or otherwise. We think, however, that it must be assumed that the man with the white ribbon was in the position of a steward, whose duty it would be to assist the chairman in keeping order should any disturbance arise. It must also, we think, be assumed that what was done by the man with the white ribbon and the policemen was done under the honest though mistaken belief that the plaintiff was one of those who were making the disturbance. It was not suggested that the defendant had personally been guilty of any wrongful act, or that he had by express instructions authorised, or by subsequent ratification adopted, the wrongful act complained of. If, therefore, any liability attached to the defendant, it must be in consequence of the general relationship which existed between the defendant and those who brought the plaintiff forward, or because his order to bring the disturbers to the front meant "Determine who are disturbers, and, when you have done so, bring forward those whom you so determine to be disturbers." Under these circumstances it becomes necessary to consider whether there was any evidence to show that the defendant's order had that meaning, or would reasonably be so understood by those to whom he gave it, which is involved in the question whether upon any principle of law the defendant could be made liable in this action. Where the trespass complained of is the direct and necessary consequence of an order given for its committal, the person who gives the order is clearly liable for the consequences, as much as if the trespass were done by his own hand; and where the relation of master and servant exists, the former is liable for the tortious acts of the latter, wherever they are such as come within the scope of the servant's duty, although in doing the particular act complained of he may have exceeded his authority, provided that what he does is in the honest belief that he is executing his master's orders; for in most cases where a duty is to be performed or an act done by a servant, some discretion must be vested in him to whom the doing of it is committed; and where this is so, the master cannot enjoy the benefit of his servant's acts which involve this discretion without being responsible for their results. This rule holds especially where the master is absent, and the duty to be performed vicariously is general in its character, as in the case of conductors of public vehicles, railway servants, and the like. Thus in the case of *Seymour v. Greenwood* (7 H. & N. 354) the Court of Exchequer Chamber held the defendant, who was the owner of an omnibus, liable for the act of his guard in removing a passenger who was supposed to be drunk; for, as was said by the court, "the master, by giving the guard authority to remove offensive passengers, necessarily gave him authority to determine whether any passenger had misconducted himself." Instead of this, in the present case there was no relation of master and servant, or of principal and general agent, or agent for such cases as might occur in the absence of the principal, but a particular

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direction as to a particular matter; and this not only prevents the decisions referred to binding us as authorities, but makes them inapplicable in principle. In the case of master and servant, the character of and duties attaching to the employment are known and defined beforehand. The servant who is to perform them is selected accordingly. In the present case no such relationship existed in the first instance, nor did it arise during the transaction. It is, no doubt, the duty of the chairman of a meeting where a large body of people are gathered together to do his best to preserve order; and it is equally the duty of those who are acting as stewards or managers to assist him in so doing; but the nature and extent of the duty on both sides cannot be very closely defined *a priori*, and must necessarily arise out of, and in character and extent depend upon, the events and emergencies which may from time to time arise. There is no such pre-existing relationship as exists in the case of master and servant, and there is, we think, no ground for extending by implication an express authority limited in its terms. The disturbance which gave rise to the defendant's words took place in the presence of those who acted upon them. They were nearer to the plaintiff than was the defendant, and if in doubt, might have referred to the defendant for further instructions. It does not, therefore, seem to us that there was any evidence which should have been submitted to the jury of a general or implied authority going beyond the limit of that which was created by the express words used, or of any authority to the persons ordered to "bring the disturbers to the front" to exercise a discretion as to who were disturbers. This rule must therefore be discharged.

Rule discharged (a)

Attorneys for the plaintiff, *Bower and Cotton*, agents for *Gardner and Horner*, Manchester;

Attorneys for the defendant, *Johnson and Weatherall*, agents for *G. Hadfield, jun.*, Manchester.

Monday, Jan. 18, 1875.

VAUGHAN v. HAMPSON.

Assault—Meeting of bankrupt's creditors at defendant's office—Plaintiff present as proxy of a creditor—Defendant elected chairman—Plaintiff refusing to leave on defendant's request—Removal of plaintiff by force—Liability of defendant—Trespasser—Licence—Right coupled with an interest.

Action for assault. Plea, that the defendant was possessed of an office and premises wherein the plaintiff was trespassing, whereupon the defendant requested him to leave the said office and premises, which the plaintiff refused to do, and thereupon the defendant gently removed him, &c. Replication, that before and at the time, &c., one M. had instituted liquidation proceedings under the Bankruptcy Act 1869 in the County Court, and had convened a general meeting of his creditors, to be holden at the office and premises in the plea mentioned on the 3rd Feb. 1874, and the defendant was the solicitor of M. in such proceedings, and in and about summoning the said meeting,

which was duly held at the said time and place; and the plaintiff, then being the solicitor and duly appointed proxy of T., a creditor of M., attended the said meeting as such, and the defendant was present at the said meeting as solicitor and on behalf of M., and officiated thereat as the duly elected chairman thereof; and a proof made under the said proceedings by T., then being such creditor, and a writing under T.'s hand duly appointing the plaintiff his proxy in the matter of the said proceedings, were produced to the defendant, then being such chairman, and afterwards and during the continuance of the said meeting, and before the termination or adjournment thereof, and whilst the plaintiff was lawfully attending the same as such proxy at the said office and premises in the plea mentioned, the plaintiff refused to leave the same when so requested by the defendant, as he lawfully might for the cause aforesaid.

On demurrer to the above replication, it was held, by the Court of Exchequer (Oleasby, Pollock, and Amphlett, B.B.), giving judgment in favour of the plaintiff, that the plaintiff was not a trespasser on the occasion. The defendant having given the plaintiff leave to be present at the meeting as proxy for a creditor, the latter had a right, coupled with an interest, entitling him to be on the defendant's premises.

Per Pollock, B.—No question arises as to the authority of the defendant as chairman of the meeting to turn the plaintiff out; no such allegation appears in the plea.

Wood v. Ledbitter (13 M. & W. 838; 14 L. J. 161, Ex.), distinguished.

To a declaration in an action for assault and battery of the plaintiff by the defendant, the defendant pleaded (inter alia) that at the time of the alleged assault and battery the defendant was possessed of an office and premises wherein the plaintiff was trespassing, whereupon the defendant requested the plaintiff to leave the said office and premises, which the plaintiff refused to do, and thereupon the defendant molitor manus imposuit, &c.

Replication:—That before and at the time, &c., one Joseph Morissy, under the provisions of the Bankruptcy Act 1869, had duly instituted certain proceedings in the County Court of Lancashire holden at Salford, for liquidation of his affairs by arrangement or composition with his creditors, and had duly, and with their previous consent and concurrence, summoned a general meeting of his creditors, to be held at the said office and premises in the said plea mentioned, on the 3rd Feb. 1874, and the defendant acted as and was the solicitor of the said Joseph Morissy in and about the said proceedings, and in and about the summoning of the said meeting and the said meeting was duly held at the said time and place, and the plaintiff; then being the solicitor and duly appointed proxy of George Taylor and John Taylor, creditors of the said Joseph Morissy under the said proceedings, attended there as such proxy and solicitor, and the defendant was present at and attended the said meeting as the solicitor and on behalf of the said Joseph Morissy, and officiated thereat as the duly elected chairman thereof; and a certain proof duly made under the said proceedings by the said George Taylor and John Taylor, then being and claiming to be creditors of the said Joseph

(a) See next case, *Vaughan v. Hampson (infra)*.

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BAXTER v. BOWER.

[CHAN.]

Morissy, and a certain instrument in writing, under the hands of the said George Taylor and John Taylor, duly appointing the plaintiff their proxy in the matter of the said proceedings, were duly handed in and produced to the defendant, then being chairman of the said meeting as aforesaid; and afterwards, and during the continuance of the said meeting, and before the termination or adjournment thereof, and whilst the plaintiff was lawfully attending the said meeting as such proxy as aforesaid at the said office and premises, the plaintiff did refuse to leave the same when he was so requested by the defendant, as he lawfully might for the cause aforesaid.

Demurrer to the replication on the ground that the facts therein alleged disclose no right in the plaintiff to remain in the defendant's office after having been requested by the defendant to leave the same. Joinder in demurrer.

Points of argument for defendant in support of the demurrer:—First, that a solicitor, by convening or allowing a meeting of creditors to be held in his office, does not confer upon the solicitor or proxy of any creditor the right to remain in the said office until the end of the meeting. Secondly, that such conduct of the defendant amounts in law merely to a permission or licence to enter his office and attend the said meeting, but not to persist in remaining there after notice to leave by the occupier. Thirdly, that if thereby the rights of the creditor, his solicitor or proxy, are injuriously affected, his remedy is not by persisting in remaining, but in an application to the Bankruptcy Court to annul or rectify the proceedings. Fourthly, that the replication, whilst admitting the defendant's possession of the office, discloses no facts entitling the plaintiff to remain there against the defendant's will.

Herschell, Q.C. (with whom was *Woodard*) for the defendant, in support of the demurrer.—The fact of the plaintiff having been invited to attend the meeting gave him no special right to be on the defendant's premises, and upon the defendant's requesting him to depart he was bound to go; and his true remedy, if he were aggrieved or annoyed thereby, would have been, not an action at law, but an application to the Bankruptcy Court to review the proceedings. The case of *Wood v. Ledbitter* (13 M. & W. 838; 14 L. J., N. S., 161, Ex.) is an authority in point for the defendant, and is a case that has never been questioned. What greater or more right had the plaintiff to be on the defendant's premises here than the plaintiff had to be on the race stand in that case? In the present case he was present merely by the defendant's permission, but in that case it was a matter of contract. The defendant here permitted the creditors to meet at his office; but that, it is submitted, gave the plaintiff no greater right or interest than there was in *Wood v. Ledbitter*. [*Pollock*, B., refers to *Wood v. Manley* (11 A. & E. 34; 9 L. J., N. S., 27, Q. B.)] In that case the interest was a substantial interest in goods which the defendant had purchased, which is quite different from having an interest merely in proceedings that are going on. At most the plaintiff was a mere licensee by parol, and the licence was revocable at any moment. A licence giving an interest must be by deed. But, secondly, whether the defendant, as chairman of the meeting, was right or wrong in deciding that plaintiff had no right to be present, and requiring him to go, is quite immaterial. His

decision as chairman was absolute, and it is not necessary to argue that he was right in his conclusion. His decision was absolute, and the plaintiff has his remedy if the chairman was wrong. The facts set up in the replication show that the defendant had a right to turn the plaintiff out.

Benjamin, Q.C., for the plaintiff *contra*, was not called to support the replication.

Cleasby, B.—To an action for an assault there is a plea that the plaintiff was trespassing on the defendant's premises, and, refusing to go when requested to do so by the defendant, the latter gently removed him; to which the plaintiff replies, setting forth the circumstances under which he was by request present at the meeting which was held at the defendant's office. The question is whether or not the plaintiff was a trespasser on the occasion in question. We are of opinion that he was not. He was, on the contrary, one of a number of persons who went to the defendant's office by invitation to attend a meeting of creditors, in order to discuss what steps should be taken in the matter of the liquidation proceedings against the bankrupt, for some of whose creditors the plaintiff was acting as the solicitor and duly appointed proxy on the occasion. The defendant had given the plaintiff leave and licence to be present, and the latter therefore had a right, coupled with an interest, entitling him to be on the defendant's premises. Our judgment must be for the plaintiff.

Pollock, B.—I entirely agree with my brother *Cleasby*. I do not think that any question arises here as to whether the defendant had or not any authority as chairman of the meeting to turn the plaintiff out. No such allegation appears in the plea. This case is not governed, in my opinion, by that of *Wood v. Ledbitter* (*ubi sup.*), on which *Mr. Herschell* seemed to rely as an authority in favour of the defendant here. It that case there was a contract for pleasure. In the present case there was, as my brother *Cleasby* has said, a right coupled with an interest in the plaintiff to be where he was.

Amplett, B.—I am of the same opinion; and I will only add that if we could come to any other conclusion I think it would be a great scandal to the law.

Judgment for the plaintiff. (a)

Attorney for the plaintiff, *W. H. Vaughan*, Cheadle, Manchester.

Attorneys for the defendant, *Edwards, Layton*, and *Jacques*, agents for *A. D. Walmisley*, Manchester.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROORE and H. PRAT, Esqrs.,
Barristers-at-Law.

Wednesday, July 14.

(Before the LORDS JUSTICES.)

BAXTER v. BOWER.

Injunction—Nuisance—Noise—Light and air—Delay.

Bill by trustees of an Independent chapel, against owners of a firm of boiler makers whose premises were situate on the south side of the chapel and separated from it by a narrow lane. The chapel was built in 1840, and in 1870 the defendants built, on what was then an open yard, a shed, in

(a) See the preceding case of *Lucas v. Mason*, *supra*.

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BAXTER v. BOWER.

[Ex.]

which they had since been carrying on their business. The plaintiffs prayed for an injunction to restrain the defendants from permitting so much of the shed erected by them to remain as would interfere or obstruct the free and uninterrupted passage of light and air to the plaintiff's premises, and from allowing to be made or continuing any noise substantially interfering with the due carrying on of religious services and ceremonies, and the due holding of meetings and day and Sunday schools. The defendants wrote a letter on the 26th June 1871, relating exclusively to the nuisance by noise, in which they promised to do what was possible to abate such nuisance, and that if proceedings should become necessary, the trustees of the chapel should not be prejudiced by delay. The bill was filed on the 19th Jan. 1874.

Held (affirming the decree of Bacon, V.C.) that the plaintiffs were entitled, not only to an injunction in respect of the nuisance by noise, but also to an injunction restraining the defendants from allowing so much of the shed to remain as obstructed the access of light. The word "air" ought never to be inserted as a common form in an order restraining the obstruction of light, where there is no evidence that the access of air has been really interfered with.

The court would not allow plaintiffs to use the injunction oppressively.

THIS was an appeal by the defendants from a decision of Bacon, V.C., under the following circumstances: The suit was instituted by the trustees of an Independent chapel in Burlington-street, Liverpool, for an injunction to restrain the defendants, who were boiler manufacturers, from carrying on their business in such a way as to interfere with the services in the chapel and the teaching in the adjoining school. The chapel ran backward from Burlington-street to the south until it abutted on a small passage. The rear of the chapel, looking on to the passage, was pierced with seven windows, four of which lighted the chapel itself and the other three the schoolrooms under the chapel. The chapel and schoolrooms, with the exception of two small class rooms built on to the south end of the chapel, were erected in 1840, and from that year had been respectively used for religious worship and instruction. The portion of the premises used as a chapel was used for the following purposes: Sunday, religious service; Monday, temperance meeting; Tuesday, Band of Hope and literary meetings, alternately; Wednesday, singing class, weekly and monthly church meeting; Thursday, weekly prayer meeting. The services on Sunday were almost continuous. The chapel was also licensed for marriages, and was used for that purpose. The piece of land which was separated from the chapel by the above-mentioned passage, was formerly used as a timber yard and afterwards as a storage yard. The defendants, at the end of the year 1870, erected a shed on this piece of land, which they used for the purposes of their trade. The plaintiffs alleged that the defendants' business was very extensive, and that continual hammering was going on in the shed from early in the morning until ten or eleven at night, and that in consequence of the noise it was impossible to hold any meeting in the chapel, as the speakers could not be heard, or to carry on the school, as the children could hear nothing on account of the noise. The plaintiffs further

alleged that on every fourth Sunday, a process of cleaning boilers took place, which caused so much noise as to seriously interfere with the services in the chapel. The shed also affected the lights of the chapel and schoolroom, so that in the latter artificial light was always necessary. On the 24th June 1871, the plaintiff's solicitors wrote to the defendants pointing out the nuisance and stating that they were unwilling to adopt legal proceedings unless forced to do so, to which letter they received the following:

We have your letter of the 24th, written on behalf of the trustees of the Burlington-street chapel, and in reply beg to say that we shall take every precaution not to make any noise during the hours of service, in fact, as a matter of course, the inference would be that our working hours will not fall at a time for service in the chapel. We have also to express our assent to the effect that, should it at any future time become a nuisance and compel the trustees to take any proceedings, we are willing to assume that they are not damaged in their rights by delay; but, on the other hand, this admission must not be taken as an acquiescence on our part that they have any legal rights, or in any way prejudice our defence, should such become necessary.

All attempts at a settlement having failed, the plaintiffs eventually filed their bill on the 9th Jan. 1874, praying that the defendants might be ordered to pull down the shed, and also might be restrained from carrying on their business in such a way as to interfere with the services in the chapel and the teaching in the school.

Upon an interlocutory application for an injunction, the defendants entered into an undertaking to stop all noisy work at seven o'clock in the evening on such evenings as the plaintiffs should give them notice that they required to use the chapel, and to stop work during weddings, and not to clean their boilers on Sunday. In the court below Vice-Chancellor Bacon said:—The plaintiffs have established their right to an injunction on both grounds. The most important objection raised on behalf of the defendants against an injunction being granted as to the obstruction of light and air was the length of time which had elapsed since the obstruction was first erected. This would be a good defence if the plaintiffs had made no complaint, and had allowed the defendants to think that they had no objection to the erection of the shed; but here there is no such ground for complaint of delay. The plaintiffs' solicitors wrote to the defendants' solicitors with respect to the nuisance caused to them by the shed, and on the 26th June 1871, the defendants' solicitors wrote a letter in reply. [After quoting the letter, which is set out above, his Honour continued.] It is true there is no express mention of light and air in this letter, but the letter contains this passage:—"We have also to express our assent to the effect, that should it (the working) at any future time become a nuisance and compel the trustees to take any proceedings, we are willing to assume that they are not damaged in their rights by delay." The evidence on the subject of the nuisance is conclusive. Rooms which were used for the purposes of the school cannot now be used except by introducing artificial light, and it is impossible to say that the light is not in some degree damaged. It has been proved also that no use can be made of the chapel for religious or other purposes during the week, owing to the noise in the defendants' yard, where the working is prolonged until late at night. This is clearly not a case where, as has

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been argued on behalf of the defendants, the question to be decided is one of damages, and the plaintiff's remedy lies at law; but the question to be decided is, whether the plaintiffs are entitled to an injunction or not. I am of opinion that the plaintiffs are entitled to an injunction to restrain the defendants from allowing so much of the shed to remain as would intercept the free and uninterrupted passage of light and air to the plaintiffs' premises, and from allowing noise to be made in their works so as to interfere with the carrying on of religious services and secular meetings in the chapel, and the carrying on of Sunday and day schools; and the defendants must pay the costs.

Jackson, Q.C. and Robinson, Q.C., for the appellants, contended there were no special circumstances in the case which would justify the court in directing the removal of a building which had been erected so far back as 1871, but they further submitted that the question to be decided was merely one of damages, and that the plaintiffs' remedy was at law. They also complained of the unqualified form of the injunction granted by the Vice-Chancellor.

The following cases were referred to:—

Curriers Company v. Corbett, 12 L. T. Rep. N. S. 169; 2 Dr. & Sm. 355;

City of London Brewery Company v. Tennant, L. Rep. 9 Ch. 212; 29 L. T. Rep. N. S. 755;

Kell v. Pearson, L. Rep. 6 Ch. 809; 23 L. T. Rep. N. S. 458;

Harvey v. Smith, 1 K. & J. 389;

Isenberg v. East India House Estate Company, 9 L. T. Rep. N. S. 625; 83 L. J. 392, Ch.

Key, Q.C. and Crossley for the plaintiffs, were not called upon.

Lord Justice JAMES was clearly of opinion that the order of the Vice-Chancellor ought to be affirmed. From the evidence given on behalf of the plaintiffs it was unquestionable that the windows of the chapel had been darkened by the buildings erected by the defendants, and that gas had now to be used where it was formerly unnecessary, and there was really no substantial contradiction of that by the defendant's testimony. From the whole of the evidence it appeared that light had been taken away from the plaintiff's windows to such an extent as to amount to a substantial diminution of their light. That being so, the plaintiffs were entitled to an injunction. But then it was said the court had never ordered a large building to be pulled down when the plaintiffs had stood by while it was building, and when it was finished had come and asked to have it pulled down. But in this case the building of which the plaintiffs complained merely consisted of some pillars and an iron roof, and it was impossible for the congregation of the chapel to know what affect it would have on the access of light to their chapel until it was completed. A few months after its completion they complained of it. All that need be done was to take down that part of the roof immediately in front of the chapel windows, or put a glass roof up. It therefore seemed to him that there was nothing to induce the court to withhold the granting of a mandatory injunction. Then as to the question of noise, it appeared that the minister of the chapel, the registrar, and other persons, members of the congregation, all stated in their affidavits that the noise of the defendants' works actually interfered with hearing what was

said in the chapel, and there was nothing to induce him to disbelieve that evidence. The plaintiffs were therefore also entitled to an injunction as to the noise. But it was contended that even if the plaintiffs were entitled to such an injunction, the injunction granted by the court below went too far. He, however, did not think so. He did not think the injunction of the Vice-Chancellor would prevent the defendants carrying on their works, except at such times when by so doing they would substantially interfere with the use of the chapel. In his opinion it was not likely the injunction would be used oppressively or vexatiously, but on any motion to commit, the court would take care that the decree was not used oppressively. With regard to the word "air," which had crept into the Vice-Chancellor's decree, he was of opinion that that word ought never to be inserted as a common form where there was no evidence that the access of air was really interfered with.

Lord Justice MELLISH concurred.

Solicitors: *J. A. Redhead, for Richardson, Jones, and Billson, Liverpool; Chester, Urquhart, and Co.*

Wednesday, July 28, 1875.

(Before the LORDS JUSTICES.)

FREWEN v. FREWEN.

Irish Church Act 1869 (32 & 33 Vict. c. 42)—Devise of Irish advowsons by will before the Act—Death of testator after the Act—Conversion of advowsons—Ademption.

A testator by his will executed in 1867 devised advowsons in Ireland. In 1869 the Irish Church Disestablishment Act was passed, and thereby compensation was provided to be paid to persons applying within three years from the passing of the Act, in respect of advowsons vested in them, and affected by the Act. The testator died in 1870, having, after the passing of the Act, executed a codicil which did not affect the devise of the advowson, and having also given instructions for an application to be made under the Act in respect of the advowsons vested in him. Compensation was awarded after his death, and the present was a special case for the purpose of determining whether the testator's executors or his devisees were entitled to the compensation money.

Held (affirming the decision of Hall, V.C.), that under the 10th sect. of the Irish Church Act, from the passing of that Act the advowsons of the benefices affected thereby, ceased to exist except as to the temporary right of presentation before 1st Jan. 1871; and that the compensation moneys paid in respect of these advowsons must be taken to be part of the testator's personal estate, and consequently as belonging to his executors.

THIS was an appeal from the decision of Hall, V.C., given on a special case raising an important question under the Irish Church Disestablishment Act 1869—viz., whether, in a case where a testator possessed of advowsons in Ireland had, by will, before the Irish Church Act of 1869, devised those advowsons and had died after the passing of the Act without altering his will, the compensation moneys subsequently paid under the Act belonged to the persons to whom the advowsons were devised by the will, or went to the executors of the testator as part of his general estate.

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The facts were as follows:—The late Mr. Thomas Frewen, who had considerable Irish as well as English property, by his will, dated the 26th Sept. 1867, devised his Innishowen estate, in the county of Cork, and the advowsons of Innishowen, St. Nicholas, Galway, and Shrule, in Mayo, to his third son for life, with remainder to his issue in tail male, and made a similar devise of his Galway estates and the advowsons of Rahoon and Ballinacourty in favour of his fourth son and his issue in tail male. On the 1st July 1869, the testator executed a codicil to his will, not affecting this devise; and on the 26th of the same month the Irish Church Act of 1869 was passed.

By sect. 2 it was enacted, that "On and after the 1st Jan. 1871, the said union created by Act of Parliament between the churches of England and Ireland shall be dissolved, and the said church of Ireland hereinafter referred to as 'the said church,' shall cease to be established by law." Sect. 10 enacts that, "Save as hereinafter mentioned, no person shall after the passing of this Act be appointed by Her Majesty, or any other person, or corporation, by virtue of any right of patronage or power of appointment now existing, to any archbishopric, bishopric, benefice, or cathedral preferment in or connected with the said church;" and sect. 18 enacted, that "The commissioners shall as soon as may be after the passing of this Act ascertain, and by order declare, the amount of compensation which ought to be paid to any person or body corporate who or which shall within three years therefrom make application in writing to this effect for or in respect of any advowson, right of presentation, or nomination to any benefice or cathedral preferment vested in or belonging to such person or body corporate, and affected by the provisions of this Act, and shall by and out of the moneys for the time being in their hands pay to such person or body corporate the amount of such compensation as ascertained and declared as aforesaid." And by sect. 66 it was enacted that, if any vacancy should occur in any benefice between the date of the passing of the Act and 1st Jan. 1871, such vacancy might be filled up by the person who would have been qualified to fill it up if the Act had not been passed. In Jan. 1870, the testator gave instructions that an application should be made on his behalf to the commissioners under the Act for compensation in respect of his advowsons; but before such application was sent in he died, in Oct. 1870. After his death the application was renewed on behalf of the persons in whose favour the advowsons had been devised by the testator, and the commissioners ascertained the amount of the compensation at the two sums of 8979*l.* 7*s.* 5*d.*, and of 1688*l.* 4*s.* 4*d.*; but they made such sums payable, not to the devisees, but to the executors of the testator; and the result of this was a special case seeking the opinion of the court as to who was entitled to the moneys. In the court below it was contended on behalf of the executors that sect. 10 of the Act put an end to all patronage, so as to take away from the testator all interest in these advowsons except his temporary right of presentation before the passing of the Act on 1st Jan. 1871, and that the subject matter of the devise in the bill being gone, the devisees could take no interest under it, and in support of their contention they cited *Levis v. Bennett* (1 Cox, 167); *Ex parte Hawkins* (13 Sim. 569) and *Townley v.*

Dodwell (14 Ves. 590). The Vice-Chancellor in delivering judgment said, "The 10th section of the Act provided that, with the exception in the Act mentioned, there should, after the passing of the Act, be no presentation to any benefice at all. If that was the case, then from the date of the Act the advowsons of those benefices had no existence. That necessarily destroyed the operation of the will purporting to devise those advowsons and reduced it to nothing. The will, in fact, by the effect of the Act of Parliament, ceased to exist so far as this devise was concerned. Then by the 66th section the Act provided that if any vacancy should occur in any benefice between the date of the passing of the Act and 1st Jan. 1871, it should be filled up by the person who would have been qualified to fill it up if the Act had not been passed, and in this case there being a will devising these advowsons, the persons taking under that will would be at liberty to present. But the Act nowhere said that for all purposes the advowson was to continue. That being the case, looking at the question independently of the clauses of the Act relating to compensation, the will was gone so far as this devise was concerned. Then, upon the language of the 18th section, giving compensation to lay patrons, it was argued that if the advowsons had by the 10th section ceased to exist, how could they remain 'vested in' any person? But those words 'vested in,' in the 18th section could only be read as 'vested in at the time of the passing of the Act.' The testator was, in fact, entitled to claim compensation in money after the passing of the Act, and though the Act in favour of persons entitled to compensation gave them three years in which to make their application, it did not mean that there should be a period during which the persons entitled to compensation should fluctuate. The testator might have made a claim immediately after the passing of the Act, and knowing that, and wishing the claim to be made, he made no specific provision in his will as to those compensation moneys. So that there was here: first, the will; second, the first codicil; third, the passing of the Act, and after that another codicil with no reference to these moneys, and so the testator left matters with regard to this claim which he personally had. Then, after his death, a claim was made on behalf of his devisees and executors respectively, and the commissioners, after considering to whom under this Act they should declare the amount of compensation ought to be paid, declared in favour of the executors. In that view they were, in his Honour's opinion, perfectly correct, irrespective of the question how far they, under the 57th section, had the power of investigating and declaring doubtful points; and, moreover, the latter part of the 18th section providing compensation to such persons as would, but for the statutes affecting Roman Catholics in reference to conformity, have had, 'at the passing of this Act,' any advowson, referred to the ownership of those persons at the passing of the Act; and it would be strange if one period of ownership was referred to in the case of the Roman Catholics and another period in the case of the Protestants affected by the Act. The authorities cited did not apply, and upon the terms of the Act his Honour decided that the compensation moneys paid in respect of these advowsons must be taken to be part of the testator's personal estate, and, consequently, as given

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to his executors, and not to the devisees of the advowsons. The devisees appealed.

E. K. Karstake, Q.C. and Deare Salmon for the appellants, contended that the 18th section of the Act treated the advowsons as still existing after the passing of the Act, and that although the right of presentation ceased except for a limited period, the advowsons remained as a property to be paid for by the State. The devisees might, therefore, have presented if any vacancy had occurred after the death of the testator and before the 1st Jan. 1871. There was no immediate conversion into money, but only a possible conversion at some future period, which, if the Act had been suspended or repealed, would never have arrived. If, however, the advowsons were by the Act to be considered as converted into money immediately on its passing, still the will, which remained unaltered after the passing of the Act, devised the advowsons as such, and the testator's intentions must have been that the compensation money should take the place of the advowsons. Moreover the testator never could have intended any ademption of so large a benefit from his devisees. They relied upon:

Drant v. Vanse, 1 Younge & Collyer C. C. 588;

Ex parte Walker; *Re The Shrewsbury and Hereford Railway*, 1 Drew. 508.

Greene, Q.C. and Ince, Q.C. for the executors, and *Dickinson, Q.C. and Macnaghton*, for other persons taking under the will were not called upon.

Lord Justice JAMES.—I have really no doubt about the case at all. In my opinion the Vice-Chancellor was quite right. The Act of Parliament destroyed the advowson, that is to say, it converted that which was an advowson with a perpetual right of presentation to a living in the Established Church into something different. The Irish Church was not disestablished until a year and a half after the Act was passed, and during that interval the testator died. The property which was vested in the testator at the time when the Act passed had its character permanently changed and practically destroyed, and for that the Act provides that the commissioners shall, as soon as they can after the passing of the Act—not as soon as they can after 1871 when the Church is disestablished, but as soon as they can after the Act is passed—ascertain what compensation is to be given to the owner, that is to say, the man who was the owner at the time when the Act passed, for the damage sustained. That is the same case which arises in taking land where a man cannot help himself, and the money probably will not be paid until some time afterwards; that is personal estate. In all those cases where the thing has been either by contract or operation of law converted, you cannot help it; there is no equity in those cases between legal and personal representatives, or between legal and personal devisees and legatees. And it does not make any difference to say that during the year and a half we have a provisional arrangement. The person who would, during that year and a half, have the advowson is to make a temporary arrangement, that is, a mere provisional arrangement for carrying on the thing during the year and a half. But it does not alter what the Act has done, that is to say, converted that which was an advowson in the hands of the then proprietor of the advowson practically into a right to receive

the compensation which shall be assessed by the commissioners. The case is clear on all the authorities and on the principle of converting realty into personalty, and in my opinion the Vice-Chancellor's decision is quite right.

Lord Justice MELLISH.—I am of the same opinion.

Solicitors for all parties, *James, Curtis, and James*, 23, Ely-place.

Tuesday, May 4, 1875.

(Before the LORDS JUSTICES.)

BUSH v. THE TROWBRIDGE WATERWORKS COMPANY.

Riparian owner—Diversion of part of stream—Injurious affecting—Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), ss. 6, 12—Lands Clauses Consolidation Act 1845 (8 Vict. c. 18), ss. 18, 68—Demurrable bill—Costs.

A waterworks company, which was empowered by its special Act to take certain springs, brooks, and streams for the purposes of its undertaking, took certain springs which partly supplied a stream by which a water meadow belonging to the plaintiff was watered, thus diminishing the amount of water in the stream and injuring the plaintiff's meadow:

Held (affirming the decision of the Master of the Rolls) that the company was not bound by the 6th section of the Waterworks Clauses Act 1847 to purchase the plaintiff's interest in the stream, but that he was entitled to compensation, as his meadow had been injuriously affected within the meaning of the 68th section of the Lands Clauses Consolidation Act 1845.

Where a defendant does not demur but puts in an answer to a demurrable bill, the court will not in all cases refuse to allow him the costs so occasioned, but may, in its discretion, refuse him his costs if it thinks the question in the suit ought to have been raised by demurrer.

THIS was an appeal from a decision of the Master of the Rolls.

The hearing in the court below is reported in ante, p. 377, where the facts of the case are fully stated.

The bill prayed for an injunction to restrain the defendants from taking the water of the Biss Brook until they should have given notice to the plaintiff of their intention to take such water, and have offered to treat for the interest of the plaintiff in the water, and until the purchase money or compensation for the interest of the plaintiff in the water should have been settled and paid.

The Master of the Rolls held that the company was not bound to purchase the plaintiff's interest, and dismissed the bill with costs.

From this decision the plaintiff appealed.

Chitty, Q. C. and G. C. Price, for the appellant.—The 6th section of the Waterworks Clauses Act, 1847 provides that, "where by the special Act the undertakers shall be empowered for the purpose of constructing or supplying waterworks to take or use any lands or streams otherwise than with the consent of the owners or occupiers thereof, they shall, in exercising the power so given them, be subject to the provisions and restrictions contained in this Act, and if the waterworks be situated in England or Ireland to the provisions and restrictions contained in the Lands Clauses Consolida-

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tion Act 1845." The plaintiff is the "owner" of the stream in question within the meaning of this section, and was therefore entitled to receive a notice from the defendant company under the 18th section of the Lands Clauses Act. The company is bound to purchase the plaintiff's interest in the stream, for this is a case of taking and not of injuriously affecting the stream. In *Ferrand v. The Corporation of Bradford* (21 Beav. 412) it was held that the diversion of a stream is a "taking and using" it within the meaning of the 85th section of the Lands Clauses Act, which is incorporated in the Waterworks Clauses Act, and before such diversion can be made, the value of the stream must be ascertained and secured to the owners of the land through which it passes. On this point they also cited

Clark v. The School Board for London, 29 L. T. Rep.

N. S. 903; L. Rep. 9 Ch. 120;

Hammersmith and City Railway Company v. Brand, 21 L. T. Rep. N. S. 238; L. Rep. 4 E. & I. 171.

But even if we are wrong in our contention, the Act is so obscure that our bill ought to be dismissed without costs. If we are wrong our bill is demurrable, and it is well settled that when a defendant puts in an answer to a demurrable bill he is only entitled to the costs which he would have incurred by demurring. This is a well settled rule. In *Hill v. Beardon* (2 S. & St. 439), the bill was dismissed, but without costs, "because of the novelty and importance of the question, and because the defendants might have had the opinion of the court upon the question of jurisdiction by a demurrer." In *Jones v. Davids* (4 Russ. 278) Sir John Leach, M. R., said: "The bill must be dismissed; but I will not in this case give the defendants the costs of the suit, because they ought to have demurred, and thus have saved to both parties all further expense." So too in *Ernest v. Weiss* (7 L. T. Rep. N. S. 613; 2 Dr. & Sm. 561, 588), the bill was dismissed without costs, because the objection was not taken by demurrer. [Lord Justice JAMES.—In that case there was a purely technical objection to the suit; the merits were with the plaintiff.] Again, in *Webb v. England* (29 Beav. 44), costs were refused on dismissal of bill at the hearing, on the ground that the defendant might have raised the point by demurrer. [Lord Justice JAMES.—The question in that case was one of jurisdiction.] On this point they also cited

Godfrey v. Tucker, 33 Beav. 290;

Nesbitt v. Berridge, 8 L. T. Rep. N. S. 76; 1 N. R. 345.

Without calling upon

Roeburgh, Q.C. and *Whittaker*, who appeared for the defendant company,

Lord Justice JAMES said.—I am of opinion that the order of the Master of the Rolls is quite right. I have heard no reasonable ground suggested for saying that the company are taking anything of which the plaintiff is either "owner or occupier," in any possible sense of the words. What the company have done is this. They entered upon the channel of the stream above the plaintiff's land, and there took and diverted water for the purposes of their waterworks, which water would in due course, if not taken, have got down to the plaintiff's land, when in some sense it would have been water of which she was owner or occupier. But when intercepted above, it was not her prop-

erty, although it might have become her property. What was done by the company did no doubt injuriously affect the plaintiff's land; but that is a thing which is provided for by a totally different section of the Act. The 12th section of the Waterworks Clauses Act 1847 says: "Subject to the provisions and restrictions in this and the Special Act, and any Act incorporated therewith, the undertakers may execute any of the following works for constructing the waterworks;" it then specifies certain works and proceeds, "They may from time to time divert and impound the water from the streams mentioned for that purpose in the special Act, or the said plans or books of reference, and alter the course of any such streams, not being navigable," &c. "Provided always that in the exercise of the said powers the undertakers shall do as little damage as can be, and in all cases where it can be done shall provide other watering places, drains, and channels for the use of adjoining lands, in place of any such as shall be taken away or interrupted by them, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers." That section exactly describes what the company have done. They have constructed waterworks and reservoirs, and have impounded water which, if they had not done so, would ultimately have flowed through the plaintiff's lands. For that she is entitled to full compensation, and she has never been deprived of her right to compensation. But, instead of claiming compensation, she adopts a different course, and by this bill she endeavours to bring the company into a difficulty so as to make them buy her land from her. She says that they ought to have given notice of intention to take her lands under the 18th section of the Lands Clauses Consolidation Act 1845. But I am of opinion that the Master of the Rolls was quite right in holding that the company were under no such obligation, as the plaintiff failed to show that she was "owner or occupier" of anything which the company have taken or used. As to costs, I think there is no ground for differing from the Master of the Rolls. The cases which have been referred to on this point show that where there is some technical question to be decided, or some questions which the court thinks ought to have been raised by demurrer, the court has used its discretion as to costs, and has frequently refused to allow the defendant his costs. But here the plaintiff, having a clear right to compensation, has endeavoured to obtain something more, and something to which she has no right, and having failed in that endeavour, she must pay the costs. I entirely agree with what the Master of the Rolls has done, and this appeal must, therefore, be dismissed with costs.

Lord Justice MELLISH.—I am of the same opinion.

Appeal accordingly dismissed with costs.

Solicitors for the appellant, *Warry, Robins, and Burgess*.

Solicitors for the respondents, *Whitakers and Woolbert*, agents for *Clark and Collins, Trowbridge*.

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LYON v. THE FISHMONGERS' COMPANY.

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July 21, 22, and 30, 1875.
(Before the LORDS JUSTICES.)

LYON v. THE FISHMONGERS' COMPANY.

Riparian owner—Wharf—Right of access—Public and private rights—Licence to construct embankment—Thames Conservancy Act 1857 (20 & 21 Vict. c. 147, ss. 53 and 179.)

By the 53rd section of the Thames Conservancy Act 1857, it is enacted that "it shall be lawful for the conservators to grant to the owners or occupier of any land fronting and immediately adjoining the River Thames a licence to make any pier, jetty, &c., immediately in front of his land and into the bed of the said river upon payment of such fair and reasonable consideration as is by this Act directed, and under and subject to such other conditions and restrictions as the conservators shall think fit to impose." And by the 179th section of the same Act, it is enacted "that none of the powers by this Act conferred, or anything in this Act contained, shall extend to take away, alter, or abridge any right, claim, privilege, franchise, exemption, or immunity to which any owners or occupiers of any lands, tenements, or hereditaments on the banks of the river, &c., are now by law entitled, nor to take away or abridge any legal right of ferry, but the same shall remain and continue in full force and effect as if this Act had never been made."

The plaintiff was the owner of a wharf and warehouse on the north bank of the Thames, projecting into the river for 40 feet, and thereby having a west as well as a south frontage on the river. The plaintiff was accustomed to moor barges on the west side of his wharf, and to load them from openings in the side of his warehouse:

Held (reversing the decision of Malins, V.O.), that this was not a private right, such as is reserved by the 179th section of the Act, but a public right of navigation enjoyed by the plaintiff in common with the rest of the public, and that the conservators of the Thames could not be restrained from licensing the defendants, the owners of the adjoining wharf, on the north-west side of the plaintiff's wharf, to construct an embankment which would cut off the plaintiff's immediate access to the river on his west frontage.

THIS was an appeal from a decision of Malins, V.O.

The hearing in the court below is reported in 32 L. T. Rep. N. S. 479. The facts of the case are stated in the judgment.

The Vice-Chancellor held that the plaintiff's right to moor barges on the west side of his wharf and load them from openings in the side of his warehouse, was a private right, with which the conservators of the Thames could not interfere by licensing the defendants, the Fishmongers' Company, who were the owners of the adjoining wharf on the north-west side of the plaintiff's wharf, to construct an embankment, which would cut off the plaintiff's immediate access to the river on his west frontage.

From this decision the Fishmongers' Company appealed.

Glasse, Q.C., Chitty, Q.C., and Dundas Gardiner, for the appellants.

J. Pearson, Q.C., Giffard, Q.C., and C. J. Simpson, for the Conservators of the Thames.

Ootton, Q.C., Philbrick, Q.C., and Ottrell, for the plaintiff.

The arguments are fully stated in the report of the hearing before the Vice-Chancellor (*ubi sup.*).

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 30.—Lord Justice MELLISH now delivered the following written judgment of the court:—This was an appeal from a decree of Vice-Chancellor Malins, by which he granted an injunction restraining the defendants from putting up any embankment facing their property on the south side, and facing the plaintiff's property on the west side, or doing any other thing whereby the plaintiff's right of access to the river on the west side of his wharf, directly from the river, might be defeated, destroyed, or prejudiced. The plaintiff is the owner of a wharf, called Lyon's Wharf, near to Upper Thames-street, which is bounded on the south side by the main course of the Thames, and on the west side by an inlet from the Thames, which is part of the Thames, called Winckworth's Hole. The defendants the Fishmongers' Company, are the owners of another wharf, called Winckworth's Wharf, abutting on Winckworth's Hole, towards the south; and the sole question to be determined is, whether the defendants are entitled, having obtained a licence from the Conservators under the 53rd section of the Thames Conservancy Act of 1857, to fill up Winckworth's Hole, and to extend their wharf to a line with Lyon's Wharf, which will necessarily block up the plaintiff's access to the river on the west side of his wharf, or whether the plaintiff's right of access to the river from the west side of his wharf is reserved to him under the 179th section. There was very contradictory evidence as to the extent to which the occupiers of Lyon's Wharf had used the west side of their premises, for the embarking and disembarking of goods, prior to 1857. But we are of opinion that there was sufficient evidence of such user to rebut any presumption that the occupiers of Winckworth's Wharf had in any way acquired the exclusive right to embark and disembark goods from Winckworth's Hole, assuming that such legal right could possibly be legally acquired, and we think it must be taken to be established that the plaintiff had in respect of the west side of Lyon's Wharf, at the time the Conservancy Act passed, the ordinary right of the owner of a wharf on the banks of a navigable river. This, indeed, was not seriously denied, and the counsel on both sides agreed that if such an embankment as that proposed were made without the authority of an Act of Parliament, the plaintiff would have a remedy by action at law, or by suit in equity; but they differed as to what would be the ground of action or suit. The defendants' counsel contended that the plaintiff could maintain such an action solely because he would suffer a particular damage from the violation of a public right, and that, therefore, according to the decision of the Court of Common Pleas in the case of *Kearns v. The Cordwainers' Company* (6 C. B., N. S., 388), his right was not preserved by the 179th section. On the other hand it was contended by the counsel for the plaintiff that the owner of premises abutting on a navigable river, where the tide flows and reflows, has rights belonging to him, as a riparian proprietor wholly distinct from the public right of navigation by virtue of which he can maintain an action against anyone who prevents the tidal water from flowing to his premises in the ordinary course of the tide, or who deprives

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him of his access to the river; and, secondly, whether this is so or not, that the right of access to the river ought to be held to be a right reserved by the 179th section. We have been unable to find any authority for holding that a riparian proprietor, where the tide flows and reflows, has any rights or natural easements vested in him similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide; and there are such obvious distinctions between the two cases that we are unwilling to hold that the rights of the one necessarily extend to the other. In the parts of rivers where the tide flows and reflows the soil between high and low watermark and the soil in the bed of the river is, *prima facie*, vested in the Crown, but the public are entitled to the right of navigation and the right of fishing and to use the shore, the property of the Crown, for the purpose of embarking and disembarking and for other purposes auxiliary to the right of navigation and fishing; but we cannot find any authority to the effect that the riparian proprietor whose property terminates at high water mark has any greater rights over the river or the shore between high and low water than anyone else, except this—that the fact of his being the owner of private property immediately adjoining the shore of the Crown enables him to go on the shore for the purpose of embarking in and disembarking from vessels on the river at parts of the shore where other persons cannot get; and at high water, if the water comes up to his property, he can bring a vessel close up to his property, and so use his property as a wharf for the loading and unloading of goods. These may, indeed, be most valuable rights, but they arise simply from the fact that the person claiming them owns lands immediately abutting on a public navigable river, which he, as one of the public, is entitled to use for the purpose of navigation, and do not, as it seems to us, render it necessary to hold that a riparian proprietor has any rights over the river or the shore of the river beyond the rights of the rest of the public. And a man having a mere right of way—the narrowest possible—down to the water edge has as much right as the owner of the most extensive riparian property to the reasonable use of any portion of the navigable river for the purpose of loading or unloading goods or embarking or disembarking passengers; and if a public way went down to the water edge, any one of the public using that way would have the same right of using the stream. The right to stop a carriage or waggon in the highway for the purpose of taking up and setting down, loading and unloading, is not limited to, and has no necessary connection with, frontage. For example, the occupier of a back workshop has exactly the same rights as the shopkeeper in front. A coal barge in the Thames unloads at a wharf, but it loads from a collier in the Pool, and it lies alongside the collier to load in exercise of precisely the same right as when it lies alongside the wharf to unload. The only authority which was cited for the proposition that a riparian proprietor has such rights, was the case of *Rose v. Groves* (5 M. & G. 613), and what was said by Lord Hatherley in *The Attorney-General v. The Conservators of the River Thames* (8 L. T. Rep. N. S. 9; 1 H. & M. 1), which, however, was entirely founded on the case of *Rose v. Groves*. We do not think that the case of *Rose v.*

Groves is a sufficient authority for the proposition it was cited to support. It was an action by the occupier of a public house situate on the banks of a navigable river for stopping the access of his customers from the river by means of pieces of timber floating on the river. The declaration was ambiguously framed, so that it was difficult to tell whether the pleader intended to rely on the violation of a public right or of a private right. The right as alleged was not traversed, the only plea being not guilty, but after the verdict for the plaintiff a motion was made in arrest of judgment, so that the only question to be decided was whether the declaration was good after verdict. All the judges were of opinion that the declaration was good upon the ground that it sufficiently alleged that the plaintiff had suffered a particular damage from what was an indictable offence in a navigable river, and in *Kearns v. The Cordwainers Company* (6 C. B. N. S. 388) Willes, J., states this to have been the ground of the decision; but some of the judges in *Rose v. Groves* do also express an opinion that the declaration might be supported on the ground that it sufficiently alleged a violation of a private right, the right alleged not being traversed, but they do not, as I understand them, express any opinion that, if the right had been traversed, it would have been proved. Tindal, C.J. does indeed suggest that the pieces of timber might drift close to a bank where the water was so shallow that no boat could go there, and that that would not be a public nuisance. Now we agree that if it be possible to prevent the riparian proprietor from having an access from the river to his premises by an obstacle placed in the river, which would not be a public nuisance, this would afford a ground for contending that there was such a private right as alleged. It seems to us, however, that any such obstruction must necessarily be a violation of the public right of navigation, and therefore a public nuisance. The public right of navigation, as is pointed out by Blackburn, J. in the case of *Marshall v. The Ulleswater Company* (25 L. T. Rep. N. S. 793; L. Rep. 7 Q. B. 166) includes a right of disembarking and coming on shore at any place where persons navigating a river have a right to come on shore, and therefore, if there be an obstruction, although in shallow water, which prevents persons landing where they are entitled to land, that is a public nuisance. In *Rose v. Groves* the customers who were hindered or prevented from having access to the plaintiff's public house, could not have brought an action on account of the obstruction, but surely they could have prosecuted an indictment to enforce their right of landing. There are two cases in which the courts of common law have had to consider the consequence of an obstruction which prevented persons from landing at a wharf where they were entitled to land. In the case of the *Eastern Counties Railway Company v. Dorting* (5 C. B. N. S. 821; 28 L. J. 202, C. P.) the plaintiff and the defendant were the owners of rival steamboats, and were entitled to use the same wharf at Ipswich, by the licence of the wharfinger, to land and embark their passengers. The wharf could only be approached by steamboats at high tide, and the plaintiffs had placed a dummy in front of the wharf to enable them to land and embark passengers at all times of the tide. The action was in trespass against the de-

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endant for using the plaintiff's dummy at high tide, when the dummy prevented the defendant's vessel getting to the wharf, but not at low tide, when the vessel could not have got to the wharf, even if there had been no dummy. A great number of pleas were pleaded, but they all depended upon the public right of navigation, and nothing was said about any private right in the wharfinger. In *Marshall v. The Ulswater Company* (25 L. T. Rep. N. S. 793; L. Rep. 7 Q.B., 166) the plaintiff was the owner of the soil covered with water, and kept up a pier in the lake which prevented the defendants from bringing their steamboats close to the land immediately adjoining the commencement of the pier, of which land the defendants were the lessees. This, therefore, was a case in which the riparian proprietor was directly deprived of access to his own property. It was held that the defendants were entitled to use the plaintiff's pier, but their right to do so was entirely rested upon the lake being a public navigable lake. There were no pleadings, but Blackburn, J. states what would have been the proper plea for the defendants to have pleaded. He says: "I think that if this case turned upon a plea, it would be sufficient to allege that the plaintiff maintained the pier in such a place that it was impossible for the public to use their right to navigate without either knocking down or removing it, and therefore the defendants, having a right to go, went, doing no unnecessary damage, across the pier." We cite these cases not as decisions that there is no such private right as alleged, but as proving that the wharfinger is amply protected in his right of access to his wharf by his interest as one of the public in the right of public navigation, and that there is no necessity to invest any private right in him as a riparian proprietor. There also appears to us to be great difficulty in making any sound distinction between an obstruction in the river which makes the access to a wharf less convenient and an obstruction in the river which absolutely stops it up. As a general rule, whatever renders the enjoyment of an easement, either natural or acquired, less convenient, or partially obstructs it, is as much a violation of the right as that which totally destroys it. A riparian proprietor above the flow of the tide can bring an action against a person who diverts a half or any substantial quantity of the water as well as if he diverted the whole. So a person entitled to a carriage way or a footway can bring an action against a person who puts up a gate or a stile where there was no gate or stile before, although such gate or stile may only cause a slight inconvenience in using the way. If a wharfinger had really a private right, distinct from the public right of navigation, to a free access from the river to his wharf, it seems to us he could bring an action, grounded on his private right, against any one who rendered that access less convenient; but *Kearns v. The Cordwainers Company* (6 C. B., N. S., 388), and *The Attorney-General v. The Conservators of the River Thames* (1 H. & M. 1) are direct decisions that he can bring no such action. On the whole we are of opinion that the right of a wharfinger to bring an action or file a bill on account of an obstruction in the river which renders the access to his wharf less convenient, and his right to bring an action or suit on account of an obstruction in the river which deprives him of all access to his wharf, depends on the same legal principle—namely, that he suffers a particular

damage from a public nuisance, and that in neither case is there a violation of any private right of his distinct from the public right of navigation which is in all the Queen's subjects. If this conclusion is correct, it seems to us to follow that we cannot affirm the decision of the Vice-Chancellor consistently with the cases of *Kearns v. The Cordwainers Company* and *The Attorney-General v. The Conservators of the River Thames*, and we are certainly not prepared to overrule those decisions. They have, no doubt, been extensively acted upon, and we think they were rightly decided. If the Conservators could not licence the erection of any wharf or pier which to a greater or less extent interfered with the access of any wharfinger to his wharf, the Conservators could not exercise their powers in the way intended by the Legislature. We think that the rights which are reserved by the 179th section are the private rights of the owners and occupiers of wharves, and not their interest in the public navigation of the river. On these grounds we think that the decree of the Vice-Chancellor must be reversed and the bill dismissed with costs, except the costs occasioned by the defendants' (the Fishmongers' Company), claim of an exclusive right to the use of Winckworth's Hole, and which costs are to be paid to the plaintiff; one set of costs to be set-off against the other.

Solicitors for the plaintiff, *Brettell, Smythe and Brettell*.

Solicitor for the Fishmongers' Company, *C. O. Humphreys*.

Solicitors for the Conservators of the Thames, *Frere and Co.*

ROLLS COURT.

Reported by G. WELBY KING and S. H. S. LORTHOVEN, Esqrs.
Baristers-at-Law.

Wednesday, June 2, 1875.

BRIGGS v. SHARP.

Advowson—Direction by testator to sell—Right to next presentation.

A testator, who was the owner of an advowson, by his will directed his executors to sell the same when the church was full, and to invest the proceeds, and pay the interest thereof to his wife for life for the maintenance of herself and their children, and after her death then to his children. At the time of the testator's death the church was full, but the executors did not succeed in effecting a sale of the advowson before the incumbent died.

Held that the equitable ownership being in the wife during her life, she was entitled to nominate to the living.

SPECIAL CASE.

The Rev. James Briggs, clerk in holy orders, by his will, dated the 23rd July 1873, after appointing his wife, the plaintiff, Sarah Ann Briggs and the defendants Thomas Sharp and A. W. Crickmay to be executors and trustees thereof, and after reciting that he was possessed of a sum of 13,000*l.*, which had been lent by him for a term expiring in 1881, and that he was also possessed of the advowson of High Halston, in the county of Kent, endowed with 800*l.* per annum tithe rentcharge, and to which appertained a rectory and seven acres of glebe land, and that he was also possessed of two

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acres of freehold land adjoining the churchyard at High Halston aforesaid, directed the interest of the 13,000*l.* to be paid in the same manner as thereafter directed concerning the dividends of the 3*l.* per cent. Consols, upon which the 13,000*l.* when received was to be invested; and he directed that his executors should get in and receive the 13,000*l.* at the expiration of the term, and should invest the same in Consols, and pay the dividends thereof to his wife during her life for the maintenance of herself and their children, and after her death then to his children as therein mentioned; and after the death of his wife and the last of his children, he directed the moneys so to be invested to be applied as therein mentioned. The will then proceeded—"And as regards the said advowson, house, and glebe land and freehold land, I direct that if the living become vacant by my death, and the advowson have not been previously sold, then and in such case the presentation be offered by my said executors to [naming certain persons]. And when the church is full, I direct my said executors to sell the advowson thereof, either by public auction or private contract, as to them may seem most advisable, and if by private contract then for such price as they shall under competent advice deem in their absolute discretion reasonable and sufficient; and also to sell the said two acres of freehold land aforesaid either by public auction or private contract as aforesaid, and to invest the proceeds of the said sales in and upon the said 3*l.* per Cent. Consolidated Annuities, and to pay the interest, dividends and annual produce thereof unto my said wife in the same manner and for the same purpose as hereinbefore directed in respect of the said sum of 13,000*l.* hereinbefore directed to be invested." The testator died on the 23rd Sept. 1874, leaving five infant daughters, who were his co-heiresses-at-law, and his will was proved by the executrix and executors thereof on Oct. 28, 1874.

The living of High Halston which had not been sold did not become vacant by the death of the testator, and at the time of his death the church was full. The incumbent died on the 18th Feb. 1875 before the trustees had sold the advowson, although they had made an attempt to do so which was unsuccessful. The question submitted to the court was in whom the right to nominate to the living was vested.

Macnaghten, for the plaintiff, the testator's widow, contended that the equitable ownership for life was in the plaintiff, and that she was entitled to nominate and referred to

Hawkins v. Chappel, 1 Atk. 621.

Coll, for the executors, argued that although at law a living was a beneficial interest, yet it could not produce income either for the maintenance of children or accumulation, and, therefore, no beneficial interest was given by the will, and the right of presentation descended to the co-heiresses-at-law. He referred to

Martin v. Martin, 12 Sim. 579;

Sherrard v. Lord Harborough, Amb. 165.

Graham Hastings, for the infant co-heiresses-at-law, submitted that there was an intestacy as regarded the advowson, and that it descended on the infant co-heiresses. He cited

Lambe v. Eames, L. Rep. 6 Ch. 597; 25 L. T. Rep. N. S. 175;

Carr v. Living, 28 Beav. 644;

Mackett v. Mackett, L. Rep. 14 Eq. 49;

Johnstone v. Baker, 6 De G. M. & G. 439.

Sir GEORGE JESSEL.—I think this is a clear case. The testator was the owner of an advowson. He anticipated, obviously from the will itself, that the incumbent, who, I suppose, was an old man, would die in his lifetime, and that the advowson would become valuable. I suppose he bought the advowson with the view of presenting himself, he being a priest in holy orders. By his will he first of all gives a sum of 13,000*l.* to his trustees, and directs them to invest it and pay the interest, dividends, and annual produce thereof to his wife "during her life for the maintenance and support of herself and our children." I am not going to decide now whether there is any obligation upon the wife to maintain the children, or whether these words were used merely to express the purpose which the testator had in view in giving the money to his wife; but this I do decide, that the children do not take as joint tenants with the wife, and that the wife takes the income. He then disposes of the advowson. He does not devise it, which I think he ought to have done. The draftsman, recollecting the difficulty occasioned by an advowson descending upon infants, used these words: "And as regards the said advowson, house, and glebe lands and freehold land, I direct that, if the living become vacant by my death, and the advowson have not been previously sold, then and in such case the presentation be offered by my said executors to my dear brother in the priesthood," and so on. How that can happen I do not know, because the instant the living becomes vacant by his death the advowson cannot be sold, except in defiance of the law. If it were sold in his lifetime, of course the advowson would have gone, and there would have been nothing for the will to operate upon. If the friend whom he mentions refuses to accept it, then he directs it shall be offered to somebody else, "and when the church is full"—not full in manner aforesaid—he directs the executors to sell the advowson and two acres of land, and to invest the proceeds of the sale, not only of the advowson, but also of the freehold land, in three per cent. Consols, "and to pay the interest dividends and annual produce thereof unto my wife in the same manner and for the same purpose as hereinbefore directed in respect of the said interest dividends and annual produce of the 13,000*l.*" He died on the 23rd Sept. 1874 leaving the incumbent of the advowson in possession. I am told the trustees tried to sell, but could not. That may relieve them of the consequences of a breach of trust. But the incumbent lived till the 18th Feb. 1875, so that there was an interval from the 23rd Dec. 1874 till the 18th Feb. 1875, during which they might have sold the advowson; and certainly they ought to have sold it as quickly as possible, for it is quite obvious by the very terms of the will that the incumbent was not expected to live very long. Now, that being so, there is a trust with respect to the property. The same observations apply to the freehold land—he directed the trustees to sell, which they had the power of doing, and to invest the proceeds. In this court that is a gift of the property. A gift of the proceeds of a sale of property is a gift of the property itself. Nothing can be better settled in this court than that the mere delay of a trustee in converting property does not affect the title of the *cestuis que trust*. A trustee could not by the exercise of his caprice or even reasonable discretion as to the time and mode of sale, control the direction of the testator that he shall

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Re TYNEMOUTH BOROUGH TRAMWAY COMPANY (LIMITED).

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sell when it is full—that is as soon as possible—and give the proceeds to the *cestuis que trust*. The property is fixed by the testator, and, consequently, the property, if not sold, belongs to the person or persons to whom the proceeds of the sale are given. I am hesitating whether, with regard to the freehold land, I am compelled to say that if the testator had not devised it, but simply directed it to be sold, so that the trust, as far as the legal estate is concerned, would have had to be carried out by means of a common law power of sale, the co-heiresses-at-law would be entitled to the estate until the sale. In my opinion that is not so; the contrary is clearly settled; and in equity the co-heiresses-at-law are mere trustees for the persons to whom the proceeds of the sale are given. That being so, the co-heiresses-at-law are not entitled; and it follows, in my opinion, if the previous part of the will is correctly construed, that the wife is entitled. I shall so decide, and, in answer to the question, say that the wife is the person entitled to nominate a clerk to be presented by the infants.

Solicitors: *Smith and Wall*.

V.C. MALINS' COURT.

Reported by F. GOULD and JAMES E. HORNE, Esqrs.,
Barristers-at-Law.

Tuesday, July 27, 1875.

Re TYNEMOUTH BOROUGH TRAMWAY COMPANY
(LIMITED).

Tramways Act 1870, rule 26—Application of deposit fund—Debts—Rights of Crown.

A company, incorporated under *The Companies Acts*, obtained a provisional order to construct a tramway. No tramway was ever commenced, and the company was ordered to be wound-up. The only shareholders were the subscribers to the memorandum of association; the only debt due from the company was less than the amount of the deposit fund.

The Court, on the petition of the official liquidator, under the discretion given by *The Tramways Act 1870, rule 26*, ordered the deposit fund to be paid out to the petitioner, to be applied by him for the benefit of the company's creditors, and refused to consider it forfeited to the Crown.

THIS was a petition by the official liquidator of the company, praying that a sum of 549l. 8s. Consols (being 4l. per cent. on the estimated cost of constructing a certain tramway), which, pursuant to the *Tramways Act 1870*, and the rules thereof, had been transferred into court, might be transferred to the petitioner.

The company was incorporated on the 9th April 1872, under the *Companies' Acts 1862 and 1867*, for the purpose (amongst other things) of obtaining provisional orders for constructing tramways in the borough of Tynemouth.

The capital of the company was 50,000l., divided into 5000 shares of 10l. each.

The only shareholders were the subscribers to the memorandum of association, who had subscribed between them for 175 shares.

On the 6th Aug. 1872 the provisional order, which had been obtained by the company pursuant to the *Tramways Act 1870*, came into operation. No time was limited by the provisional order for the commencement of the works thereby authorised.

The company never commenced the works authorised by the provisional order, and on the 28th May 1875 the company was ordered to be wound up, and shortly afterwards the petitioner was appointed official liquidator.

By the chief clerk's certificate, dated the 14th July 1875, it appeared that the only claim against the company was that of *The Tramways Union Company* for 392l.

The *Tramways Act 1870, rule 26*, provided that if the promoters empowered by the provisional order to make the tramway did not, within the time in the provisional order prescribed, and if none was prescribed, then within two years from the commencement of the operation of the provisional order, complete the tramway, then the deposit fund should, after the expiration of the time aforesaid, be applied towards compensating all road authorities for the expenses incurred by them in taking up any tramway placed by the promoters as therein mentioned; and if no such compensation should be payable, then the said deposit fund should either be forfeited to her Majesty, "or in the discretion of the court, if the promoters are a company, and such company is insolvent, or has been ordered to be wound-up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver, or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company, for the benefit of the creditors thereof."

The petitioner now applied that the fund in court should be transferred to him, to be by him applied as part of the assets of the company for the benefit of creditors.

Higgins, Q.C. and *McLaren*, in support of the petition.—The company having been wound-up, the court, in the exercise of its discretion, will order the fund to be paid out to the official liquidator for the benefit of creditors: (*Tramways Act 1870, rule 26*.) The court will never make a call on contributories where, as here, there is a sufficient fund *aliunde*, to pay the only claim against the company. In *Re The Common Road Conveyance Company (Limited)*, before Vice-Chancellor Hall (unreported), the court made a similar order.

Rigby, for the Crown.—In *Re The Common Road Conveyance Company (Limited)* there were no assets, as all the shares were fully paid up. The court can only apply the deposit money for the benefit of creditors. Here the company is not insolvent, it has 1750l. of uncalled share capital, and the only claim against the company is a sum of 392l. Unless it is shown that the deposit money will be required to pay the company's debts, the court has no discretion, under rule 26, to make the order (*Re London and County Tramways Company, L. Rep. W.N. 1875, p. 49*).

The VICE-CHANCELLOR said that, in the events which had happened, the deposit was to be disposed of under the 26th rule. That rule provided for payment of compensation in respect of various things; and if no such compensation should be payable, then the deposit fund was to be forfeited to the Crown, "or in the discretion of the court, if the promoters are a company and such company is insolvent, or has been ordered to be wound-up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver or to the liquidator or liquidators of the company, or be otherwise applied as part of the

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assets of the company for the benefit of the creditors thereof." The court had, therefore, a discretion to say either that it should go to her Majesty or to the applicant. His Honour was of opinion that the court ought to exercise its discretion in favour of the official liquidator. It was said that the court ought not to do that, because the seven persons who had subscribed the memorandum might be resorted to for payment of debts. That would be unjust. If the subscribers had subscribed *bond fide*, they were entitled to the deposit. The court must regard the subscribers as the persons who had provided the deposit; and they were, therefore, entitled to it, after payment of debts. There had been a winding-up order, and there was only one debt to be paid. In *Re London and County Tramways Company*, Hall, V.C., ordered that the deposit should be applied first in satisfying the Attorney-General's costs, and then that the balance should be paid to the official liquidator. His Honour intended to make precisely the same order: the costs of the Attorney-General would be paid first, and then the balance would be paid to the official liquidator. The rule did not mean that people should be called upon to pay on their shares, only in order to enable the Crown to take the deposit. What the Vice-Chancellor meant by his decision was, that, the court having a discretion, the deposit should go to pay the debts of the company.

Solicitors, *Ashurst, Morris, and Co.; Raven and Hare.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Monday, May 31, 1875.

WEMYSS (app.) v. HOPKINS (resp.).

Causing damage on highway—Assault—5 & 6 Will. 4, c. 50, s. 78—24 & 25 Vict. c. 100, s. 42—First conviction bar to second.

A conviction under 5 & 6 Will. 4, c. 50, s. 78 for causing injury to a person on a highway by negligence or wilful misbehaviour is a bar to a subsequent conviction for assault under 24 & 25 Vict. c. 100, s. 42 on the same facts.

On the 26th June 1874, Walter Wemyss, the appellant, was convicted before the justices at petty sessions, on the complaint of the superintendent of police, for having, on the 15th June, while driving on the highway, struck the horse on which Jane Hopkins, the respondent, was riding, which caused her to fall and suffer serious injury, and was fined 2l. This conviction took place under the Highway Act 1835 (5 & 6 Will. 4, c. 50), s. 78, which provides that "if the driver of any carriage whatsoever upon any part of any highway shall, by negligence or wilful misbehaviour, cause any hurt or damage to any person, horse, cattle, or goods conveyed in any carriage passing or being upon such highway," . . . "every person so offending in any of the cases aforesaid, and being convicted of any such offence, either by his own confession, the view of a justice, or by the oath of one or more credible witnesses before any two justices of the peace, shall, in addition to any civil action to which he may make himself liable, for every such offence forfeit any sum not exceeding 5l. in case such driver shall not be the owner of such . . . carriage, and in case the offender be the owner of

such . . . carriage then any sum not exceeding 10l."—or in default be imprisoned for not more than six weeks.

On the 6th July the respondent commenced an action against the appellant in the County Court, claiming 50l. as damages sustained by the respondent in consequence of the appellant striking the horse on which she rode and pushing her and causing her to fall thereupon, on the 15th June 1872, and for the board and lodging of the respondent during her illness arising therefrom, and also for loss of wages, and medical and other expenses incurred by reason thereof. On the 17th July the cause was adjourned until the next court by consent of both parties. On the 5th Aug. the cause was removed into the Queen's Bench by writ of *certiorari* upon the motion of the attorney for the appellant.

On the 7th Aug. a complaint preferred by the respondent against the appellant under 24 & 25 Vict. c. 100, s. 42 for an assault committed on the 15th June, was heard before two justices, who convicted the appellant, and adjudged him to pay 1l. and 1l. for costs. By 24 & 25 Vict. c. 100, s. 42 "Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence, and the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction there to be imprisoned with or without hard labour for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of 5l."—in default imprisonment, with or without hard labour, not exceeding two months. The respondent afterwards abandoned the civil action commenced by her against the appellant as aforesaid. The appellant applied to the justices to state a case under 20 & 21 Vict. c. 43, which they refused to do. He afterwards obtained a rule from the Court of Queen's Bench calling on them to state a case, and the case was stated in obedience to this rule. Upon the hearing of the said last-mentioned complaint on the 7th Aug. 1872, it was proved on the part of the respondent, and found as a fact that the appellant did, on the 15th June 1872, unlawfully and wilfully strike and push against the horse upon which the respondent was riding, and also against the respondent herself, and thereby caused her to fall from the horse to the ground, whereby she sustained certain hurt and damage. It was contended on the part of the appellant, that as he had been duly convicted of the complaint preferred against him, and heard on the 26th June 1872, he could not be convicted again upon that occasion, for what, his attorney contended, was the same offence, and also that previously to issuing the summons, the respondent had elected her choice of remedy against the appellant by commencing an action for damages in the County Court. The questions of law for the opinion of the court were—First, whether the appellant having been convicted on the 26th June 1872, under 5 & 6 Will. 4, c. 50, s. 78 as hereinbefore stated, upon the complaint of the superintendent of police, could again be convicted on the 7th Aug. 1872, under 24 & 25 Vict. c. 100, s. 42, upon the complaint of the respondent. Secondly, whether the respondent having previously to the issuing of the summons

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upon which the second conviction was founded, commenced an action in the County Court for damages for the injury she sustained on the 15th June 1872, as herein stated, had not thereby elected her choice of remedy so as to render the second conviction bad in law. If the court should be of opinion that the said second conviction was legally and properly made, and that the appellant was liable as aforesaid, then such conviction to stand; but if the court should be of opinion otherwise, then the said conviction to be quashed.

Arthur Charles, for the appellant.—[BLACKBURN, J.—The money which the justices can order to be paid under 24 & 25 Vict. c. 100, s. 42 is not compensation to the party injured, but a fine; the second point is, therefore, utterly untenable.] The conviction is bad on the first ground. The appellant having been convicted under 5 & 6 Will. 4, c. 50, s. 78, ought not to have been afterwards convicted on the same facts. In *R. v. Elrington* (31 L. J. 14, M. C.), the dismissal by justices of a complaint for an assault was held a bar to an indictment for unlawfully wounding and for an assault occasioning actual bodily harm arising out of the same circumstances. Cockburn, C.J., in his judgment in that case says: "It is a fundamental principle that out of the same state of facts a series of prosecutions is not to be allowed." That applies to the present case. The facts proved on the second occasion were the same as those on which the first conviction proceeded, which makes the second conviction illegal. (See Chitty's Criminal Law, vol. 1, pp. 452, 461; 2 East's P. C. p. 519). Most of the cases which have arisen have been cases where *auterfois acquit* has been pleaded, but the principle is the same. In *R. v. Walker* (2 M. & R. 446) where the prisoner had been convicted and fined for assault before two magistrates, and was afterwards indicted on the same facts for felonious stabbing, Coltman, J. held that a plea of *auterfois convict* was a bar to the indictment. *R. v. Stanton* (5 Cox C. C. 324) is to the same effect. [BLACKBURN, J.—In those cases the conviction was under 9 Geo. 4, c. 31, by s. 28 of which Act a person convicted before justices and punished was "released from all further or other proceedings, civil or criminal, for the same cause." There is no such provision in 5 & 6 Will. 4, c. 50, so this case must proceed on the rule of common law, but I can see no distinction in principle between a summary conviction and any other.] The language used by Byles, J. in giving judgment in *R. v. Morris* (L. Rep. 1, O. C. R. at p. 94) shows that he considered that a conviction before magistrates, and a conviction by a jury, had the same effect. [FIELD, J.—In Paley on Summary Convictions, 145 (5th edit.), the rule is thus stated: "The true test to show that such previous conviction or acquittal is a bar is whether the evidence necessary to support the second proceeding would have been sufficient to procure a legal conviction on the first."] In Broom's Legal Maxims, p. 258 (2nd edit.), the same rule is laid down. The facts here had already been the subject of a judgment, and the case is within the principle of *King v. Hoare* (13 M. & W. 494). The same principle which applies to the judgments of the Superior Courts applies to the judgment courts of competent jurisdiction created by statute. The respondent did not appear.

BLACKBURN, J.—I think it is clear that the fact of a person having been convicted under one Act of Parliament is a bar to a subsequent conviction

for the same assault under another Act. The only doubt which could possibly be entertained is whether it applies to a case where jurisdiction is given to two justices to adjudicate upon a particular matter under the provisions of a special statute, but I think there is no reason for doubting that it does so apply. The mode of conviction does not make any difference, if the person is charged with the same assault, and the same matter which was the subject of the previous charge is again brought before the court, for he ought not again to be vexed for the same cause. The averment in the plea of *auterfois convict* is an averment of the identity of the offence. This case is not exactly the same as *R. v. Elrington* and *R. v. Walker* (*ubi sup.*), for the decisions in those cases proceeded on a statute going much further than the common law. Here we are driven back to the rule of common law, and it is clear that the appellant was charged a second time with the identical matter for which he had already been convicted and sentenced; the justices, therefore, have made a mistake. As to the other ground, that by commencing an action in the County Court the respondent had elected her remedy, that is clearly no defence, for the object of the proceedings under 24 & 25 Vict. c. 100, s. 42 is to punish, while the object of the action is to recover damages. Judgment must be for the appellant on the first point.

LUSH, J.—I am also of opinion that this conviction must be quashed. To hold otherwise would be to violate the fundamental maxim that no person ought to be punished twice for the same offence. An assault committed on a public highway under certain circumstances is an offence punishable under two statutes. Here the appellant was prosecuted under the Highway Act; he cannot, therefore, be afterwards convicted because the same Act happens to be an offence against two different statutes.

FIELD, J.—I am of the same opinion. The principle is clearly stated in the passages which have been referred to in Paley on Summary Convictions and Broom's Legal Maxims. Also I think it is quite clear that the circumstance that the conviction took place before a court created by statute makes no difference.

Judgment for the appellant.

Attorneys for the appellant, *Hughes and Beadles*, for *Ravenhill*, *Aberystwith*.

Tuesday, June 1, 1875.

KAY v. OXLEY.

Right of way—Grant by general words—Unity of possession—Previous use by tenant.

Defendant, the owner of two adjoining farms or messuages, each with farm buildings and land, expressly permitted the tenant of one to use a private farm road belonging to the other in order to approach the hay chamber which the tenant had built over his stable. It was not impossible but very inconvenient to carry hay to this chamber by any other mode. At the conclusion of the tenancy the defendant conveyed the messuage and premises of which this stable and hay chamber formed part to the plaintiffs, together with all ways, rights of way, easements, and appurtenances to the said messuage, land, and hereditaments, or any of them now or heretofore demised, occupied, or en-

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joyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto.

Held, in an action for obstructing the plaintiff's use of this approach to his hay chamber, that under the circumstances the general words used included a grant of this right of way.

This was an action to try the right of the defendant to obstruct a way which the plaintiff claimed a right to use over the defendant's land for certain purposes. It came on for trial at the Leeds Assizes, March 1874, and the following special case was stated by order of Nisi Prius.

On and previous to the 1st May 1860, the defendant was the owner of a dwelling house together with the cottage, stable, outbuildings, and garden thereto belonging, now the property of the plaintiff, and called or known by the name Roseville, situate at Roundhay, in the parish of Barwick-in-Elmet, in the county of York, abutting upon a public highway called Horseshoe-lane, leading from Leeds to Seacroft; and was also the owner of an adjoining farmstead and farm called Rose Cottage Farm, abutting also upon the same highway, and having a private farm road leading from it to the farm buildings, stack yard, and other premises connected therewith, and to a field adjoining them.

By an indenture of lease dated May 1st, 1860, the defendant demised Roseville to Robert John Hudson for a term of ten years from that date, together with "all and singular the rights, privileges, easements, advantages, and appurtenances whatsoever to the said messuage and premises thereby demised belonging or in anywise appertaining or therewith used or enjoyed."

At the time of the demise the stable had no other storey, and was of the same height as the adjoining cottage demised with it.

The lessee, Robt. John Hudson, entered at once into possession under his lease, and in the same year built at his own expense a hay chamber or upper room over the stable, with two square openings in the east wall of the chamber, of the respective dimensions of 4ft. 7in. by 2ft. 10½in., and 2ft. 10in. by 2ft. 10in., for the purpose of getting his corn, hay, and straw into his hay chamber, for which purpose they were adapted. Both openings were fitted with shutters, and the shutters to one of them opened outwards. There were no other means for the admission of light and air into the chamber, except a man hole 2ft. 6in. by 2ft. 1in. square, cut through the south-east corner of the floor.

The east wall and the openings abutted upon and looked into the stack yard and adjoining premises of Rose Cottage Farm, and there was no access to them with carts and waggons out of any part of the premises demised to Hudson, and the only way by which carts and waggons could be brought up to them was by taking them along the private farm road of Rose Cottage Farm.

Before making the alterations Robert John Hudson consulted the defendant and Robert Barker, who was then the defendant's tenant of Rose Cottage Farm, upon them, and obtained their consent to them, and at the same time their permission to use the Rose Cottage Farms private road to get to the hay chamber with his cart and waggon loads of hay, corn, and straw when completed.

No openings were made in the opposite or west wall of the hay chamber.

The lessee, Hudson, remained in occupation of

Roseville and premises until about March 1863, when he sub-let them to a Mrs. Fletcher, who remained in occupation twelve months, and on her quitting them Hudson sub-let them to Richard Green, who remained in occupation up to the expiration of the said lease of 1860, and was in actual occupation and using the defendant's farm road as Hudson had done to get hay and corn into the hay chamber at the time when the plaintiff purchased from the defendant as hereinafter mentioned.

In 1868 the defendant entered into the occupation of Rose Cottage Farm himself, and has continued to occupy it up to the present time, having a bailiff residing in the farmstead, and he has been all along and still is the owner of it.

All the time Hudson and his under tenants were respectively in occupation of Roseville they respectively used the defendant's private farm road with their carts and waggons to get their hay, corn, and straw into the hay chamber, and were never interrupted or interfered with by the defendant or his tenants or servants in their use of it.

The permission which the defendant gave to his lessee, Hudson, before building the hay chamber was never withdrawn, but on a few occasions the servants of Hudson and Green asked permission of the defendant's tenant and bailiff to use the road.

Within twelve months after he had built the hay chamber Robert John Hudson erected against the west wall of his stable and the wall of another building of the defendant adjoining it on the north end a substantial wooden shed, fixed to posts placed on stone foundations made in the ground, and with a lean-to sloping roof, which he used as a cart shed and for washing carriages in.

The shed stood out 13ft. 6in., and covered lengthways 11ft. of the stable wall, the remaining portion to the north lengthways resting against and covering the adjoining building of the defendant.

The plan, which formed part of this case, showed the shed as it stood—the north end of it next the west wall of the hay chamber, and the space of blank wall between the top of the shed and the eaves of the hay chamber, the stable door, and the space of wall between the top of it and the same eaves, and the defendant's adjoining building, against which the northern end of it rested.

The space between the top of the roof of the shed and the eaves of the hay chamber was in height 22in., and the space between the top of the stable door and the eaves 26in., spaces practically too small to admit of openings being made in the west wall of the hay chamber for getting hay and straw into it.

The height of the stable inside is 9ft. 10in., and the floor of the hay chamber about 10in. thick, and the height of the shed was 11ft. 4in.

In May 1870, the plaintiff agreed with the defendant to purchase Roseville, and by a conveyance dated 2nd August 1870, the same was conveyed to him, "together with all buildings, erections, fixtures, commons, hedges, ditches, fences, ways and rights of way, waters, watercourses, drains, cisterns, lights, and rights of light, liberties, privileges, easements, advantages, and appurtenances whatsoever to the said messuage, dwelling-house, cottage, land, and hereditaments, or any of them appertaining, or with the same or any of them now or heretofore demised, occupied, or

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enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto."

At the time of the conveyance the hay chamber with the two openings in the east side and the shed stood precisely as they had been erected by Hudson.

Before the plaintiff finally agreed to purchase Roseville the defendant took him round the boundaries of the now two properties, and whilst they were standing together at the back of the stable and hay chamber in the defendant's farm yard the plaintiff pointed generally to the buildings, and asked the defendant if they were all part of the premises purposed to be sold, and the defendant replied that they were.

Nothing was specifically said on either side as to the two openings in the hay chamber, or about any right of way to them.

The plaintiff entered into possession under his conveyance, and commenced at once to use, as part of the premises comprised therein, the defendant's farm road, and by means of it to bring his carts and waggons up to the openings in the hay chamber, and to use them to get in his hay and straw, and continued to do so throughout the years 1870, 1871, 1872, and 1873, without interruption or interference, until the 22nd May of the last-mentioned year, when the defendant's bailiff stopped a load of straw which the plaintiff was proceeding to carry to his hay chamber along the defendant's road, and the defendant has ever since refused the use of it by the plaintiff.

The plaintiff during all this time took corn about once a month, and hay and straw two or three times a year along the defendant's road.

The division of the two properties of the plaintiff and the defendant respectively, as effected by the conveyance to the plaintiff, left a portion of the northern end of the shed erected by Hudson standing on the defendant's ground, and beyond the plaintiff's northern boundary, at that spot, as may be seen by the striped lines on the plan endorsed on the conveyance to the plaintiff.

The plaintiff used the shed which Hudson had built for the same purposes as Hudson, until the summer of 1872, when he pulled it down, and in the place of it and upon the same foundations, so far as his own land allowed it, he erected a substantial brick building for a saddle and harness room, and built the northern end wall of it on his own boundary line on that side of his property.

The roof of this new building is pitched 20in. higher than the roof of the old shed. At the same time as the plaintiff was doing this work, he was building a wall to inclose his yard on the same side.

These building operations of the plaintiff were going on for two or three months, and persons about the defendant's Rose Cottage Farm could have seen them in progress.

Since 1868, the defendant has been in the habit of going abroad, or being away from his home in Yorkshire, during a half or three-parts of the year, generally leaving in May, but sometimes later in the year, but when at home he visited his Rose Cottage Farm nearly every day; and after the plaintiff came into possession, he saw the defendant several times about his farm and premises.

The defendant never made any complaint to or remonstrated with the plaintiff about his new

building in the place of the old shed, or suggested any alterations in his premises.

On the 27th May 1873, after the interruption of the plaintiff in the use of the way, as before stated, the defendant disputed his right of light to his stable window looking into the defendant's farm yard, and he attempted to obstruct it by putting a pile of wood reaching to the sill of the window, and building on the top of it a straw stack which reached to the eaves. The plaintiff immediately gave the defendant notice to remove, and he did remove the obstruction.

The space coloured green on the plan hereinafter mentioned was, up to the time of the plaintiff's purchase, ordinarily used as a stack yard of the Rose Cottage Farm, but up to that time other parts of the vacant space of ground outside it had been occasionally used by the defendant and his tenants for stacks.

When the plaintiff purchased this green space, it was fenced in with running posts and rails, and is so still.

From 1863 to 1868, Joseph Elam was the defendant's tenant of Rose Cottage Farm, and in four years out of the five of his tenancy he placed farm stacks so near to the two openings of the hay chamber that hay and corn could not be got in whilst the stacks were standing. One of these stacks was a hay stack, and it was placed with one end to the hay chamber, within two yards of it, and a cart could not be got between it and the wall.

Since 1870 no stacks have been put on any part of the defendant's stack yard or premises so as to obstruct either of the plaintiff's openings in his hay chamber, and no actual obstruction to the use of them ever occurred to Hudson, Fletcher, or Green, by reason of stacks standing in the way when they required to use the two openings.

Mrs. Fletcher kept no horse, and so had no occasion to use the defendant's road whilst she was in occupation of Roseville; and Green, whilst in occupation, chiefly bought his hay and corn from the defendant. He also sometimes bought it elsewhere.

An old drain ran from the plaintiff's stable to a tank in the defendant's farmyard, and also an overflow drain on the defendant's same ground is carried off, and the plaintiff's stables are spouted on the defendant's side.

The plaintiff has, since his purchase, always used the old drains and spouts, as comprised in his purchase.

When the plaintiff took down the old shed he might have made openings on his or the next side of the hay chamber of the same size as those now existing on the east, but he could not then have had his present saddle and harness room, or any building of the same size as the old shed in the place of it.

As things were at the time of the purchase by the plaintiff, and now are, the plaintiff had not nor has he now any way of putting hay, corn, and straw into his chamber except by using the defendant's farm road, or incurring expense in the necessary alteration of his buildings and premises which he purchased from the defendant.

The ground plan mentioned showed the present position and boundaries of the two properties of the plaintiff and the defendant, the private farm road of the defendant in question, the stable, coach-house, cottage, and harness house of the

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plaintiff, the drains and overflow from the plaintiff's stable and tank on the defendant's land, the stack yard and piece of vacant ground adjoining that of the defendant, in which stacks were at times built as stated in this case, and the farm buildings and premises of the defendant's Rose Cottage Farm.

The elevation plan showed the boundary line between the plaintiff's stable and hay chamber, and the defendant's adjoining farm building, the eastern side of the stable of the plaintiff, with windows, and of the hay chamber with the two openings.

The question for the opinion of the court was, whether the plaintiff had a right of way over the defendant's private farm road to and for the use of his hay chamber for the purposes mentioned, or any or either of them, either by virtue of or ancillary to the conveyance of 1870. If the court should be of opinion that the plaintiff had such a right, then the verdict entered for the plaintiff was to stand for the sum of 10*l.* 1*s.* But if the court should be of a contrary opinion, then the verdict was to be entered for the defendant.

Mellor (with him *Dugdale*) argued for plaintiff. — Upon the findings of fact in the case it may not be that this was strictly a way of necessity for the enjoyment and use of the plaintiff's stable, but the words of the conveyance are quite sufficient to pass this right of way along the defendant's farm road. Roseville was conveyed, together with all ways, rights of way, liberties, privileges, easements, advantages, and appurtenances whatsoever to the messuage, land, and hereditaments or any of them appertaining, or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them or any of them, or appurtenant thereto. The previous demise of Roseville in 1860 included all easements to the premises belonging or in anywise appertaining or therewith used or enjoyed, and the alteration of the stable made for the purpose of using this way, permission for which was expressly granted by defendant, and his then tenant of Rose Cottage Farm. [Stopped by the court.]

Herschell, Q.C. (with him *Evins Bennett*) for defendant. — The case of *Thomson v. Waterloo* (L. Rep. 6 Eq. Cas. 36; 18 L. T. Rep. N. S. 545) is a decision of Lord Romilly, M.R., in favour of the defendant; there the owner of two adjoining closes A and B, who had during the unity of possession made and used for his own convenience for agricultural purposes, a way across B to A, executed a conveyance of close A to a purchaser with these general words, "together with all ways, easements, and appurtenances thereto appertaining, and with the same now or heretofore occupied or enjoyed." The purchaser, who had access to A from other land of his own, claimed under the conveyance the right to use the roadway over B; it was held, that as there was no roadway over B to A before the unity of possession, the right to use it did not pass under the general words of the conveyance. This decision was followed by the Court of Exchequer in *Langley v. Hammond* (L. Rep. 3 Ex. 161; 18 L. T. Rep. N. S. 858), where the general words were "together with all ways, &c., therewith now used, occupied, and enjoyed." The qualifying remark made by Bramwell, B., which is cited with approval in *Watts v. Kelson* (L. Rep. 6 Ch. App. 166; 24 L. T. Rep. N. S. 209) is not in point. Mellish,

L. J., there said, at p. 171: "We may also observe, that in *Langley v. Hammond*, Bramwell, B., expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words." Here the words do not pass a right of way which is not of necessity, and not appertaining to the premises which were conveyed. It is said (2 Wms. Saund. edit. 1871, p. 809, n. c.): "Where there is a unity of seisin of land and of a way over the land in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way. And after such extinguishment, or during such suspension of the right, the way cannot pass as an 'appurtenant,' under the ordinary legal sense of that word, notwithstanding it has continued to exist in point of user." [BLACKBURN, J.—The note proceeds: "Therefore, in order to pass it, the grantor must either employ words of express grant, or must describe the way as one 'used and enjoyed with the land.'"]

Mellor was not heard in reply.

BLACKBURN, J.—When we come to understand the point, I think there is no doubt the plaintiff is entitled to this right of way. The general words in the conveyance are more than usually extensive, and although, if they had stopped at the word "appertaining," possibly the plaintiff could not have disputed the defendant's right to obstruct this path, yet the words which follow, "with the same (hereditaments) or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them or any of them, or appurtenant thereto," are sufficient to make it necessary for us to consider whether there was in fact any enjoyment of this way. Two cases have been cited, upon which the defendant's counsel relies: the first is *Thompson v. Waterloo*, in which Lord Romilly said: "There is, as it appears to me, a distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way which, previously to such unity of possession, existed from one close to another, and which has become merged by the fact of the same person having become the owner of both properties. I do not think that the judges in *Plant v. James* (5 B. & Ad. 791), intended to lay down that such words of conveyance as were used in that case, and in the present, would constitute the grant of a right of way where the user had sprung solely from the convenience of the person who held both tenements, which convenience ceased to exist when the severance between the closes took place." Taking that as the rule to be applied, I do not think the plaintiff is without ground for bringing this action. It cannot be said that the user of this way had sprung solely from the convenience of the person who held both tenements. The other case is *Langley v. Hammond*, in which Kelly, C.B., is reported to have laid down, apparently as matter of law, that as a right of way in the strict sense was not shown to have ever existed, but the way having only been used for the accommodation and at the pleasure of the owner of both parties, the general words, however extensive, could not grant such a way as appurtenant to land conveyed. I quite agree, that upon the facts

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stated in that case, the Court of Exchequer was right in holding that the plaintiff obtained no right of way over the defendant's land by his grant; but I cannot agree that, no general words, under any circumstances, could include the use of a way which has not before been enjoyed of right by a person other than the owner of the land. The ground upon which Martin and Bramwell, BB., concurred with the Chief Baron, does not go so far; indeed, they expressly refuse to decide that point. On the other side, we have dicta of both the Lords Justices in *Watts v. Kelson*, throwing considerable doubt upon any such doctrine as that contended for by the defendant, although not without some justification by the two other cases cited. The facts of this case are very strong to show that this way was used as part of the enjoyment of Roseville, and I do not recognise any rule of law to compel us to hold that these general words were not enough to include it in the conveyance to the plaintiff. The intention to do so seems to me to have been clear.

LUSH, J.—I am of the same opinion. The only question for us is, whether the right to approach this stable wall by the defendant's farm road was intended to pass under the conveyance of Roseville to the plaintiff. Up to the time of the conveyance the defendant had allowed his tenant to make use of the way; he had never withdrawn his express permission, and the words used seem to show an intention to give plaintiff the right to use it. I do not think our conclusion is in conflict with that of the Master of the Rolls in *Thomson v. Waterlow*; nor with the decision of the court in *Langley v. Hammond*, though I do not entirely agree with all that was said by the Lord Chief Baron.

Judgment for plaintiff.

Attorneys for plaintiff, *Clarke and Son*.

Attorneys for defendant, *Phelps and Sidgwick*.

Tuesday, June 8, 1875.

WILLIS v. THORP.

Hosiery Manufacture (Wages) Act 1874 (37 & 38 Vict. c. 48), s. 3—Fines deducted from wages—Action for penalty.

An employer in the hosiery manufacture is not liable to a penalty under 37 & 38 Vict. c. 48, s. 3 for deducting from a workman's wages fines incurred under a rule of the factory for staying away from work without permission.

APPEAL from the County Court of Leceister.

The respondent was in the appellant's employment in the hosiery manufacture as a worker at a hand-loom. By one of the rules of the factory workmen staying away from their work without permission were liable to certain fines. The respondent had incurred fines to the amount of 3s. 9d. under the above-mentioned rule, which amount the appellant deducted from his wages. The respondent accepted the balance under protest, and brought an action in the County Court against the appellant for a penalty under the *Hosiery Manufacture (Wages) Act 1874 (37 & 38 Vict. c. 48), s. 3*, and obtained a verdict.

37 & 38 Vict. c. 48.—Preamble: Whereas a custom has prevailed among the employers of artificers in the hosiery manufacture of letting out frames and machinery to the artificers employed by them, and it is desirable to prohibit such letting of frames and machinery, and the stoppage of wages for frame rents and charges in the hosiery manufacture.

Sect. 1: In all contracts for wages the full and entire amount of all wages the earnings of labour in the hosiery manufacture shall be actually and positively made payable in net, in the current coin of the realm, and not otherwise, without any deduction or stoppage of any description whatever, save and except for bad and disputed workmanship.

Sect. 2: All contracts to stop wages, and all contracts for frame rents and charges, between employer and artificers, shall be and are hereby declared to be illegal, null, and void.

Sect. 3: If any employer shall bargain to deduct, or shall deduct, directly or indirectly from the wages of any artificer in his employ any part of such wages for frame rent and standing or other charges, or shall refuse or neglect to pay the same or any part thereof in the current coin of the realm, he shall forfeit a sum of five pounds for every offence, to be recovered by the said artificer or any other person suing for the same in the County Court in the district where the offence is committed, with full costs of suit.

Sect. 5: No action, suit, or set-off between employer and artificer shall be allowed for any deduction or stoppage of wages, nor for any contract hereby declared illegal.

Benjamin, Q.C. (Merevether with him), for the appellant.—Under the Truck Act (1 & 2 Will. 4, c. 37) it was held that deductions for frame rent and charges were not illegal: (*Chawner v. Cumings* 8 Q. B. 311; 15 L. J. 161, Q. B.) The law as to that is altered by the present Act, but the intention is only that no deduction shall be made from wages, which the workman cannot avoid incurring; he need not incur fines. "Frame rent" and "charges" have a distinct meaning, as is shown in *Chawner v. Cumings (ubi sup.)*, and this is not a "charge" within the meaning of sect. 3, for it is not anything of the same kind as frame rent and standing. Sect. 3 is not co-extensive with sect. 1. As to a particular class of contracts to deduct, that is, those mentioned in sect. 3, the Legislature was not satisfied with having made them null and void by sect. 2, but went further and imposed a penalty. This case does not come within the words "shall refuse or neglect to pay the same or any part thereof in the current coin of the realm," for if it did the provisions as to the penalty would apply to cases where the employer was bankrupt or neglected to pay the wages. Those words refer only to payments made otherwise than in coin.

Cave, for the respondent.—There is another decision which the Legislature may have had in view in passing this Act: (*Archer v. James*, 2 B. & S. 61; 31 L. J. 153, Q. B. in which the Court of Exchequer Chamber was equally divided.) One of the charges there set-off was fines for irregular attendance. This is sufficiently analogous to frame rent and standing to be included in the words "other charges." It is also within the meaning of the words "shall refuse or neglect to pay the same or any part thereof in the current coin of the realm."

Benjamin, Q.C. in reply.—The Act was not passed with reference to *Archer v. James (ubi sup.)* for the word "fine" is not used.

BLACKBURN, J. — We need not hear you any further. This is a case in which we have to say what is the construction of an Act of Parliament, the words of which show how desirable it is that the framers of statutes should take a little trouble to make their meaning intelligible. It appears, according to the cases, that the Truck Act (1 & 2 Will. 4, c. 37), did not apply so as to prohibit the practice of making deductions from wages in the hosiery trade, and the present Act was passed for the purpose, as is shown by the recital in the preamble, of prohibiting two things, the letting of

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frames and machinery, and the stoppage of wages for frame rents and charges. It then proceeds to enact by sect. 1 that "In all contracts for wages the full and entire amount of all wages the earnings of labour in the hosiery manufacture, shall be actually and positively made payable in net, in the current coin of the realm, and not otherwise, without any deduction or stoppage of any description whatever, save and except for bad and disputed workmanship." Now on the construction of that section nothing can be clearer than that the employer must pay in coin, and, except in cases of bad or disputed workmanship, without deduction. So far the meaning is clear. In the present case what the parties have agreed is simply that the contract of service shall be subject in case of misconduct to certain fines, but the contract to stop them out of the wages is clearly within the mischief pointed out in the preamble and within the words of the first section. Then by sect. 2 contracts to stop wages and contracts for frame rents and charges are declared to be illegal, null, and void. But apparently it was considered that the provisions of the first two sections were not enough to stop two things which seem to have been looked upon as peculiarly objectionable, the letting of frames and the mischief of paying wages in goods or in some other way not in money, for it is further enacted by sect. 3 that "If any employer shall bargain to deduct, or shall deduct directly or indirectly from the wages of any artificer in his employ any part of such wages for frame rent and standing or other charges, or shall refuse or neglect to pay the same or any part thereof in the current coin of the realm, he shall forfeit a sum of 5*l*. Now here the respondents have directly deducted the sum of 3*s*. 9*d*. for the payment of fines, and the question is whether this is covered by the words "other charges" in sect. 3. No doubt that expression in its general sense is wide enough to cover anything in the nature of a charge or deduction, but in this section the words must clearly be read together with the words "frame rent and standing," and the other charges must be *ejusdem generis* with these. The charges alluded to are charges for something supplied to the workmen for the purpose of enabling them to do the labour in which they were employed, but a deduction for fines is not of the same kind. Then reliance has been placed on behalf of the respondent on the words "or shall refuse or neglect to pay the same or any part thereof in the current coin of the realm," and I must confess that at first I paused, and was inclined to think that they might apply, because in one sense it is true that they refused, and the provisions of sect. 1 are positive. But, on reflection, I am convinced that this cannot be, for clearly the words could not be held to apply to a case where the employer neglected to pay because he was too poor to do so, and I think that they only apply to cases where payment is made in materials or goods or in some other way not in money. If the Legislature had meant the clause to bear the other construction, they ought to have and would have repeated the words used in sect. 1 "without any deduction or stoppage;" by so doing they would have expressed clearly what their meaning was. I cannot see why those words should have been dropped out from sect. 3 if the meaning was intended to be the same. It may be said that the change ought to be made so as to show the intention more clearly,

but it is a general rule that where a penalty is sought to be imposed, the burden lies on the persons wishing to impose the penalty to show that the case is within the words of the Act. All the instances referred to in sect. 1 do not appear in sect. 3, but only two are mentioned. I have come, therefore, though with some hesitation, to the conclusion that the County Court Judge was wrong, and the judgment must be reversed.

MELLOR, J.—I am also of that opinion on the construction of the words of the third section. It is clearly the policy of the Legislature in this Act to take care that no undue disadvantage shall be imposed upon workmen, and to prohibit employers from making deductions from wages at their own will. When we come to examine the words of sect. 2 it is clear that the object is to make all contracts to stop wages and contracts for frame rent and charges, null, and void, and by sect. 3 if the employer bargains to deduct wages,—not for every stoppage, but "for frame rent, standing, or other charges," he is liable to a penalty. According to the ordinary rule of construction the "other charges" should be *ejusdem generis* with those previously mentioned, and if a penalty is to be imposed there should be a clear intention shown to impose it. I am of opinion that the County Court Judge was wrong.

FIELD, J.—I also think that this penalty is not recoverable. In this, as in every other action, the plaintiff must establish his case, and he tries to do so on the words of sect. 3. Now the preamble, which recites the custom prevailing in the hosiery manufacture, speaks of deductions for the supply of those things which go to make up the element which the workman has to produce, and these were prohibited so that the workman might be enabled to know the exact amount of the clear sum to which he would be entitled for his work. I think that sect. 3 does not apply to a case of this sort.

Judgment reversed.

Attorneys for the appellant, *Visard, Crowder, and Co.*, for *Owston, Leicester*.

Attorneys for the respondent, *G. L. P. Eyre and Co.* for *Heath, Nottingham*.

Tuesday, June 8, 1875.

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Commissioners appointed by statute to make orders—Breach of order—Indictment—35 & 36 Vict. c. 95, s. 5.

By the Epping Forest Amendment Act 1872, sect. 5, the Epping Forest Commissioners may make orders prohibiting, until after their final report, any inclosures or waste of land within the forest, subject in their judgment to any forestal or common rights.

The commissioners made a general order prohibiting all persons from committing waste upon a piece of land described until the final report, or until further order; all persons affected to be at liberty to apply to them as there might be occasion.

The defendant applied to the commissioners by counsel as a person affected, but they refused to enter into the question raised.

The defendant was convicted upon an indictment moved by certiorari for breach of this order.

Held, upon a case stated, that the order and the indictment were good.

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THIS was an indictment found by the grand jury of the county of Essex against the defendant for a misdemeanor, alleged to have been committed by the defendant by breaking the soil of a portion of the waste lands of Epping Forest, within the manor of Theydon Bois, in the county of Essex, and thereby committing waste, injury, and destruction of and to the vert, herbage, trees, and other things in and upon the said land, contrary to an order made by the Epping Forest Commissioners.

The said indictment was on the 20th May 1873, removed by writ of *certiorari* into this court.

By order of Pollock, B., a suggestion was entered on the record for the trial of the said indictment at the assizes for the county of Surrey, upon certain terms in the said order specified.

The case accordingly came on for trial at the Summer Assizes 1873, held at Croydon, in and for the county of Surrey, before Martin, B. and a special jury of the said county, when a verdict of guilty was entered against the defendant, subject to the opinion of the court upon the following case:

By the Epping Forest Act 1871 (34 & 35 Vict. c. 93), the Epping Forest Commissioners were constituted a body corporate for certain purposes in the said Act specified.

By the 5th section of the Epping Forest Amendment Act 1872 (35 & 36 Vict. c. 95):

The commissioners may from time to time make orders prohibiting, until the expiration of the session of Parliament next after the commissioners shall have made their final report under the Epping Forest Act 1871, and no longer, any inclosures of any land within the said forest not inclosed before the passing of the Epping Forest Act 1871, and for the prevention of any waste, injury, or destruction of vert, herbage, trees, shrubs, or other growing things in or upon any land within the said forest, subject in their judgment to any forestal or common rights.

By the Epping Forest Act 1873 (36 Vict. c. 5), the time for the commissioners to make their final report, under the Epping Forest Act 1871, was extended to two years, from the passing of the said Act of 1873.

On the 29th Nov. 1872, the said commissioners made an order in the following form:—

We, the Epping Forest Commissioners, do, in pursuance of the authority to us given by the Epping Forest Amendment Act 1872, hereby order, until the expiration of the session of Parliament next after we shall have made our final report under the Epping Forest Act 1871, or until further order, that all persons whosever be, and they are hereby, prohibited from committing any waste, injury, or destruction of or to the vert, herbage, trees, and shrubs or other growing things in or upon the waste lands of Epping Forest aforesaid, within the manor of Theydon Bois, in the county of Essex (including inclosures of waste lands within the said manor made within twenty years next preceding and since the 21st Aug. 1871). And all persons affected by this order are to be at liberty to apply to us as there may be occasion.

The said order was served on the defendant, Lewis John Walker, on the 19th April 1873.

Previous to the service of the said order on the defendant, the fact of such order having been made was brought to the notice of the defendant, who by his counsel applied to the commissioners as a person affected by the said order as by the said order was directed, but the said commissioners refused to enter into the question raised by the defendant's counsel on the said application.

The defendant Lewis John Walker is in occupation as tenant of a certain piece of land within the said forest and the said manor of Theydon Bois, and formerly part of the waste land of the

said manor, which piece of land formed part of the land referred to in the said order of the 29th Nov. 1872.

The said piece of land is let to the defendant by John William Couchman, who purchased the fee-simple thereof, together with all rights in or over the same from Frederick William Straker and William Martindale, who held the same by a title duly derived from a grant by the trustees of the Hall Dare Estates, in which estates were included the said manor of Theydon Bois, they the said trustees having at that time all the rights of the lord of the said manor.

The said piece of land was inclosed, and surrounded with a wire fence previously to the passing of the Epping Forest Act 1871, and subsequently to the year 1851.

By a deed, dated the 17th April 1857, the Hon. James Kenneth Howard, one of the Commissioners of her Majesty's Woods, Forests, and Land Revenues, duly authorised in that behalf, granted and released all the rights of forest of the Queen's Majesty, upon and over certain lands and hereditaments, of which the piece of land in the occupation of the defendant as aforesaid formed a part.

The prosecutor Thomas Sears, and other persons, inhabitants within the said forest, claim a right of pasturage for cattle on all waste lands within the said forest.

The defendant by his servants, on the 23rd April 1873, in the indictment mentioned, and after the service of the said order of the commissioners upon the defendant, broke the soil of the said piece of land in the occupation of the defendant, and injured the vert and herbage thereon growing, and took therefrom certain marl and clay for the purpose of carrying on the defendant's business of a brickmaker.

It is agreed that the indictment and plea herein shall form part of this case, and that the defendant shall be at liberty, on the argument of the case, to take all objections to the said indictment, and to raise all questions which it would have been open to him to take or raise at any stage of the trial of the said indictment; and that the Epping Forest Acts 1871, 1872, and 1873, and all Acts incorporated therewith, may be referred to for the purposes of this case, and that the court shall be at liberty to draw any inferences or find any facts which in the opinion of the court a jury ought to have drawn or found.

The question for the opinion of the court is, whether the defendant can be convicted of a misdemeanor upon the said indictment? If the court shall be of opinion that the defendant can be so convicted, the verdict of guilty is to stand; but if the court shall be of a contrary opinion, then the verdict of guilty is to be set aside, and a verdict of acquittal entered for the defendant.

The following was the indictment:

The jurors of our lady the Queen upon their oath present that heretofore and before the commission of the offence hereafter in this count mentioned, by a certain Act of Parliament made and passed in 34 & 35 Vict. intitled "An Act to amend the Act 12 & 13 Vict. c. 81, and to extend the provisions of that Act, and The Metropolitan Commons Act 1868, so far as regards that part of Waltham Forest known as Epping Forest (to wit, The Epping Forest Act 1871)," certain persons, to wit, Charles Wood, barrister-at-law, chairman, John Watlington Perry Watlington, esquire, Henry Ford Barclay, esquire, and John Lock, esquire, were constituted and appointed commissioners under the said Act of Parliament, and that by a further Act of Parliament made and passed in 35 & 36

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Vict., intituled, An Act to enlarge the powers of the Epping Forest Commissioners, and for other purposes (to wit, the Epping Forest Amendment Act 1872), it was provided that the said commissioners might from time to time make orders prohibiting until the expiration of the Session of Parliament next after the said commissioners should have made their final report under the said Epping Forest Act 1871, and no longer, any inclosures of land within the said forest not inclosed before the passing of the Epping Forest Act 1871, and for the prevention of any waste, injury, or destruction of vert, herbage, trees, shrubs, or other growing things in or upon any land within the said forest subject in their judgment to any forestal or common rights, and that thereupon, heretofore, and during the continuance of the powers by the said Acts conferred, the said commissioners, acting under the powers of the said Act of Parliament, and in pursuance of the provisions thereof, did upon the 29th Nov. 1872, duly make an order in the words and figures following:

"The Epping Forest Act 1871.

"The Epping Forest Amendment Act 1872.

"We, the Epping Forest Commissioners, do, in pursuance of the authority to us given by the Epping Forest Amendment Act, hereby order, until the expiration of the Session of Parliament next after we shall have made our final report under the Epping Forest Act 1871, or until further order, that all persons whosoever be, and they are hereby prohibited from committing any waste, injury, or destruction of or to the vert, herbage, trees, shrubs, or other growing things in or upon the waste lands of Epping Forest aforesaid, within the manor of Theydon Bois, in the county of Essex, including inclosures of waste lands within the said manor, and within twenty years next preceeding and since the 21st Aug. 1871, and all which lands are distinguished upon the plan hereto annexed by the colour green, and all persons affected by this order are to be at liberty to apply to us as there may be occasion.

"Given under our seal, and the hands of the undersigned Epping Forest Commissioners, this 29th Nov. 1872.

(Signed) "CHARLES WOOD, Chairman,

"JOHN LOCKE,

"J. W. PERRY WATLINGTON,

"HENRY FORD BARCLAY."

[Seal of the Epping Forest Commissioners.]

And did thereby attach a certain plan, and did authenticate the said order by the signature of the said commissioners, and that the said order was duly published by the direction of the said commissioners in the *London Gazette* of the 6th Dec. 1872, and that the said order still remains in full force and effect. And the jurors aforesaid, upon their oath aforesaid, do further present that after the making and publishing of the said order (to wit, on the 19th April 1873), notice of the aforesaid order was duly granted to Lewis John Walker, and that he the said Lewis John Walker was duly made acquainted with the contents thereof, and that the original order under the hands of the said commissioners was then produced to the said Lewis John Walker, and a copy of the same delivered to him. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Lewis John Walker, well knowing the premises but not regarding the said order, did upon the 23rd April 1873, at the parish of Theydon Bois, in the county of Essex, unlawfully, wilfully, and contemptuously break and turn up, and caused to be broken, dug, and turned up, the surface and the soil of a certain portion of the waste lands of the Royal Forest of Waltham, otherwise Epping Forest, within the manor of Theydon Bois, being a portion of the lands included in and referred to by the order aforesaid, being an inclosure of such waste land made within twenty years next preceeding the 21st Aug. 1871; and did thereby thereby then and there commit waste, injury, and destruction of and to the vert, herbage, trees, shrubs, and other things growing in and upon the said land, contrary to the direction of the said order and in manifest breach and contempt of the same, to the evil and pernicious example of other of her Majesty's subjects, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and before the commission of the offence hereinafter in this count mentioned, the Epping Forest Commissioners constituted

under the Epping Forest Act 1871, and by the said Act and the Epping Forest Amendment Act 1872, being thereto duly empowered, did make an order prohibiting all persons from committing any waste, injury, or disturbance of or to the vert, herbage, trees, shrubs, or other growing things in and upon the waste lands of Epping Forest, within the manor of Theydon Bois, in the county of Essex, which said order was authenticated under the hands of two of the said commissioners, and was published in the *London Gazette* of the 6th Dec. 1872; and that after the making and publishing of the said order (to wit, upon the 23rd April 1873) Lewis John Walker, well knowing the premises, did in contempt of the said order, at the parish of Theydon Bois in the county of Essex, unlawfully, wilfully, and contemptuously break and dig, and turn up and cause to be broken, dug, and turned up, the soil and the surface of a certain portion of the waste lands of the Forest of Waltham, otherwise Epping Forest, within the manor of Theydon Bois, being a portion of the lands included in the order aforesaid, and did thereby then and there commit waste, injury, and destruction of and to the vert, herbage, trees, shrubs, and other things growing in and upon the said lands contrary to the direction of the said order, and in manifest breach and contempt thereof, to the evil and pernicious example of her Majesty's subjects, and against the form of the statutes in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

The following were the objections raised by the defendant's points of argument:—First, that the disobedience to the order set out in the indictment was not criminal, and the indictment shows no offence; secondly, it does not appear either in the indictment or the case that the acts complained of were done while the commissioners' order was in force; they may have made their final report, and the then next session of Parliament have ended before the defendant did the acts charged; thirdly, the indictment is bad for not showing that the defendant knew that the lands were waste lands, or that he knew that it was land included or referred to in the order; fourthly, that sect. 5 of 35 & 36 Vict. c. 95, does not extend to prohibit waste to lands inclosed before the passing of the Epping Forest Act 1871; fifthly, that the commissioners have no power over the defendant's land, inasmuch as it does not appear that they ever ascertained the boundaries of Epping Forest; and by sect. 17 of 34 & 35 Vict. c. 93, they had only jurisdiction over lands situate within the boundaries of Epping Forest ascertained by them; sixthly, that the commissioners had no power over the defendant's land, inasmuch as it had been lawfully inclosed, and the Crown was not entitled to exercise any forestal rights over it. It was inclosed by the lawful owners. The Crown had released its forestal rights, and although it is stated that persons claimed rights of common, it is not alleged that their claim was well founded, or that such claim existed at the date of the order, or that their rights were prejudiced; seventhly, that the Crown having released its forestal rights, the defendant's land was not at the time of 34 & 35 Vict. c. 93, within the boundary of Epping Forest; eighthly, the commissioners' order was invalid, inasmuch as they exercised no judgment as to whether the defendant's land was subject to any forestal or common rights; ninthly, the commissioners ought to have proceeded judicially against the defendant before making an order affecting his land, and to summons him and hear him, or give him an opportunity of being heard, and they wholly failed in this; and, tenthly, that the commissioners had no power to make a general order.

Edward Clarke argued for the prosecution.—This order of commissioners appointed by Act of

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Parliament is analogous to the orders of the King in council, authorised by statute; the disobedience of such an order was held to be an indictable offence, and punishable as a misdemeanor at common law in *Bex v. Harris* (4 T. Rep. 202). So, with respect to a towing-path on the bank of the Thames, authorised by statutes to be made by the Mayor and Commonalty of London, it was held in *Bex v. Smith and others* (2 Doug. 441), that it is an offence at common law to obstruct the execution of powers granted by statute, and an indictment for such offence need not and ought not to conclude *contra formam statuti*. Also, upon an indictment charging a defendant with unlawfully acting as an attorney, it was said by Lord Denman, C.J., "I am of opinion that, wherever a person does an act which a statute, on public grounds, has prohibited generally, he is liable to an indictment. I quite agree that where in the clause containing the prohibition a particular mode of enforcing the prohibition is prescribed, and the offence is new, that mode only can be pursued. The case is then as if the statute had simply declared that the party doing the act was liable to the particular punishment; but where there is a distinct absolute prohibition, the act is indictable."

Noel Paterson, for the defence.—The grounds upon which an indictment will lie are stated in Hawkins's Pleas of the Crown (book 2, c. 25, s. 4), besides crimes: "Also, it seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it." It cannot be said that the offence here charged is included under either of these heads; it is much more nearly within the subsequent exception: "Also, if a statute extend only to private persons, or if it extend to all persons in general, but chiefly concern disputes of a private nature, as those relating to distresses made by lords on their tenants, it is said that offences against such statute will hardly bear an indictment." In illustration, *William Willoughby's case* is cited from Cro. Eliz. 90, where the indictment was for inclosing common land, and exception was taken "because it concerneth only the interest of particular persons, and was no common nuisance to the Queen's people; and it concerning a private commodity of certain persons, and not of the Queen, the parties grieved are to have their action upon the case." So *Bex v. Robinson*, 2 Burr. 799; *Crouther's case*, Cro. Eliz. 634. Further, this is not the kind of order contemplated by the 5th section of the Act of 1872; first, it is not a final order; liberty to appeal is given to persons affected, yet the commissioners refused to enter into the question raised upon appeal by defendant's counsel; secondly, the object of the section is to protect preliminarily the final provisions to be carried out under the commissioners' recommendations. This is too general an order; it ought to have contained the final determination of the commissioners concerning each claim of title concerned. It does not even profess to apply to any particular common or forestal right, as required by the Act. The burden is

upon the prosecution to show that the powers of the commissioners have been strictly pursued.

LUSH, J.—We need not hear Mr. Clarke in reply. The indictment seems to be perfectly good.

QUAIN, J.—I am of the same opinion.

Judgment for prosecution.

Attorneys for prosecution, *Horne and Hunter*.
Attorneys for defence, *Dingwall and Wall*.

Tuesday, June 8, 1875.

BALL (app.) v. WARD (resp.)

Obstruction of thoroughfare—Caravan off the street—Towns Police Clauses Act 1853 (10 & 11 Vict. c. 89) ss. 21 and 28.

The appellant had an auction caravan, standing in the market-place of a town, for which he paid a rent or toll to the improvement commissioners, appointed by a local Act the lords of the manor. The caravan was only 3ft. from a public street of the town, and many persons obstructed the thoroughfare by stopping to listen to appellant's sales. The justices convicted appellant under 10 & 11 Vict. c. 89, s. 28, of causing an obstruction in a thoroughfare.

Held, upon a case stated, that what the appellant did was not an offence within that Act.

THE following case was stated by two of her Majesty's justices of the peace in and for the parts of Holland, in the county of Lincoln, under the statute 20 & 21 Vict. c. 43.

At a petty sessions holden at the sessions house in Spalding, in the aforesaid parts, on the 16th Feb. 1875, an information preferred by George Ward, inspector of county police (hereinafter called the respondent), against William Ball, a travelling licensed hawker and general dealer (hereinafter called the appellant), charging that the said appellant, "On the 3rd Feb. 1875, at the parish of Spalding, in the parts of Holland aforesaid, within the limits of the town district of Spalding, as defined by the Spalding Improvement Act 1853, in a certain street there situate, called the Market-place, unlawfully and to the obstruction of passengers did, by certain means, to wit, by holding a sale of goods from a caravan, and attracting and causing certain persons, to the number of fifty and upwards, to assemble and stand there, wilfully cause an obstruction in the public thoroughfare there, contrary to the form of the statute in such case made and provided," was heard and determined (the said parties respectively being then present, and the said appellant being heard by his solicitor Mr. Percival), and on such hearing the said justices convicted the said appellant of the said offence, and adjudged him to forfeit and pay the penalty or sum of 10s., and also to pay the sum of 19s. 6d. to the respondent for costs.

The said justices, upon the appellant's application, stated and signed the following case:

The information was laid under sect. 28 of The Towns Police Clauses Act 1847 (10 & 11 Vict.) c. 89, which is in force within the town and parish of Spalding aforesaid, by virtue of the incorporation thereof with the Spalding Improvement Act 1853 (16 & 17 Vict.), c. cxxxix.

The market-place of Spalding aforesaid comprises an area of paved ground now vested in the Spalding Improvement Commissioners as lords of the manor of Spalding (by virtue of a recent purchase of the lord's rights from the previous owners), and is used for the purposes of a public

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market regularly on chartered market and fair days, and for the purposes of exhibitions of various kinds occasionally on other days, and for such use tolls or stallage dues have been from time to time and still are collected from and paid by the parties setting up stalls or exhibitions on the south-west side of the market-place. A public highway (formerly part of the turnpike road by statute) passes in a direct line through the same, and such highway is paved with granite stones for carriage and horse traffic, and with Yorkshire flags or slabs next to the houses and shops there for foot passengers, and the highway is distinctly marked out from the rest of the market-place by the latter being paved with an entirely different kind of stones.

Upon the aforesaid hearing it was proved by the respondent, and afterwards admitted as fact by the appellant's attorney, that on the said 3rd Feb., from 7.30 to 9 in the evening, the appellant had an auction caravan open, and was publicly selling goods therefrom, his son occasionally playing an accordion; that the caravan stood in the above-mentioned area of the market-place aforesaid, at about 3ft. from and facing towards the line denoting or marking out the aforesaid highway; that a crowd of people (from fifty to sixty) were attracted together by the appellant acting as salesman, and that the people stood upon and obstructed the aforesaid public carriage and footways; that two females driving a horse and trap had to pull up, and the people to divide to let them pass through, and that a score of passengers had to turn off the foot pavement to pass along; that respondent spoke to appellant and the latter replied, "If you want the people clearing away, you may clear them yourself," and insisted that he had a right to be there; that respondent did not require the people to move on, not having had any orders from the improvement commissioners to prevent obstructions (see sect. 21): that the day in question was not a regular market or fair day; that there were large open spaces of ground on either side and at the back of the caravan, and that after that night appellant moved such caravan further back into the aforesaid open space or area facing another direction.

Appellant's attorney took objection to the form of the information, that the offence alleged was not within the said sect. 28, for that the word "means" could only be used and taken *ejusdem generis* with the preceding words in the section, viz., "every person who, by means of any cart, carriage, sledge, truck or barrow, or any animal, or other means," and "persons" were not enumerated therein; but such objection was overruled, and thereupon he contended and afterwards proved, that appellant's caravan stood upon ground for which the appellant paid a rent or toll to the said improvement commissioners' collector, who had placed him there, and accordingly further contended that appellant had a right to stand and sell goods from where his caravan stood, and that he was not legally responsible for the obstruction complained of, the same being the voluntary act and personal offence of the several people standing on such highway; and furthermore, if those people did cause any obstruction, the respondent should have interfered with them and have made them move away.

The justices, however, were of opinion that appellant's right to stand and sell his goods as aforesaid did not extend to the causing of an ob-

struction of the public highway as aforesaid, and that upon the evidence given and admitted he wilfully caused the obstruction which took place, and considering the information laid to have been proved and to be within sect. 28 as aforesaid, they convicted the appellant as before mentioned.

If the court should be of opinion that the said conviction was legally made, then the same is to stand confirmed, otherwise to be quashed.

To the above was subsequently added, by the justices who stated the case, the following:—In compliance with a notice or requisition this day served upon us by Mr. Selby, clerk to the Town Improvement Commissioners of Spalding, describing himself as the appellant's attorney, we desire to make the following addition to or amendment of the foregoing case (namely): That on such hearing of the information by us as aforesaid, the appellant's attorney further objected to our adjudicating thereon, on the ground that a question of right or title for the appellant to be where his caravan was having been raised, and evidence given in support of the assertion of such right or title, our jurisdiction was thereby ousted, and that we had not the power to hear and determine the question. And we state that we dismissed such objection, on the ground that the appellant's right to stand and be selling his goods on the market place itself, as defined in the above case, was not denied or disputed at all, and was irrelevant, and that we considered the only question before us was the appellant's right to obstruct the highway, and that the aforesaid question of right or title could not be so raised.

Mellor argued for appellant.—By 10 & 11 Vict. c. 89, s. 28: "Every person who in any street, to the obstruction, annoyance, or danger of the residents, or passengers, commits any of the following offences, shall be liable to a penalty not exceeding 40s. for each offence." Amongst the offences following is this:—"Every person, who by means of any cart, carriage, sledge, truck, or barrow, or any animal or other means, wilfully interrupts any public crossing, or wilfully causes any obstruction in any path, footpath, or other public thoroughfare." This is the only offence which has any possible reference to the act of the appellant, but he was not at the time in a street, nor did his cart or carriage cause the obstruction. This does not profess to, even if it could, be an offence under sect. 21, by which, "the commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets within the limits of the special Act, in all times of public processions, rejoicings, or illuminations, and in any case when the streets are thronged or liable to be obstructed, and may also give directions to the constables for keeping order and preventing any obstruction of the streets in the neighbourhood of theatres and other places of public resort, and every wilful breach of any such order shall be deemed a separate offence against this Act." The appellant does not come within the words of either section.

The respondent did not appear.

Per CURIAM (Lush and Quain, JJ.).—This is no offence within that Act.

Judgment for appellant.

Attorney for appellant, Percival.

[Ex. Ch.]

HOLKER v. PORRITT AND OTHERS.

[Ex. Ch.]

EXCHEQUER CHAMBER.

Reported by H. LUSH, Esq., Barrister-at-Law.

Nov. 28 and 30, 1874; and Feb. 8, 1875.

HOLKER v. PORRITT AND OTHERS.

Watercourse—Easement—Right to flow of water—Natural and artificial stream—Increase of water—Prescription—Riparian owner—Obstruction.

A natural stream was divided at a point E. into two branches by a large stone called a "feather," placed in the stream for that purpose before living memory. One branch of the divided stream ran down to the river Irwell, and the other branch flowed into a farmyard, and there supplied a watering trough used for watering cattle and domestic purposes, the overflow from the trough diffusing itself over the surface of the land, and passing away by percolation through the soil to the river. In 1847 W., the owner of the farm on which the watering trough stood, and also of the intervening land between the farm and the river, and of a mill on the bank of the river, constructed reservoirs to collect the water overflowing from the trough, and conducted it from them by means of a covered drain to the mill on the bank of the river. In 1865 he became the owner, by purchase, of the rest of the land through which this branch flowed, and in 1867 he conveyed the mill, with all the water rights annexed and appurtenant thereto, to the plaintiff.

The defendants, landowners on the banks of the stream above the point of division E., obstructed the stream, and thereby diminished the flow of water to the reservoirs and the mill, whereupon the plaintiff brought an action against them for so doing; and it was

Held by the Court of Exchequer Chamber (Lord Coleridge, O.J., and Keating, Lush, Quain, and Archibald, JJ.), affirming the judgment of the Court of Exchequer, that the plaintiff, who had acquired by purchase the same right as W. previously had to the uninterrupted flow of the water to the trough, and to the flow of it from the trough to the mill, was entitled to maintain the action for the obstruction complained of.

This was an appeal from the judgment of the Court of Exchequer, in favour of the plaintiff, discharging a rule to enter the verdict for the defendant. The following are the facts of the case: From time out of mind there were two streams flowing down to a deep valley called Buckden Ginnell, where they became united, and their joint stream was then carried by an artificial embankment across Buckden Ginnell valley into an estate called Broadwood Edge, and flowed on to a point in Broadwood Edge marked E in the plan, which was used at the trial. At that point the stream was divided by a large stone or "feather," which had existed as far back as the memory of any of the witnesses could carry them, and as to the origin of which there was an absence of evidence. The stream being here divided, part of it flowed down into Buckden brook, and so on thence into the river Irwell; and the other part of it flowed to a watering trough in the farm of one Silas Wilson, which formed part of an estate called Lumm Hall Estate. The water so flowing into the watering trough was used for drinking by cattle and for domestic purposes, and that which overflowed the trough diffused itself over the surface of the land and wasted itself by perco-

lation through the soil, ultimately finding its way by such means to the river. In the year 1845 the Lumm Hall estate, extending from Broadwood Edge to the river Irwell, and which was copyhold of the manor of Tottington, in the Salford division of the county of Lancaster, became the property of a gentleman of the name of Walker. Upon the estate was a mill on the banks of the river Irwell, about half a mile from Silas Wilson's farm, which mill Walker proceeded to turn into a paper mill, and in order to supply it with water he constructed lodges or reservoirs adjacent to the mill, and in 1846 and 1847 he connected them with the above-mentioned watering trough. In 1865 Walker became the owner by purchase of the Broadwood Edge estate, which also was copyhold of the manor of Tottington; and in 1867 he sold and conveyed to the plaintiff the paper mill with the lodges and reservoirs, with power to enter on the Lumm Hall and Broadwood Edge estates to repair and construct weirs and goits, together with the full and free use and enjoyment of all springs, wells, and streams of water in, under, upon, or arising or issuing in, or from any part of the Lumm Hall and Broadwood Edge Estates. The property so conveyed was distant about 400 yards from Silas Wilson's farm. The defendants were owners of land traversed by the two streams which became united as above-mentioned in Buckden Ginnell, and the plaintiff brought the present action to recover compensation in damages from the defendants for obstructing these two streams above the point E. At the trial of the action at the Manchester Summer Assizes 1872, before Willes, J., the obstruction was admitted, and a verdict by consent was entered for the plaintiff for 40s. damages, and leave was reserved to the defendants to move to enter a nonsuit or a verdict for them, if the plaintiff was not entitled to maintain the action; and a rule, which was afterwards obtained by the defendants to that effect, was subsequently discharged by the Court of Exchequer: (See report of the case below, L. Rep. 1 Ex. 107; 42 L. J. 85, Ex.)

From that decision of the court the defendants appealed to the Court of Exchequer Chamber, and now

Nov. 28 and 30, 1874.—Herschell, Q.C. (Pope, Q.C. and Baylis with him) argued for the defendants (appellants).

The Solicitor-General (Sir J. Holker, Q.C.) (with him were Kemplay, Q.C. and Gorst), for the plaintiffs, *contra*.

The following cases and authorities were cited and referred to

The Stockport Waterworks Company v. Potter and others, 10 L. T. Rep. N. S. 748; 3 H. & C. 300; *Hodgkinson v. Ennor*, 8 L. T. Rep. N. S. 451; 4 B. & C. 229; 33 L. J. 231, Q. B.; *Laing v. Whaley*, 3 H. & N. 675; 5 Ib. 480; 26 L. J. 327; 27 L. J. 422, Ex.; *Sampson v. Hoddinott*, 26 L. J. 148, C. P.; 1 C. B., N. S., 590; *Miner v. Gilmour*, 12 Moo. P. C. C. 131; *Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1; *Nuttall v. Bracewell*, 15 L. T. Rep. N. S. 313; L. Rep. 2 Ex. 1; 36 L. J. 1, Ex.; *Acton v. Blundell*, 12 M. & W. 324; 13 L. J. 289, Ex.; *Dickinson v. The Grand Junction Canal Company*, 7 Ex. 283; 21 L. J. 241, Ex.; *Dudden v. The Clutton Union*, 1 H. & N. 627; 26 L. J. 146, Ex.; *Webb v. Bird and others*, 4 L. T. Rep. N. S. 445; 10

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[O. P.]

C. B., N. S., 268; 13 Ib. 841; 30 L. J. 384, C. P.; 81 Ib. 335, C. P.;
Chasemore v. Richards, 7 H. L. Cas. 349;
Wood v. Waud, 3 Ex. 748; 18 L. J. 305, Ex.
Gale on Easements, 3rd edit. pp. 5, 102; 244 et seq.;
Angell on Watercourses, pp. 157, 158.

Our. ado. vult.

Feb. 8, 1875.—Their Lordships (Lord Coleridge, C.J., and Keating, Lush, Quain, and Archibald, JJ.) having taken time to consider, the following judgment of the court was now delivered by

LUSH, J.—After stating the case, the learned judge proceeded as follows: Upon the hearing of this appeal before us, at the sittings after the last term, two questions were principally argued. First, whether the conveyance of the surplus water, by means of the drain, from the watering trough to the mill is to be considered as a prolongation of the stream, entitling the millowner to the ordinary riparian right thereon; and secondly, if not, whether by the enjoyment without interruption for more than twenty years, first by Walker and afterwards by the plaintiff, the latter had acquired a right to the water, as an easement by virtue of the Prescription Act. Upon consideration of the peculiar facts of the case, we think that the plaintiff's title rests on a broader ground, and that he need not resort either to the theory of an extension of the stream or to the Prescription Act. It must be taken upon the facts stated, that the owner of Silas Wilson's farm had a prescriptive right to the maintenance of the stone or "feather" at the point E, and of the diversion, by means of it, of part of the stream to and for the exclusive use of the farm. The water which came down to him at the farm was his own to use as he pleased. There was no one entitled to share with him in its use, and no one who could call him to account for any use which he chose to make of it there. In this respect his position was different from that of a riparian owner who only shares the use of the water in common with other riparian owners. In collecting the overflow at the trough and carrying it to the mill he clearly did nothing in derogation of the rights of any other person which he was not entitled to do in the lawful use and enjoyment of his own property. Nor did he thereby lose any right which he then before had. While the water overflowed the trough and ran to waste he had a right to complain of any undue diversion or obstruction which diminished the accustomed supply to the trough, and he acquired no greater right by conveying it to the mill. No doubt the consequences to a wrongdoer became more serious after the drain was made than they were before, because the wrongful act was more injurious, and larger damages would have to be paid for it; but it is a fallacy to say that a man's rights are abridged if, when he abuses them, he has to make a larger compensation. It is the necessary effect of every appropriation of running water to a new and more beneficial use that a wrongful diversion or abstraction entails a larger measure of liability. It is established by many authorities, which are collected in and confirmed by the case of *Mason v. Hill* (*ubi sup.*) that as soon as the owner of land on a stream has appropriated the water to a beneficial use, he may sue for the injury done to him in respect of such new use. In that case the proprietor, having appropriated the stream to the use of a mill newly erected, was held entitled to recover from a pro-

prietor, higher up the stream, damages for the injury to his mill, occasioned by the wrongful diversion of the stream; although, before the mill was built, the wrongdoer would only have been liable to nominal damages. If, therefore, Walker had been in possession of the mill in question it is clear to us that he could have brought this action; not because he happened to be, at the same time, riparian owner higher up than the mill, and also owner of the mill, but simply as owner of the mill. And there is no conceivable reason why the plaintiff should not have the same right, inasmuch as he is the surrenderee of the mill, with all the water rights annexed, and which had become appurtenant to it. Walker had chosen to create a servitude on his own land, but none had been created, or attempted to be created, on the lands or riparian right of the defendants. None of the authorities cited conflict in the least degree with this view. In the case of *The Stockport Waterworks Company v. Potter* (*ubi sup.*) the water was taken directly from the stream, in the regular flow of which the proprietors below had an interest; and it is clear that such use of the water could only grow into a right by twenty years' enjoyment. Whether that case was rightly decided or not, whether the grounds upon which the majority of the court decided it can be maintained, or whether it is distinguishable from the case of *Nuttall v. Bracewell* (*ubi sup.*), we need not now consider. The present case stands clear both of the difficulty and the reasoning in that case, and we have no hesitation in holding for the reasons which we have given that the judgment of the court below in favour of the plaintiff ought to be affirmed.

Judgment affirmed.

COURT OF COMMON PLEAS.

Reported by STERLING SMITH and J. M. LELY, Esqrs.
 Barristers-at-Law.

Friday, June 4, 1875.

TURNER (app.) v. MORGAN (resp.)

Game—25 & 26 Vict. c. 114, s. 2—Seizing on a highway.

By 25 & 26 Vict. c. 114, s. 2, it is enacted that it shall be lawful for any constable in any highway, &c., to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in pursuit of game, and having in his possession any game, &c., and should there be found any game, &c., to seize and detain such game, &c., and such constable shall, in such case, apply for a summons citing such person to appear before two justices, &c.

Held, that it is a condition precedent to the jurisdiction of the justices that the game should not merely be found upon the person charged, but also be seized on the highway by the constable who applies for a summons under the Act.

Clarke v. Crowder (*L. Rep.* 4 O. P. 638) followed, and the dictum of Bovill, J., in that case affirmed.

THIS was a case stated by justices who had convicted the appellant under 25 & 26 Vict. c. 114, s. 2. The section of the Act is as follows: "It shall be lawful for any constable, &c. in any highway, street, or public place to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or

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abetting such person, and having in his possession any game, unlawfully obtained, or any gun, part of gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance, in or which such constable shall have good cause to suspect that such game or any such article or thing is being carried by any such person; and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable shall, in such case, apply to some justice of the peace for a summons citing such person to appear before two justices, &c.; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid, for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding 5*l.*, and shall forfeit such game, &c.; and if no conviction takes place the game or any such article or thing as aforesaid, or the value thereof, shall be restored to the person from whom it had been seized." The circumstances were that the appellant, a dealer in fish and poultry, not having a shop, but living in a back street in the hamlet of Neithrop, close to Banbury, was seen on Saturday morning, the 10th Oct. 1874, about a quarter to eleven, to drive in his cart out of Banbury, and over a bridge across the Cherwell, which there separates Oxfordshire from Northamptonshire, along the road into Northamptonshire. At half past eleven he returned, and as soon as he had again crossed the bridge the police constables, who were waiting for him, called to him to stop. He, however, instead of stopping, whipped up his horse and drove past them as quickly as he could, and got away into the streets of Banbury. As the cart passed them the police could see something bulky lying in the bottom of the cart, covered over with a horse rug, but could not see any game or rabbits. When in Banbury, but out of sight of the police, the appellant threw a bundle of two dozen rabbits, wrapped in a horse rug, into the cart of a man named Greatorex, telling him to take care of them, and he left a bag containing another dozen at a public-house in Banbury. The police took the rabbits out of Greatorex's cart while it was standing under a gateway off the street. This place and the public house were out of the jurisdiction of the county justices. Morgan, the constable, who had been on the road and who afterwards seized the rabbits, summoned the appellant before the justices, who fined him 5*l.* The questions for the court were, whether there was a sufficient finding and seising on the road to authorise the constable to summon the appellant, and give the magistrates jurisdiction under the Act; and secondly, whether there was sufficient evidence that the appellant had been on inclosed land in pursuit of game.

W. Graham, for the appellant.—It is a condition precedent to the jurisdiction of the justices that the game be searched for, found, and seized upon a public highway. Here the only thing done was a call to the appellant to stop; there was no search and no finding; and the seizure of the rabbits afterwards was not part of the same transaction and was not made in a public place. *Clarke v. Crowder* (L. Rep. 4 C. P. 638) establishes that the game must be found, and if it be actually found

without search it is enough, but here nothing was seen at all. A rug was in the cart and something under it, the police could not see what. Suspicion in such case will not do: (*Brown v. Turner*, 16 C. B., N. S., 485). *Hall v. Knox* (9 L. T. Rep. N. S. 380) says that where the constable sees a man with game in a highway he may summon him without search, having heard a gun report and seen the man with a gun immediately after, but that is very different from this case, where there was suspicion and nothing more. Then the statute means that the game should not only be found on the highway, but that it should be seized and detained there. This was done in *Hall v. Knox* (*ubi sup.*), and Bovill, C.J., in *Clarke v. Crowder* (*ubi sup.*), says, "My present impression is that it is necessary that there should also be a seizing and detaining of the game in the highway." Then, secondly, there must be some evidence that the man was coming from land where he has been in pursuit of game. Here there was absolutely none. The appellant was only seen driving along the road. I admit that circumstantial evidence will do, but there must be some: (*Evans v. Botterill*, 8 L. T. Rep. N. S. 272; *Jones v. Dicker*, 22 L. T. Rep. N. S. 95.)

R. S. Wright, for the respondent.—The conviction was good. The Act was sufficiently complied with to give the justices jurisdiction. A demand to stop was made in the jurisdiction, and the constable saw what he suspected and what was afterwards proved to be game in the cart. A search is unnecessary, and it is submitted that practically the game was found within the meaning of the Act. [BRETT, J.—It was not seized.] Actual seizure on the highway cannot be necessary, otherwise the poacher might always throw the game over the hedge when stopped, and defy the constable. Certainly, this has not been absolutely decided; what was said in *Clarke v. Crowder* (*ubi sup.*) by Bovill, C.J., was only an opinion, and, as he expressly said, it was unnecessary to determine the point.

BRETT, J.—It seems to me that our judgment must be in favour of the appellant, that the conviction was bad, and must be quashed on the ground that those things were not fulfilled which it was necessary should be fulfilled as conditions precedent to give the justices jurisdiction to convict in the case. I can say little more than was said in *Clarke v. Crowder* (*ubi sup.*), and it is unnecessary to consider whether the Act creates a new offence or not. I there expressed my opinion that it did not. It does, however, create a new tribunal and new procedure, and enables that tribunal to act upon different evidence from that which would otherwise ordinarily be required to give it jurisdiction to punish the offence. It is a penal statute, and must be construed with reasonable strictness. As pointed out by Bovill, C.J., in the case cited, the Act gives authority to constables and peace officers to do certain acts, to stop a person on a public highway, and to search him or any conveyance, and then if, on so stopping a person on a highway, he find any game, guns, nets, or engines used for taking game upon such person or in his cart, it gives him power to seize and detain such game, &c. Now these are strong powers for anyone to be authorised to exercise on the Queen's highway without a warrant. Then the Act goes on to say that "such constable shall, in such case, apply for a summons citing such

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person to appear before two justices." It is not, therefore, left to the constable's option; it is imperative on him that he take out a summons, and the provision is, therefore, a check upon the use of his powers of search. But, then, who is the person to be charged upon this information? The words are "in such case" and "such person," and it must, therefore, necessarily be the person searched or on whom the game, &c., has been found. Again, "such constable" must mean the constable who has stopped the suspected person on the highway, and who has found on the person or in his cart such things as are specified, and who has seized and detained such things, and it is he only who can take the suspected person before the justices. Let us see now if the constable in this case was such a constable as the Act requires. There was, I think, evidence to justify the justices in saying that the police had reasonable grounds for feeling certain that there was game in the appellant's cart, and therefore there was evidence, in my opinion, on which they might say that the police did find game in his cart. But, having found the game, the next thing in fulfilment of the Act was to seize it. But this they did not do, and the appellant, by his quickness, and perhaps I might say, experience, drove on and got away so quickly as entirely to prevent their being able to seize the game on the highway. Therefore, that being so, one of the conditions precedent to the constable bringing the appellant before the justices by summons under this Act was absent, and the justices had no jurisdiction to convict. It becomes unnecessary to give any opinion on the second point raised, as we give judgment upon the first for the appellant.

DENMAN, J.—I am of the same opinion. The case is practically decided by *Clarke v. Crowder* (*ubi sup.*), which was a decision of this court and is, I think, in point and right, and upon which we must act. The Act begins by enacting that "it shall be lawful for any constable in any highway, &c., to search any person whom he may suspect, &c.," and the words in any highway are to be imported into the following clause. The words "such game" also mean so seized by the constable, and there must, therefore, as I read the section, be a seizure of the game found on the person, and such seizure must have taken place in the highway before the constable, who must be the one who has stopped the person and seized the game, can, by this Act, summon the man before the justices. The latter part of the section throws additional light on this construction, which is the literal and obvious one of the Act, because it provides that the game so seized is to be restored if no conviction upon the summons takes place.

LINDLEY, J., concurred.

Judgment for the appellant.

Attorney for the appellant, T. W. Goldring, Chancery-lane, for E. Crosby, Banbury.

Attorneys for the respondent, King and McMillin.

Tuesday, June 8, 1875.

MILNES v. BALE; MILNES v. LEA; MILNES v. COLSEY;
MILNES v. CORBETT.

Municipal election—35 & 36 Vict. c. 60, s. 3—17 & 18 Vict. c. 102, ss. 2 and 4—Bribery—Several acts of bribery—Penalties recoverable for each act. A person who is guilty of bribery at an election is guilty of a distinct offence for each act of bribery

committed; and is, under 17 & 18 Vict. c. 102 and 35 & 36 Vict. c. 60, liable to be sued in respect of each act of bribery for the penalty imposed by those Acts; and the recovery against him of one penalty for bribery at that election is no defence to an action claiming additional penalties for other acts of bribery committed at the same election.

THESE were four actions in which the same plaintiff sued the four defendants for penalties under the Corrupt Practices (Municipal Elections) Act 1872, in respect of bribery committed by them at the municipal elections for the borough of Kidderminster.

The declaration in each case contained two counts, one alleging that the defendant gave money and the other that he promised money to voters at the election, and separate penalties were claimed in respect of the offence in each count. The defendants demurred on the ground that only one penalty could be recovered for bribery committed at one election. They also pleaded that an action had already been brought against them by another plaintiff for penalties incurred by them in consequence of alleged bribery at the same election, and judgment had been recovered. To this plea the plaintiff demurred. The demurrers were argued together, the facts being the same in each case, and the real question being whether, on the true construction of the Acts, bribery committed at an election was one single offence and subject to one penalty, or whether each act of bribery might be the subject of an action for a penalty.

Giffard, Q.C. (*Merewether* with him), for the plaintiff in all the actions.—The real question is whether each single act of bribery is the subject matter of an action. The sections on which the actions are founded are 35 & 36 Vict. c. 60, s. 3 and 17 & 18 Vict. c. 102, ss. 2 and 4. It is contended by the defendants that all the acts of bribery are purged by their having been sued and having paid the penalty in one case; but surely the nature of the acts done shows that they are separate and distinct; and the statute does not say that only one offence can be charged at one election. Cases under penal statutes throw some light on the principle to be adopted in construing these sections. Under the 19 Geo. 2, c. 21, s. 8, the limitation of penalties for swearing, as seen in *Reg. v. Scott* (8 L. T. Rep. N. S. 662; 33 L. J. M. C.), turned on the form of conviction, and it seems there that if the occasions had been different more penalties might have been incurred. In *Cooper v. Slade* (6 E. & B. 447) there were penalties asked for against the defendant with reference to different persons, and no objection of this kind was made, though the matter was brought before the court. The real decision was that the promise and the subsequent giving were not two acts, but one. *Garrett v. Messenger* (L. Rep. 2 C. P. 583) will not apply to this case, for there the proof of the offence consisted in the house being kept open, not merely that it was once opened without a licence. To make it applicable, the defendants must argue that if the man had kept another unlicensed house open within the period, a second penalty could not have been recovered; and the case does not warrant this. In *Reg. v. Leatham* (8 L. T. Rep. N. S. 505) there is an assumption, which is essential to the judgment, that each act of bribery was a separate offence. Then, if the offences are separate, they are by the Act separate misdemeanors, and there

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must be separate penalties incurred for each misdemeanor.

Powell, Q.C., for the defendants Bale and Corbett.—The arguments that have been used would go to make imprisonment cumulative, and the result would be so monstrous as to show that the Act cannot be construed as the plaintiff contends. This offence being committed at one election, must be considered as one only, and subject, therefore, to one penalty. It is similar to offences under other statutes, which, with the cases, are to be found in *Paley on Convictions* p. 260. In *Reg. v. Lovett* (7 T. R. 152), where the statute made the use of a gun for destroying game and the use of a dog for the same purpose an offence, it was held that, though the defendant kept and used both on a certain day, he could only be convicted in a single penalty. Then *Crepps v. Durdan* (Cowp. 740), decided on 29 Car. 2, c. 7, held that a baker who had separately sold a number of loaves on the Lord's Day could only be convicted in one penalty. But under 12 Geo. 2, c. 36, in a case of *Brook v. Milligan* (3 T. R. 509), the subject was discussed, and where two distinct sales of books had taken place two penalties were recoverable. Another statute is the London Coal Act (1 & 2 Will. 4, c. 76), and under it a penalty is imposed for every sack deficient; yet in *Collins v. Hopwood* (15 M. & W. 459) one penalty only was incurred in respect of seventeen sacks sent out at the same time to a purchaser. [BRETT, J.—If a voter has 5l. given him, first by one candidate and then by another, has he been bribed once or twice?] It is only one offence and one punishment. The Act would have said that for every such offence he should incur the penalty, had it been intended. *Pilcher v. Stafford* (9 L. T. Rep. N. S. 759; 33 L. J. 113, M. C.) decided that only one penalty could be inflicted on a person for not complying with the Act as to vaccination; though the child continued unvaccinated after the recovery of the first penalty. And it is submitted, that even if the acts of bribery may be called distinct offences, yet, as they are only acts in pursuance of a course of conduct, the Legislature has provided for one penalty to be recovered in respect of that course of conduct which constitutes the complete offence, and the words "so offending" apply to the aggregate. [BRETT, J.—The argument must be the same for the misdemeanor as for the penalty.]

E. Clarke, for the defendants Lea and Colsey.—It has been said that these must be distinct offences, because in an indictment it would be necessary to specify the person bribed; but 26 & 27 Vict. c. 29, s. 6, provides that in an indictment or information for bribery it shall be sufficient to allege that the defendant was guilty of bribery. In *Crepps v. Durdan* (1 Sm. L. Cas. 666) attention is drawn to the words of Pollock, C.B., in the *Attorney-General v. McLean* (1 H. & C. 750). He says the form which the Legislature uniformly adopts when the intention is that for each and every violation of an Act of Parliament there shall be a distinct penalty, is to impose a penalty by express words for each and every offence." Certainly that has not been done here.

Giffard, in reply, cited *Marks v. Benjamin* (5 M. & W. 569), to show that, as to an unlicensed house, the real offence was the habitual keeping of it, and in *Crepps v. Durdan* the same distinction is manifest; the offence is that of a man exercising his ordinary trade on the Lord's Day, and this he does by

several acts which together constitute the offence. At common law these would surely be separate acts of bribery, for which a man could be indicted. And sect. 5 of 26 & 27 Vict. c. 29 extends the provisions of 17 & 18 Vict. c. 102, s. 14 to misdemeanors or any other offence under the Corrupt Practices Prevention Acts. The nature of the act done is the test—some are clearly complete offences in themselves, others require proving by several instances.

BRETT, J.—In this case I am of opinion that our judgment should be for the plaintiff. The action was brought to recover penalties to which the defendant was stated to have made himself liable under sect. 3 of the Municipal Election Corrupt Practices Act 1872, and the second section of 17 & 18 Vict. c. 102. Now the third section of the Corrupt Practices Act says, "The offences of bribery, treating, undue influence, and personation shall be deemed to be corrupt practices at an election for the purposes of this Act. The terms bribery, &c., shall respectively include anything committed or done before, at, after, or with respect to an election," that is to say, all those things which shall be corrupt practices under this Act; all the acts with which a defendant may be charged are acts which may be done before, at, after, or with respect to an election. The section then says, "Any person who is guilty of a corrupt practice at an election shall be liable to the like actions, prosecutions, penalties, forfeitures, and punishments as if the corrupt practice had been committed at an election of members to serve in Parliament." That throws us back to sect. 2 of 17 & 18 Vict. c. 102. The section defines what shall be the offence of bribery at a Parliamentary election; but, in defining it, the Act does not say that the acts creating the offence are limited as being done at an election. The words are, "Every person who shall directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to vote or refrain from voting." It seems to me that any person who does that is guilty of bribery. Then a similar enactment about giving or offering a place to any voter, &c., and so on. It seems to me that any person who does, any one of those prohibited acts, is guilty of a complete offence, and any person who does two or more such acts is guilty of two or more distinct and separate offences, and offences so separate that, in order to prove one, you could not give the other in evidence against him. So, the evidence that he had committed one offence would be no evidence against a man as to his having committed another. That being so, we have the words of the Act also further on, which say any person so offending shall be guilty of a misdemeanor. The ordinary construction of the language would require us to construe that as applicable to each of the offences created above. Otherwise, if it were not so construed we should have, in effect, to say that, although we conclude from the other and former part of the Act that a person has been, upon the necessary evidence of course, guilty of several distinct offences, yet he is to be guilty of one sole misdemeanor. The only sensible way to read it as to the misdemeanor is that a person who commits

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one of the offences defined is guilty of a misdemeanor, and a person guilty of several offences is guilty of several misdemeanors. Then, as to the clause about the penalties, I think we cannot separate the penalties from the misdemeanors; and if there are several misdemeanors it follows that there must be several penalties. This is so far upon the statute itself, and the consideration of the words which are contained in the sections quoted. But then it is said that, because there are not in the Act any words which say that a person shall, for each offence, forfeit the penalty named, you cannot inflict more than one penalty for any number of offences committed by the same person at one election. And in support of this contention cases were cited, by way of illustration, based upon other penal statutes; but, as I understand them, in all the cases where it was said that there was only one penalty, it will be seen that the real fact was that several acts were done in carrying out the offence against which the Act of Parliament was directed; and that in every case you might have given in evidence all the separate acts as evidence, admissible and proper, to prove the whole offence. But I can find no case where, when each act is a full offence in itself, and so much so—so distinct and complete—that you cannot give one in evidence for the other, I can find no case, I say, where the penalty has been held not also to be separate. I will not call it a cumulative penalty, but a single penalty for each single offence. The first case is *Reg. v. Scott* (8 L. T. Rep. N. S. 662). That says that if many oaths are used in one act of swearing that is but one profanity, but if a man uses the same oath at different acts of swearing they are separate profanities within the statute; and it is certainly no decision to the effect that if you curse one person at one time and another person at another time on the same day those are not two distinct acts of profanity. The next case is *Garrett v. Messenger* (*ubi sup.*), and that, being an information for keeping a house open for music and dancing without a licence, proceeded on the ground that opening a house for an hour is not an offence. The very form and essence of that offence is keeping the house open without a licence, and it is a comprehensive offence to be proved by many acts; and *Marke v. Benjamin* (*ubi sup.*) shows that in an action for the penalty under the same Act it is necessary to prove that the house has been kept open. Parke, B., says, "It must be kept for the purpose prohibited by the statute, there must be something like an habitual keeping of it." Each act, therefore, in such case is not the offence, but all of them together prove the offence. Then *Picher v. Stafford* (9 L. T. Rep. N. S. 759) was a case of vaccination, the offence being that of leaving the child unvaccinated. Such an offence was proved by showing that it was continuous for a certain time. My view of that statute is that there was only one penalty for the one offence, and that cannot be sued for for all time; because, if the child be vaccinated before suing, it is cured and the action falls. I, however, use this case to see from it that the principle is that, when the offence charged under a statute inflicting penalties is continuous, that is made up of a continuing series of acts; it is only one offence, and therefore subject to only one penalty. *Cropps v. Durdin* (*ubi sup.*) was where a man was charged with "exercising his ordinary trade on the Lord's Day." That is one complete

offence shown and proved by various acts; and the court there held that selling loaves to various persons were acts which were all evidence of the one comprehensive offence. "It is but one entire offence, whether longer or shorter in point of duration, whether it consists of one or a number of particular acts." These are cases where only one penalty has been incurred, but they are not applicable to this case, where the acts are distinct in themselves, and so distinct that, as I have said, they cannot be used in evidence one in proof of another. Then there is *Cooper v. Slade* (*ubi sup.*), and it is a strong authority, for it went through all the courts and up to the House of Lords, and though there were two counts for penalties under the Corrupt Practices Prevention Act 1854, it never struck any person apparently that there might not be a verdict on both counts, nor was any contention raised on that point. Then *Reg. v. Leatham* (3 L. T. Rep. N. S. 503) also seems to me to be a strong authority, because, when it was suggested there that the prosecutors ought to be put to their election, such suggestion, which was adopted by the court, showed that there were two separate offences in the indictment. There were counts charging the defendant with having bribed different voters, and the exercise of the power of putting parties to their election upon which they will proceed, is conclusive that the offences in the various counts were distinct and separate in their nature. Although the consequences are most serious, as has been pointed out during the argument, yet, under this Act, if a person at the same election commit several acts of bribery, he subjects himself to penalties for those acts. And, on the other side, it may be said that it would be strange if a man who had bribed voters on both sides could not be convicted of both acts of bribery, or was guilty of only one misdemeanor, and similarly in the case of a man who had accepted bribes from both sides. They are to my mind obviously distinct offences, and each carries with it its punishment as a misdemeanor, and the penalty which is attached by the Act to the misdemeanor. Under all the circumstances, therefore, I think judgment in this case must be for the plaintiff as, having decided the question on the statute, I cannot say, if my view is right, that the declaration is bad or the plea good.

DENMAN, J.—But for the strongly restrictive sense in which the courts construe penal statutes, I should have entertained no doubt at any period of what was the correct decision upon the construction of this statute. But we are bound to look closely into the Act and into the circumstances of the offence charged under it before saying that a forfeiture has occurred. Having done this, and after the full discussion of the case, I come to the same conclusion as that arrived at by my brother Brett, viz., that these are distinct offences, and liable to distinct penalties, and that there is nothing in the statute to limit the liability of the person who has been guilty of them to be sued for each of them. We could not hold—at least, I think it would be a monstrous interpretation of the Act to hold—that a man who commits twenty distinct acts of bribery on one day has, at the end of it, only been guilty of one offence. I will, therefore, only add a few words to express my concurrence in what my brother Brett has said on the other cases as to penalties which have been cited to us in argument. In all of them there has

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been a distinction manifested as to whether the act contemplated by the statute, and charged against the individual, was a complex and continuous act or series of acts, or one single act, constituted by one isolated proceeding. I need not go through them, because I agree in what my brother Brett has said as to them, but I have found another Act of Parliament, not hitherto mentioned, which illustrates the distinction as well as any which have been cited. In *Crepps v. Durden* (*ubi sup.*) it was held that where the offence charged was of carrying on his ordinary trade upon the Lord's Day, the fact of the appellant having made several sales did not render him liable to several penalties. I would compare with this the statute 11 & 12 Vict. c. 63, and the case in *Re Hartley* (31 L. J. 232, M. C.), where the justices had convicted some persons in four several penalties for exposing four pieces of bad meat for sale on the same day at the same stall. It was argued there that it was one offence, and one conviction would have satisfied the provisions of the statute. But Mellor, J., said that "each exposure of a piece of bad meat was a separate offence." The very argument was put in that case, and ignored altogether; and it was ignored, I apprehend, on the ground that the offence in the statute was not the doing of one continuous act, which must be indicated by several overt acts, but was an isolated offence in each case of exposing a piece of bad meat. The case shows the distinction to be drawn between it and *Crepps v. Durden* as well, perhaps, as any other, and so I thought it desirable to refer to it; but I agree fully in all that has been said as to the other cases which have been discussed by my brother Brett, and that our judgment must be for the plaintiff.

Judgment for the plaintiff.

Attorney for the plaintiff, *Girdwood*.

Attorney for the defendants *Bale and Corbett, Hunt*.

Attorney for the defendants *Lea and Colsey, N. Wedd Cooke*.

EXCHEQUER CHAMBER.

Reported by H. LEXER, Esq., Barrister-at-Law.

Feb. 10 and 11, 1875.

APPEAL FROM THE COURT OF EXCHEQUER.

(Before BLACKBURN, MELLOR, LUSH, GROVE, DENMAN, and ARCHIBALD, JJ.)

MILL v. HAWKER AND OTHERS AND WICKETT.

Highway—Obstruction of—Highway board—District surveyor—Liability of for illegal act under order of the board—Individual corporators—Personal liability of—Respondent superior—25 & 26 Vict. c. 61, sect. 9, sub-sects. 2, 6; sects. 12, 16, 17—5 & 6 Will. 4, c. 50, sects. 69, 73, 74—Construction of Act.

The plaintiff being the occupier of land through which a footpath ran, the members of the highway board of the district passed a resolution at a meeting of the board that the path was a highway, and that the plaintiff should be directed to remove the locks from a gate which he had placed across the path, and that, in default of his so doing, the surveyor of the board should remove them. The plaintiff failing to comply with the directions of the board, the surveyor, by order of the board, removed the locks. Thereupon the plaintiff brought an action of trespass against the members of the

board in their individual character and the surveyor, at the trial of which the defendants having pleaded a justification, Kelly, C.B. nonsuited the plaintiff on the ground that no individual liability attached either to the members of the board who gave the order in their corporate capacity, or to the surveyor who acted in obedience to such order; and no evidence was given in support of the plea of justification.

The majority of the Court of Exchequer (Pigott, and Olesby, BB., dissentiente Kelly, C.B.) subsequently made absolute a rule setting aside the nonsuit and ordering a new trial on the ground, first, that the members of the board who concurred in the resolution were personally liable, on the assumption that the resolution itself was illegal; and, secondly, that, although the surveyor was bound by sect. 16 of the Highway Act 1862 (25 & 26 Vict. c. 61) to obey the orders of the board, he was not thereby excused if, in obeying such orders, he committed an illegal act.

On appeal, by the defendants, from that decision, it was

Held by the Court of Exchequer Chamber (Blackburn, Mellor, Lush, Grove, Denman, and Archibald, JJ.) expressly abstaining from expressing any opinion as to the first ground of the decision of the court below, but affirming the judgment on the second ground, that the surveyor was liable to an action for the trespass he had committed in obeying the order of the board, and that, therefore, the judgment setting aside the nonsuit and ordering a new trial must be affirmed.

THIS was an action of trespass to land belonging to the plaintiff, and was brought against several defendants. The facts of the case are so fully set out in the report of the case below (*ante*, p. 147; 30 L. T. Rep. N. S. 894; reported also 43 L. J. 129, Ex.; L. Rep. 9 Ex. 309), that it is unnecessary to do more on the present occasion than briefly state the nature and circumstances of the action, which were as follows:—

The plaintiff was the occupier of land through which ran a path which the defendants alleged to be a public highway. Twelve of the defendants in the action were members of the Highway Board of the Camelford Highway District, incorporated under the Highway Acts 1862 and 1864, and within which district the land through which the alleged highway ran was situated. Another of the defendants, Hawker, was the clerk of the board, and the remaining defendant, Wickett, was the district surveyor. At a meeting duly convened of the members of the board on the 20th Nov. 1872, at which all the defendants were present, it was resolved that the path in question was a highway, and a resolution was adopted by the board that the plaintiff be directed to remove the locks from a gate which the plaintiff had placed across the path, and in default of his doing so that the surveyor be ordered to remove the same. All the defendants, except Hawker and Wickett, concurred in directing the surveyor to remove the locks. The plaintiff failing to comply with the direction of the board to remove the locks, the defendant Wickett, the surveyor, removed them in obedience to the orders of the board. Thereupon an action of trespass was brought by the plaintiff against the members of the board in their individual character, and the surveyor, in which, the defendants having pleaded a justification, Kelly, C.B., at the trial, nonsuited the plaintiff on

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the ground that neither the members of the board nor the surveyor were individually liable, and no evidence was given in support of the plea.

A rule *nisi* having been obtained by the plaintiff to set aside the nonsuit and for a new trial the Court of Exchequer (Kelly, C.B., dissenting) made the rule absolute and ordered a new trial (except as against the defendant Hawker, the clerk, whose name was ordered to be struck out of the record) against all the defendants, on the ground, first, that the members of the board who concurred in the resolution were personally liable on the assumption that the resolution itself was illegal, and that although the surveyor was bound by sect. 16 of the 25 & 26 Vict. c. 61, to obey the orders of the board, he was not thereby excused if, in obeying such orders, he committed an unlawful act.

From the above decision (except so far as relates to the defendant Hawker, the clerk) the defendants appealed to the Court of Exchequer Chamber, and now,

Kingdon, Q.C. (with him *Lopes*, Q.C., and *Pinder*), for the defendants, argued, in the first place, that the defendants, who were members of the highway board, were not personally liable, but as the court expressly abstained from giving any judgment on this point of the case it is not necessary to set it out or refer further to it. Secondly, as to the defendant Wickett, he contended that as surveyor of the highway board he was not liable. Sect. 16 of the 25 & 26 Vict. c. 61 (the Highway Act 1862) enacts that the surveyor "shall in all respects conform to the orders of the board in the execution of his duties." That being so, the surveyor cannot help himself; he is bound to obey the orders of the board. He is in a position similar to that of a bailiff or other officer who has to execute the process of a court of justice; and such an officer may, in an action of trespass against him for anything done by him, justify under the process of the court, even though it should turn out to have had no foundation in fact. That has always been held to be the law, and for the proposition, the cases of *Devs v. Riley* (11 C. B. 434; 20 L. J. 264, C. P.), and *Andrews v. Marries and Whitham* (1 Q. B. 3; 10 L. J., N. S., 226, Q. B.) are authorities. The surveyor here was a public officer, acting for a public body. [BLACKBURN, J.—It must, I think, be taken, from the fact of the nonsuit, that the path was not a highway, and if that be so then the board had no jurisdiction for their action in the matter; and although it is true that the surveyor is bound to obey the board, yet it is "in the execution of his duties."] The exemption of a judicial officer from liability in respect of his acts as such, does not depend upon the process being within the jurisdiction of the court: (*Moravia v. Sloper*, Willes Rep. 30). The board are bound to keep the highways in their district in repair (25 & 26 Vict. c. 61, s. 17), and they must therefore determine as between themselves and their subordinates which and where the highways are. It is not possible for the surveyor to ascertain, nor is he bound to inquire, whether an order given him by the board is of a legal or an illegal order. [BLACKBURN, J.—He may require to be indemnified before acting, or that the board should take legal proceedings.] It would, it is submitted, be unreasonable that the surveyor should be bound to be satisfied that the board has jurisdiction in the case of every act which they

order him to do. If it is apparently so, that is sufficient.

Arthur Charles (with him was *H. T. Cole*, Q.C.), for the plaintiff, *contra*, argued, first, the question as to the individual liability of the members of the board, and cited numerous authorities on the point, which, however, for the reasons above mentioned, it is unnecessary further to refer to. With regard to the second point, the surveyor's liability, he contended that as his was the hand which did the illegal act he was personally liable. The cases relied on by the defendants are cases, one of an officer of State and the others of officers of courts of justice, and do not apply to such a case as the present, to which they have no analogy. It is enough for a sheriff's officer to exhibit the writ, and he need not go behind the writ for his protection. Such a defence as the present has never been set up before; all that has hitherto been decided being that where the defendant has acted *bond fide* in the exercise of a supposed public duty, he is entitled to notice, but not that he is to be protected from liability. It is clear from the former Highway Act (5 & 6 Will. 4, c. 50), ss. 69, 73, and 74, that in cases of supposed obstructions to the highway, the surveyor was not meant to act *mero motu*, but that he was to complain to the justices. If the defendants' construction of sect. 16 of the Act of 1862 is right, then the surveyor must obey the orders of the board at all risks, no matter what such orders may be. By the former Act the surveyor had no one over him but the justices; by the present Act he is placed more in the position of a servant to a master, and the ordinary law of master and servant is applicable to the case.

Kingdon, Q.C., was heard in reply.

Their Lordships retired for a short time, and on their return to the court the following judgments were delivered:

BLACKBURN, J.—This was the case of an action of trespass brought against several defendants, of whom one, the defendant Hawker, was the surveyor of the highways, and the others were members of the highway board, which, under the late Highway Act, is made a corporation. At the trial of the action the Lord Chief Baron decided, for reasons which I will consider presently, that the action would not lie against either of the defendants, either the surveyor, or the members of the board, and he accordingly directed a nonsuit; the point as to whether the *locus in quo* was or not a highway not being discussed or decided. The majority of the Court of Exchequer (Pigott and Cleasby, BB.), upon a rule for a new trial (the Chief Baron still retaining the opinion which he held at the trial) thought that the learned judge was wrong on both points, and set aside the nonsuit, and ordered a new trial on two distinct grounds. They thought the Chief Baron was wrong in holding that the surveyor was protected, and that the action would not lie against him, and also in ruling that no action would lie against the other defendants as corporators. From that decision the defendants brought the present appeal, and we are all of opinion that, as regards the surveyor, the nonsuit was wrong, and that, consequently, the rule for a new trial was right; and inasmuch as it was one nonsuit where the parties were sued all together in one action, the decision that the nonsuit was wrong as respects one defendant sets it aside as regards all of them.

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and therefore the judgment of the court below, making the rule for a new trial absolute, must be affirmed. In arriving at these conclusions we proceed on the ground on which we are unanimous that the surveyor was clearly liable. With regard to the other question which was discussed, as to whether the individual corporators were liable, it is one of great difficulty and considerable importance. If it were necessary to decide that question we should require time to consider it, and possibly when we had considered it our decision would not be an unanimous one, and in sending down the case for a new trial would be of no assistance, but probably rather an embarrassment, to the learned judge who would have to try the case. We therefore think it better to leave the decision of the Court of Exchequer upon that point where and as it is. The majority of that court thought that the corporators were individually liable; the minority thought otherwise. We leave the question with the authority which it had before—no better and no worse. On the new trial the facts will be ascertained, and the point may then be reserved, so that the court before which it may come will be much better able to deal with it than we should be were we to consider it now. The question at the trial will be, is the way in question a highway or not, which has not yet been discussed. I will now shortly give my reasons for thinking that the surveyor is liable, and in so doing I believe that I shall be expressing the opinion of all the judges. If the board had authority given to them by the statute to determine whether a disputed highway was a highway, and consequently were authorised to break into a close where they supposed that there was, but where there really was not, a highway, though they honestly and *bona fide* believed that there was, if there had been any such authority given to them, and if the surveyor was acting under their orders, then I should think that he would be protected. For sect. 16 of the 25 & 26 Vict. c. 61 enacts that "the district surveyor shall act as the agent of the board in carrying into effect all the works and performing all the duties by this Act required to be carried into effect, or to be performed by the board." If the board had authority given to them to enter into a close where there was no highway, but where they really believed there was a highway, and they directed their surveyor to go there, that would be a duty in which the surveyor would be directed to act. But then the section goes on, "and he shall in all respects conform to the orders of the board in the execution of his duties." If the statute said to a man, "You are to obey the orders of a particular person," it would be very hard to punish him if he did not obey those orders, and at the same time to make him liable if he did obey them. But when we come to look at the matter it must be that the board must have some power or duty to order what is to be done, and the surveyor who is to do the act for them is to obey their directions. The statute does not say that when the board think they have an authority, but have really not got it, the surveyor is then to act upon their directions, and that whilst so acting he is to be protected. Now as to the question whether any jurisdiction or authority is given to the former surveyors of highways (under the 3 & 4 Will. 4, c. 50) and to the highway boards which are substituted for them, to break into a close which is

private property, but where they think there is a highway, one is somewhat embarrassed in consequence of not knowing on what ground the highway board believed this footpath to be a highway. No board has power to decide whether a certain way is a highway, but if they like they may, and anybody, if he likes, may, raise the issue at common law and have it decided by a court of law. There are provisions in this statute by which the question, whether or not a certain place is a highway, may be brought before the justices to decide, but there is no power for any board or for anyone else to decide that question. Anyone acting on such a decision does so at his peril. Mr. Kingdon endeavoured to point out some section which gave that power, but I can see none. Mr. Charles argued that, even if it had been a highway, the surveyor had no right to remove the obstruction. How that would be I do not say, for that is not the question here. We must assume, in favour of the plaintiff, that if he had not been stopped he would have proved that this was not a highway; and if he had proved that, the question whether the surveyor would have a right to remove an obstruction across a real highway would not have arisen. Here a gate across a path on a close, which has not been proved to be a highway, has been broken through, and there is no clause in the Act of Parliament which says that that can be done. It gives no right to the board to remove something from that which is not a highway, but which the board thinks is a highway. If that be so, the ground on which the learned Chief Baron held that the surveyor was not responsible, seems totally to fail. The exception is only that of people acting for courts of justice, or it may be, perhaps, where any Act of Parliament says that they must in all events obey. But it does not apply to such a case as the present, where the Act only says that the surveyor shall obey lawful orders. The case comes within the principle that a person acting under the orders of other persons can only justify the act done in cases where the principals themselves would be justified. For these reasons I think that the judgment of the court below ought to be affirmed, but on the ground only that the surveyor was liable, and we must not be taken as either affirming or disaffirming the judgment of the court below with regard to the liability of the other defendants as corporators.

MELLOR, J.—I am of the same opinion. I think that the true limit of the surveyor's obedience is where the board are acting legally, and not where it is acting illegally. In cases where the board are protected the surveyor is protected, but if they order him to do anything which it is beyond their power or authority to order, then I am of opinion that the surveyor is no longer protected. I take this to be the meaning of sect. 16 of the statute, and on that ground I agree that the judgment of the court below, so far as the surveyor is concerned, should be affirmed. It is not necessary that I should add anything with regard to the other question.

LUSH, J.—I agree, and have nothing to add to what has already been said.

GROVE, J.—I also agree in the opinion which has been expressed, and would add only one or two sentences. When the point is put in its naked form it does not, I think, admit of much doubt. It is admitted for the purposes of this part of the case, that the board is liable in its corporate

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capacity for an act which, for the purposes of the case, is admitted to be unlawful. Here the surveyor commits the unlawful act, for which he should be held legally responsible. The whole question, therefore, no other section having been brought to bear upon the matter, is whether by sect. 16 he is exempted from that liability. [The learned judge read the section.] Now it seems to me that it would be a great straining of the statute to say that by that section the surveyor is actually exempted from all legal liability. If the construction contended for by Mr. Kingdon on behalf of the appellants were put upon this section, it would virtually give the surveyor such an exemption, and there are no words in the section limiting that exemption; nor do I see anything giving it a wider limitation than that of things lawfully ordered by the board. The section is confined to carrying into effect the "duties" required by the Act, and nothing more. Mr. Kingdon has cited no case in support of his argument, except the cases of officers executing legal process, and acting in the execution of duties imposed upon them by courts of law. In my opinion that shows that the exemption which has been claimed in the present case is not an exemption which would be likely to exist, for if it had we should probably have had some cases more expressly in point cited to us. I ought, I think, to add that I have entertained some doubt as to whether the court ought not to have given judgment on the other question as to the liability of the individual corporators; but that doubt is not sufficient to induce me to differ from the rest of the court, more especially as since we must send the case down for a new trial, the question can be argued with better effect after that trial has taken place, when the court will be in fuller possession of the facts than we now are.

DENMAN, J.—I am of the same opinion. The question as to the liability of the surveyor depends entirely, I think, upon the words of sect. 16 of the 25 & 26 Vict. 61, of which the words relied on by Mr. Kingdon are "He shall in all respects conform to the orders of the board in the execution of his duties." In order to ascertain the real meaning of these words we must go back to the earlier part of the section, where it is said, "He shall act as the agent of the board in carrying into effect all the works and performing all the duties required to be carried into effect or to be performed by the board." Now, what are these duties? They are duties relating solely to highways, and for the purposes of this case we are bound to assume that the particular place, in which the surveyor attempted to execute his duties on the occasion complained of, was a place which was not a public highway. If so, I think that it follows, for the reasons given by my brother Blackburn, that the board had no jurisdiction over that place. Then, if the board had no right to do what they did there, had the surveyor any right to act under their authority in the manner complained of? Well, the words are, "He shall in all respects conform to the orders of the board in the execution of his duties." But if this was not a highway he could have no "duties" there at all, and so cannot resort to this section for the purpose of its affording him protection. The cases which have been relied upon were cases of a peculiar kind (*Dew v. Riley* and *Andrews v. Morris and Whitam*, *ubi sup.*), the only two which told at all in favour of Mr. Kingdon, and

which were cases relating entirely to duties performed by officers under the orders of courts of justice. These cases are not applicable to the present case; but the general rule, that a man who has done a wrong is responsible for that wrong, is applicable. Here the surveyor has done work not within his duties, for it was done in a matter with which he had no duty to interfere, and therefore he at all events was responsible. As to the question of the corporators being personally responsible for the act which they did, that, I think, is a matter of very great difficulty, and it would be better not to send down the case for trial with possibly a divided opinion on that point, or by taking time to consider to prevent the case being tried at the next assizes, when all the facts will be found.

ARCHIBALD, J., concurred.

Judgment for a venire de novo affirmed.

Attorneys for the plaintiff, Pattison, Wigg, and Co., agents for White and Dingley, Launceston.

Attorneys for the defendants, Coodo, Kingdon, and Cotton, agents for C. C. Hawker, Bosccastle.

COURT OF EXCHEQUER.

Reported by H. LING, and CYRIL DODD, Esq., Barristers-at-Law.

June 8 and July 7, 1875.

THE ATTORNEY-GENERAL v. THE MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION (LIMITED).

Revenue—Inhabited house duty—Block of buildings, each containing separate sets of chambers—Different tenements being distinct properties—Gross and rateable value—Proper mode of ascertaining value.

Schedule B of the 48 Geo. 3, c. 55, according to the regulations in which the inhabited house duty is, under the authority of sect. 2 of 14 & 15 Vict. c. 35, now levied, contains the following (amongst other) rules: Rule 6. "Where any house shall be let in different stories, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to and shall in like manner be charged to the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling house, and shall be charged to the said duties." Rule 14: "Where any dwelling-house shall be divided into different tenements, being distinct properties, every such tenement shall be subject to the same duties as if the same were an entire house, which duty shall be paid by the occupiers thereof respectively."

The Westminster Chambers (the property of the defendants) consist of seven blocks of buildings, with seven principal entrances. Each block is divided into two ranges by an internal staircase, which has only one door at the principal or street entrance. The seven blocks are divided structurally into 117 different tenements or suites of rooms, which are quite distinct from each other, like chambers in the inns of court, and they are let and occupied, and in every instance are capable of being let and occupied separately as offices, chambers, or residences. Each suite of rooms has an outer door opening out on to the internal common staircase, and also an inner private hall or passage. There is no means of communication between these several suites of rooms other than the

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common staircase. The outer or street door to each block is kept locked at night, and a porter, appointed and removable by the defendants, the lessors, resides in a distinct set of rooms on the basement of each block, and the care of each entrance and the rooms connected therewith are in his charge, and he has a duplicate key of and access to the sets of rooms in each block in the occupation of the tenants, to whom he acts as their servant; the defendants provide gas for the staircases, halls, and passages, and water for the entire building, and pay all rates and taxes, charging their tenants higher rents in consequence. Each tenement or suite of rooms is let under an agreement whereby the defendants (the lessors) let the same for a certain term at a certain rent, the lessors agreeing to pay all rates, &c., and the lessee covenanting not to commit waste; to keep the premises internally in repair; not to alter or interfere with the arrangement of the premises, nor underlet or assign the same; with power to the lessors to enter and paint the outside, and to view the state of the interior, and a power of re-entry on the non-payment of rent within twenty-one days after becoming due, or on breach of any of the covenants, or on the bankruptcy of the lessee. The premises are taken by the lessee subject to the following regulations: The tenants have the right free of charge to the general services of the porter, who is to be constantly in attendance, to cleanse the general stairs every morning; to receive and deliver all letters, and to attend to the regular and proper supply of coals to the several apartments, which coals are supplied by the lessors at a certain price, the tenants not being allowed to have stores of coals in their rooms.

The Commissioners under the Westminster Improvement Act 1853, from whom the defendants derive title, have power to demise or sell any set of apartments separately from the rest of the house. None of the sets have been sold, but the greater number have been let by the defendants for seven, fourteen, or twenty-one years, and some remain untenanted. In the valuation list, prepared under the 32 & 33 Vict. c. 67, each block is not inserted as one hereditament, but each of the 117 sets of rooms, of which the seven blocks consist, is treated as one hereditament, and assessed accordingly, the name of the tenant of each occupied set being inserted as the occupier, and the tenants being separately assessed to the poor rate.

In assessing the property for the Inhabited House Duty the seven blocks were treated as seven separate inhabited houses, and the duty assessed on the defendants as occupiers thereof (under Rule 6 in Schedule B of 48 Geo. 3, c. 55) in the sum of 548l. 17s., the aggregate amount of the values appearing in the valuation list prepared in pursuance of the Valuation (Metropolis) Act 1869, as the values of the 117 sets of chambers comprised in the seven blocks. Against that assessment the defendants appealed, and contended, first, that each of the 117 sets of chambers should be separately assessed on the tenants under Rule 14 in Schedule B; and secondly, that the value in the valuation list did not correctly represent the annual value of the blocks to the defendants, since many sets were unlet, and the Crown ought to make a separate valuation of each block under sect. 76 of 32 & 33 Vict. c. 67.

Held, by the majority of the Court of Exchequer

(Bramwell and Cleasby, BB.) giving judgment for the Crown on both points (dissentients, Kelly, C.B. on the first point), first, that the whole property was properly assessed to the duty as seven several dwelling-houses and on the defendants as occupiers under Rule 6, and that Rule 14 was not applicable to the case; secondly, that the value of each block was accurately and properly represented by the aggregate sum of the values appearing in the valuation list as those of the separate hereditaments in the occupation of the several tenants of the defendants, although (per Cleasby, B.) it caused an injustice which ought to be corrected.

SPECIAL CASE.

STATED by order of Cleasby, B., and by consent, under 22 & 23 Vict. c. 21, s. 10, for the purpose of obtaining the opinion of the court as to the proper mode of charging on the defendants the duties under the statutes relating to the Inhabited House Duty, upon the facts stated hereunder; the Attorney-General having proceeded against the defendants to recover 548l. 17s. for such duties, being the amount in which they were assessed by an assessment made for 1871, upon certain premises called "The Westminster Chambers," belonging to the defendant association, situated in St. Margaret and St. John, Westminster, and in the metropolis, as defined by 32 & 33 Vict., c. 67, of the Valuation (Metropolis) Act 1869.

2. The Westminster Chambers consist of seven blocks of buildings, having seven principal entrances. Each of these blocks is divided into two ranges by an internal staircase, which has only one door at the principal or street entrance; and each block is in its internal arrangement structurally divided into different tenements or suites of rooms, which are quite distinct from each other, like chambers in the Inns of Court; and they are let and occupied and are in every instance capable of being let and occupied separately, as chambers, offices, or residences. Each tenement or suite of rooms has an outer door, opening on to a staircase common to all, and also an inner private hall or passage, a water-closet, and lavatory. There is no means of communication between those tenements or suites of rooms other than the staircase common to all. Nearly all the tenements or suites of rooms are let and used as offices or chambers, for business purposes, and they are locked and unoccupied during the night. A few only of the tenements or suites of rooms in three of the blocks are used as residences.

3. The outer or street door to each block of buildings is kept locked at night, and a porter, who is appointed by the association, resides in a distinct set of rooms in the basement of each block of building, and has a key of and access to the suites or sets of rooms in such building in the occupation of the tenants, as their servant. "The regulations" hereinafter referred to show more fully the mode in which the porters are appointed and employed.

4. The Westminster Improvement Act 1853 (16 & 17 Vict. c. 176), s. 69, applies to the said association and the property in question, and enacts that where any house erected on land of the commissioners shall be occupied or be intended to be occupied by different persons in distinct sets of apartments, the commissioners, their successors or assigns, may, if they shall think fit so to do, demise or sell any set of apartments separately

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from the rest of the said house. The said association hold the Westminster Chambers by title derived from the commissioners, whose assigns they are. None of the suites of rooms have been sold, but the greater number have been demised for seven, fourteen, or twenty-one years.

5. The association provide gas for the staircases, halls, and passages, and water for the entire buildings, and pay all rates and taxes in respect thereof, charging their tenants higher rents in consequence.

6. Each tenement or suite of rooms is held under a written agreement. A copy of the old form of agreement, which has been disused for some time, is set forth in the printed report of the case of *Reg. v. St. George's Union* (L. Rep. 7 Q. B. 90). The form of agreement, of which a printed copy marked A is appended to and forms part of this case, is the one now in use.

7. Each block is not inserted in the valuation list, prepared in pursuance of The Valuation Metropolis Act 1869, "as one hereditament, but each tenement or suite of rooms is treated therein as a separate hereditament and assessed accordingly; the name of the tenant of each occupied tenement or suite of rooms being inserted as the occupier thereof. There are in the seven blocks 117 of these tenements or suites of rooms thus separately assessed. The tenants thereof are separately charged and assessed to the poor rate in conformity to the valuation list.

8. The following extract from the district tax assessment for the year 1871-72 shows in detail the different mode in which the inhabited house duties have by the House Tax Commissioners been assessed on the premises:

Number of Assessment.	Name of street or place and Christian and surnames of occupier.	Number of House.	Description as to trade, profession, and purposes for which the premises are occupied.	Inhabited House Duties.	
				Gross annual value of the premises as fixed by the Valuation List.	Duty payable at 9d. in the pound in respect of any dwelling house not occupied and used for any of the purposes described in the preceding columns.
	Victoria-street. The Mutual Tontine Association Limited, G. S. Sidney, Secretary.		Westminster Chambers	£	£ s. d.
263	" Nos.	7	{ House or building let in tenements.	2650	99 7 6
263	" "	6		1349	50 11 9
264	" "	5		2632	98 6 6
265	" "	4		1850	66 7 6
266	" "	3		3742	109 16 6
267	" "	2		1760	66 0 0
268	" "	1		1663	62 7 3
				14,636	548 17 0

9 The commissioners for the district, in assessing the property for the year 1871 for the inhabited house duty to an amount of duty in the aggregate of 548l. 17s. have treated the whole of the buildings (with the exception of the Imperial Bank premises being part of block Number 1, which, having a separate communication direct

with the street, are separately assessed on the bank as occupier to a duty amounting to 11l. 16s. 3d., as seven separate inhabited houses, and have assessed the same to the association itself as "occupiers," and not to their tenants whose names appear in the valuation list.

10. The value, upon which the assessment of each block is made, is taken from the valuation list, and is the sum of the values inserted there with respect to all the 117 tenements or suites in that block. A great number of such 117 tenements are unlet. Several have never been let since the Westminster Chambers were built. Out of the 117 tenements there are 99 and no more let. A copy of the valuation list will be in court, and may be referred to by either side on the argument of this case as part of the case.

11. The inhabited house duty is now levied under the authority of 14 & 15 Vict. c. 36, of which sect. 2 enacts that all duties imposed by the Act shall be assessed and levied according to the regulations contained in 48 Geo. 3, c. 55, schedule B.

12. Amongst the rules for charging the inhabited house duties, contained in 48 Geo. 3, c. 55, schedule B, the following are material:

Rule 6. Where any house shall be let in different stories, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to, and shall, in like manner, be charged to, the said duties as if such house or tenement was inhabited by one person or family only; and the landlord or owner shall be deemed the occupier of such dwelling house, and shall be charged to the said duties.

Rule 14. Where any dwelling house shall be divided into different tenements, being distinct properties, every such tenement shall be subject to the same duties as if the same were an entire house, which duty shall be paid by the occupiers thereof respectively. (a)

13. By sect. 45 of 32 & 33 Vict. c. 67, (the Valuation (Metropolis) Act 1869) it is enacted that, "The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted, that is to say, (2) For the purpose of any of the following taxes which become chargeable during the year that the list is in force, namely: (a) The tax on houses levied under the House Tax Act and the Acts therein incorporated or referred to." By sect. 76 it is enacted that, "where for the purpose of the Acts relating to the duty on inhabited houses or to the duties charged under Schedule B. of the Income Tax Act or to the Sale of Excisable Liquors it is necessary to make a separate valua-

(a) Rule 4, which was not set out in the case, but was afterwards referred to in the argument and judgments, is as follows: "Every chamber or apartment in any of the Inns of Court or of Chancery, or in any college, or hall in any of the universities of Great Britain, being severally in the tenure or occupation of any person or persons, shall be charged thereto" (the Inhabited House Duties) "as an entire house, and on the respective occupiers thereof."

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tion of any hereditament by reason of its not being separately valued in any valuation list, the value of such hereditament shall be ascertained in the same manner as if this Act had not been passed."

14. In the year 1870 before the Valuation (Metropolis) Act came into operation, the Commissioners of Assessed Taxes submitted, under 48 Geo. 3, c. 55, a case to two of Her Majesty's Judges asking their opinion whether the assessment of the property of the Association to the house duty should be on seven blocks of buildings or on each tenement or suite of rooms as distinct properties, according to rule 14 of Schedule B. The two Judges (Keating, and Hannen, JJ.), decided that the property in question should be assessed in seven blocks. The case, with the opinion of the Judges thereon, will be in court and may be referred to by either side if deemed necessary. Such case was drawn by the commissioners but the representatives of the Association were not consulted upon it, and it does not, in the opinion of the association, sufficiently state the facts.

15. In the course of each year some of the tenements or suites of rooms in each block are unlet and unoccupied, and consequently the association derive no rent from the same; and the aggregate sum of the values which appear in the valuation list does not, therefore, represent the annual value of the block to the association. In three of the blocks, namely Nos. 2, 3, and 7, one or more tenants of the association reside; so that, if each block is a house liable to be assessed at one sum for house duty, such three blocks are in part inhabited. No tenants reside in the other blocks, but all use the same as offices or chambers only.

16. The association when they found that their tenants were separately charged and assessed to the poor rate for each tenement or suite of rooms occupied by them (being 117 in all), appealed, under the provisions of The Valuation (Metropolis) Act 1869, against the valuation list, on the ground that the seven blocks were not 117, but seven rateable hereditaments. But the Court of Queen's Bench decided that each tenement or suite of rooms was a separate rateable hereditament and that the valuation list rightly treated them as 117 rateable hereditaments. See *Reg. on Prosecution of Mutual Tontine Westminster Chambers Association (apps.) v. Assessment Committee of St. George's Union (resps.)* (L. Rep. 7 Q. B. 90).

The questions for the opinion of the court are—First, whether the property is properly assessed to the inhabited house duty as seven dwelling houses only on the association as occupiers, or whether each of the 117 suites or sets of chambers, of which the entire building consists, should be separately assessed on the tenants thereof respectively. Secondly, if the court should be of opinion that the said property is properly assessed as seven separate dwelling houses for the purpose of assessing the inhabited house duty, then, whether the value of each of the seven blocks is properly represented by the aggregate sum of the values which appear in the valuation list as those of the separate hereditaments in the occupation of the tenants of the association in that block, or whether the commissioners ought not to make a separate valuation on the association itself of each block under sect. 76 of 32 & 33 Vict. c. 67 (the Valuation (Metropolis) Act 1869).

The court is to be at liberty to draw inferences of fact, and judgment is to be entered up in accordance with the answers given to the questions submitted to the court; the costs to be in the discretion of the court.

By the form of agreement referred to in par. 6, under which each tenement or suite of rooms is held, each lessee agrees that he, his executors, administrators or assigns, will not do or permit any waste—will clean the windows of the demised premises once in every two months at least—will repair and keep the premises in repair at all times, suitable and ready for the occupation of a tenant—will once in every four years paint all the inside woodwork with two coats of paint, and colour all the ceilings properly—will not without written consent of the lessors alter or in any manner interfere with the construction or arrangement of the premises—or alter or injure any of the walls, timbers, &c., or use the premises as a shop or warehouse, or for any unlawful or immoral purpose, or otherwise than as residential, professional, or official chambers, or without consent affix any board, placard, or notice upon any external part of the premises, or permit any of such things to be done; and will not without consent assign or underlet, &c. The lessors or their agents are to be at liberty at all times to enter for the purpose of painting, and at all seasonable times to enter and view the premises, and give notice to the lessee of any defects, want of repair or misuser, all of which are to be amended and corrected within one calendar month after such notice, with power in the lessors to re-enter and resume possession, and put all persons therefrom, in case of non-payment of rent within twenty-one days after becoming due and demand made, or on breach of any of the foregoing stipulations, &c. The premises are taken by the lessee also subject to the regulations made by the lessors with respect to the duties of the resident porter, the supply of coals and other matters, for the general convenience of the tenants (which regulation the lessors reserve to themselves the right to alter and modify from time to time as circumstances may, in their judgment, render desirable), and of which regulations the following are some: The care of each entrance and the rooms connected therewith will be in charge of a resident porter appointed by the lessors. There are duplicate keys to the outer doors of each set of chambers, one of which is always to be in the hands of the porter, and the other in the care of the tenant, while the rooms are in use. The tenants have the right, free of charge, to the general services of the porter, viz., he is to be constantly in attendance, to cleanse the general stairs, &c., every morning, to receive and deliver all letters and parcels, to receive the keys of the outer doors of the several sets of rooms from the tenants on their leaving at night, to attend to the regular and proper supply of coals to the several apartments. Coals are supplied by the lessors at a certain price. Tenants are not allowed to have stores of coals in their rooms.

Points of argument on the part of the Crown:—First, that the entire buildings of the Westminster chambers are properly assessed to the Inhabited House Duty as seven separate dwelling-houses, in accordance with the decision of Keating and Hannen, JJ., in 1870; secondly, that sect. 45 of the Valuation (Metropolis) Act 1869, having de-

Ex.] ATTORNEY-GENERAL v. MUTUAL TONTINE WESTMINSTER CHAMBERS ASSOCIATION (LIM.). [Ex.]

clared the valuation lists in force for the time being to be conclusive evidence of the annual value of the several hereditaments included therein, for the purposes of the Inhabited House Duty Acts, the commissioners were right in taking the sum of 14,951*l.*, the aggregate annual value of the 117 hereditaments, as the aggregate value of the seven blocks, and charging the association with duty accordingly; thirdly, that in the event of its being held that no one of the seven blocks is valued in the valuation list as a separate hereditament within the meaning of sect. 76 of the Metropolis Valuation Act 1869, the property in question is still to be assessed as seven blocks, and the value to be ascertained by the commissioners as if that Act had not passed.

Points for the defendants:—First, that the property is not properly assessed to the inhabited duty as seven dwelling-houses only; secondly, that each of the 117 sets of chambers is a separate and distinct house, and ought, if inhabited, to be separately assessed in accordance with the decision of the Court of Queen's Bench in 1870; thirdly, that the property comes under Rule 14, and not under Rule 6 of Schedule B of 48 Geo. 3, c. 55; fourthly, that the valuation list prepared under 32 & 33 Vict. c. 67, which values and assesses each set of chambers separately, and treats the tenants of the association as the occupiers thereof respectively is binding upon the Commissioners of Assessed Taxes; fifthly, that if the property is properly assessed as seven houses for the purpose of assessing the inhabited house duty, the value of each of the seven houses is not properly represented by the aggregate sum of the values which appears in the valuation list as those of the separate hereditaments in each house; sixthly, that if the property is properly assessed as seven separate houses, the commissioners ought to make a separate valuation of each house under sect. 76 of 32 & 33 Vict. c. 67.

The Attorney-General (Sir R. Bagge, Q.C.), (with whom were the Solicitor-General (Sir J. Holker, Q.C.), and Pinder), appeared for the Crown, and argued that the assessment appealed against was made on the right principle, and was to be upheld. For the purpose of assessing the inhabited house duty, the property in question was to be treated as seven distinct houses, each block being taken as a separate dwelling house, without reference or regard to the various sets of rooms contained in it, in accordance with Rule 6 of Schedule B of the 48 Geo. 3, c. 55, which was applicable to the case, and the defendants, as the landlords and owners of such seven blocks, were to be deemed the occupiers of each such separate dwelling house, and to be charged to the duties accordingly. The decision of the two learned judges (Keating and Hannen, JJ.), referred to in paragraph 14 of the case, is an authority for and confirms that view of the matter. The defendants will contend that Rule 14 of the 48 Geo. 3 applies to this case, and that the seven blocks should have been assessed as 117 separate tenements, and they will probably cite *The Mutual Tontine Westminster Chambers' Association (Limited) v. St. George's Union Assessment Committee* (25 L. T. Rep. N. S. 696; L. Rep. 7 Q. B. 90; 41 L. J. 30, M. C.), in support of their contention, but the decision in that case is not applicable here, the questions in the two cases being quite

different, and under different statutes. Again, the defendants will liken this case to that of chambers in the Inns of Court, but the latter are expressly provided for by Rule 4 in schedule B to the statute, which has nothing to do with any other kind of properties or holdings, and Rule 14 applies to cases of houses divided off into different stories, each story being a distinct property and holding, and the property of a different owner: secondly, the value of each of these blocks is correctly and rightly represented by the aggregate amount of the valuations of the several separate hereditaments occupied by the defendants' tenants, as set down in the valuation list made under the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67).

H. Giffard, Q.C. (with him was Poland) for the defendants *contra*, disputed all the propositions contended for on the part of the Crown, and submitted, first, that the present case was one coming clearly within Rule 14 of Schedule B. to the Act of Geo. 3, and the assessment should have been made under that rule upon the several tenants. In all respects the separate sets of chambers or rooms in these blocks were identical with chambers in the Inns of Court, for the mode of assessing which the Legislature had by Rule 4, in Schedule B, made express provision; and it would be unfair and unjust to assess these chambers, which are precisely similar in all essential conditions and characters, on a different principle. By adopting the assessment under Rule 6, the Crown imposed on the defendants the liability to pay duty on all the sets, whether occupied or not, and many of them are not let. That is manifestly unjust, and cannot be the intention of the Legislature. But, secondly, if the court should hold the Crown to be right in assessing this property under Rule 6, as seven separate houses only, yet it is contended that the aggregate amount of the value in the valuation list does not correctly represent the value of the property to the defendants, inasmuch as many of the sets are unlet and so producing no rental at all. There should be a separate valuation of each block under sect. 76 of the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67). He cited

Reg v. St. George's Union Assessment Committee (ubi *sup.*);

Evans and Fynche's case, Cro. Car. 472;

Henrette v. Booth, 9 L. T. Rep. N. S. 392; 33 L. J.

61, C. P.; 9 Jur. N. S. 1293; 15 C. B. N. S., 500;

Cuthbertson v. Butterworth, 21 L. T. Rep. N. S. 140;

L. Rep. 4 C. P., 523; 38 L. J. 98, C. P.;

Cook v. Humber, 5 L. T. Rep. N. S. 838; 31 L. J. 73,

C. P.; 11 C. B. N. S., 33;

Pitt v. Smedley, 7 M. & G. 85; 14 L. J. 73, C. P.;

and

30 & 31 Vict. c. 40, s. 25.

The Attorney General replied on the part of the Crown.

Cur. adv. vult.

July 7.—The court having taken time to consider, and there being a difference of opinion among their Lordships, the following judgments were now delivered:

CLEASBY, B.—The question in this case is, What is the position of these houses in applying the statute 48 Geo. 3, c. 55; and whether the case comes within Rule 6 or Rule 14 in the schedule B to that statute? It must come within one or the other of these rules; and in that way the case has been argued. We are to construe the 48 Geo. 3, c. 55. No assistance can be derived from

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the later statute, 32 & 33 Vict. c. 67. It would lead to monstrous conclusions if there was to be one construction of the statute from 1808 to 1869 (61 years), and that construction was then to be changed by an argument derived from the language of an Act then passed *alio intuitu*, and which provides for the mode of getting at the amount of assessments. In reality, this question has arisen in consequence of a difficulty in applying all the provisions of the later Act; but that is no reason for varying the construction of the former Act; and the difficulty could be removed by legislation. The question is, whether the several tenements or suites of rooms in each block are to be regarded as let to tenants so as to come within Rule 6, or as being distinct properties so as to come within Rule 14. I do not think that Rule 4 affords the least assistance. It provides expressly for a defined exceptional case, and has no application, direct or indirect, to other cases. In the particular cases of chambers at the Inns at Court, or the universities, each set of chambers is made one house; and the reason is that there is nothing whatever to give them, collectively, the character of one house; no common outer door, no person residing for common purposes, and no element of common occupancy. In the present case each block undoubtedly forms one house, and this was not disputed; but the question was is it to be assessed under Rule 6 or Rule 14. This makes the decision in the case of *Reg. v. The St. George's Union Assessment Committee (ubi sup.)* not applicable. The only question there was, whether there was a separate possession of the chambers under the agreement, not whether they were let. I find it impossible to read the terms of the agreements of demise, and the regulations, without coming to the clear conclusion that, in this case, the sets of chambers were let in different tenements, within Rule 6, and that they are not distinct properties within Rule 14. We find more than the usual clauses of tenancy; the tenants cannot commit waste, they cannot assign without license, they must keep the premises in repair, they cannot in any manner interfere with the construction or arrangement of the premises, they can only use them for specified purposes, namely, office or residential; the landlord may enter and paint the outside, and, in case of non-payment of rent or breach of any of the covenants, the landlord may re-enter and avoid the lease. This appears to me to be an unheard-of sort of ownership or distinct property, where persons have none of the ordinary rights of ownership; and by the memorandum the lessees are bound by further stringent regulations which the lessors, and as I should say, the owners, reserve to themselves the right of varying. It is quite a common thing in London for different persons to be the owners of the different stories or flats of one house, and it is to that state of things, and not to such a case as the present, that the 14th rule applies. For the above reasons, I am of opinion that the whole property is properly assessed as seven several dwelling houses. I also think that it follows that the value of each block is accurately represented by the aggregate values which appear in the valuation list. I should have been glad to escape from this conclusion by resorting to sect. 76 of the 32 & 33 Vict. c. 67; but it appeared, upon the argument, that this was impossible. This inevitable conclusion causes an injustice

which ought to be corrected. I think that our judgment must be given for the Crown.

BRAMWELL, B.—I am of opinion that our judgment should be for the Crown in this case. The Act of 48 Geo. 3, c. 55, imposes a duty on inhabited houses. Had it given no rules on the subject, the question would have been whether these blocks, constructed and used as they are, were, each, one or many "houses" within the Act. To determine this it would be perfectly relevant to inquire what the law had held to be a "house" in cases of burglary and others; and it may be, I offer no opinion, that possibly each of the separate apartments in each of these blocks would have been held to be a separate house. But the statute has given its own arbitrary definition of what shall and what shall not be a "house," for the purposes of charging the duty. By Rule 1 it enacts that the charge shall be on the occupier. By Rule 6, when the house is let in different stories, tenements, lodgings, or landings, and inhabited by two or more, the landlord shall be deemed the occupier, but the duties may be levied on any occupier where the landlord is not in the district. I think that this includes the present case. Mr. Giffard argued that it applies to cases of lodgers only, persons who have not possession of the rooms as against the landlord; mere licencees, who could maintain no action of trespass against him if he came into their room. Very unfortunate language has been used, as he admitted, if this is so. Rule 6 speaks of a "house" or "tenement" "let." I think that it does not apply to such cases as lodgers, but to such as the present. I should think so if Rule 14 did not exist. But that rule, I think, makes the matter plain. It says that where there is one house divided into different tenements, being distinct properties, they shall be separately assessed. That does not mean distinct properties in the occupier, for that would be true of lodgings. I am not sure that it means distinct owners; it may or may not mean being distinct, as one field might be from another. This at least is manifest, that Rule 6 supposes that there will be one owner or landlord, and rule 14 supposes that there may be several. It is asked why chambers in the Inns of Court are separately assessable if these chambers are not? This is an unfortunate question, because, if rule 6 includes this case, what need was there of rule 14? But the question may be answered. The Legislature foresaw trouble and risk to the revenue if each occupier of part of a house was, as a rule, to be separately charged, and accordingly it said that, in that case, the owner of the house should be. It made an exception in favour of chambers in the Inns of Court, because it foresaw that there was no such danger as to them, and that they might be safely excepted, and it was convenient that they should be. It is said that here the defendants may sell part of the house. I really do not see the bearing of that. They have not so sold. When they do, I think I can tell what ought to be done. But this power to sell part of a house belongs to every owner. It is said that to hold as I do will be a hardship on the defendants; that one set of chambers may be occupied, the rest empty, and the defendants be liable to duty on the whole block. No doubt this is a hardship, but it may well be an intentional hardship for the security of the revenue. It may well be that the Legislature determined that

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unless a house was uninhabited it should pay on the whole, and without inquiring how much was empty. This hardship clearly would exist in the case of a house let in lodgings. In support of this opinion is that of Mr. Justice Keating and Mr. Justice Hannen, and the intimation of a similar opinion in the Court of Queen's Bench. As to the second point, I am also of opinion in favour of the Crown. The statute 32 & 33 Vict. c. 67 provides that a general assessment should be made applicable to all rates and taxes. Such an assessment has been made, and must be acted on. For the purpose of the poor rate, it was necessary to assess each set of chambers separately; for the purpose of this tax, it is necessary to add up the sums so separately assessed. It is said that that is hard, for that a less value will be charged to poor rate than to the house tax. That is the same objection of hardship that I have before disposed of. Uninhabited parts of a house are included in the value where there are inhabited parts. The house is assessed on its letting value.

KELLY, C. B.—The real and substantial question in this case is in effect whether each suite of rooms or set of chambers in these houses or buildings is to be treated as a separate property, and to be assessed to the house duty in respect of its annual value, that is to say, its rateable value as distinguished from its gross annual value, or whether the whole block or house is to be assessed as one tenement. It cannot be denied that the case may be brought within the words of either the 6th rule or the 14th in the 48 Geo. 3, c. 55, but, when we look carefully and critically to the language of these two rules, and consider it with reference to the character or description of these tenements, the language of the 6th rule will be found to be applicable rather to lodgings than to chambers, while the language of the 14th seems to point rather to chambers than to lodgings. The words in the 6th rule are, "different stories, tenements, lodgings, or landings;" in the 14th rule the words are, "different tenements being distinct properties," the word "tenements," therefore, being common to both rules. What, then, is the description given in the case of the sets of rooms in question? They are described expressly as "different tenements or sets of rooms, which are quite distinct from each other, like chambers in the Inns of Court, and they are let and are occupied, and are, in every instance, capable of being let and occupied separately as chambers, offices, and residences; each house has an open door opening on to the staircase, common to all, and also a private hall or passage, and other conveniences. There is no means of communication between these tenements or sets of rooms, otherwise than a staircase common to all; nearly all are let and used as offices or chambers for business purposes, and are locked and unoccupied during the night. A few only are used as residences. Now every word of this description from beginning to end is strictly applicable to and indeed identical with the sets of chambers in the Inns of Court, and we find by the 4th rule that these chambers in the Inns of Court are charged as entire houses or separate properties. Why, then, should the Legislature have treated the chambers in the Inns of Court as separate properties, and not have dealt in the same way with the chambers in the buildings in question, which are in character and description identical with

those of the Inns of Court? But when we find that, by the Westminster Improvement Act the commissioners may not only demise but actually sell any of these sets of apartments separately from the rest of the house, how can it be said that they are not in every respect separate properties, whether they happen to have been let or to remain unlet, or to have been sold out and out, and become the property of other proprietors? The nature and description of these properties, and whether they are to be deemed "lodgings," or in the nature of lodgings under the 6th rule, or "tenements being distinct properties" under the 14th rule, surely cannot depend upon the accident whether they are let or unlet, or are actually sold. But the mode in which the assessment in this case has been made seems to me conclusive that the Legislature intended them to be deemed separate properties, and that the greatest possible injustice would be done, and indeed has been done, by the assessment in question, if each block, with all the sets of chambers within it, is to be deemed for the purpose of the assessment a single property. For it appears, when we look to the assessment itself, that each set of chambers is set down separately with its gross value against it in another column, and the gross annual value of those which are unlet is apparently the same as that of those which are actually let and occupied by tenants; and the association or company is taxed or assessed, not in respect of what is the real value to them, that is the net annual value of the aggregate of all those sets of chambers which are actually let, and yield to them each a substantial rent, but in respect of the aggregate of the whole number of these sets of chambers, those which are unlet, and yield no rent at all, at the same amount or ratio as those which are let to Hence, supposing that one of these blocks contains twenty sets of chambers, ten of which are let for 120*l.* a year each, the gross rental being 120*l.*, and rateable or net rental being 100*l.* a year, and the ten remaining sets of chambers are unlet and yield during the whole year no rental at all, the association are taxed in respect of the net or rateable annual amount of 2000*l.* a year, whereas the real or actual net rental amounts to but 1000*l.* a year. In other words, they pay a tax upon 2000*l.* for property from which they derive only 1000*l.* per annum. We have only to suppose the case of one single set of chambers, and no more, being let at 120*l.* a year, and nineteen sets of chambers unlet, and so yielding no rent at all, and if the assessments were made out as the assessment is in the present case, the association would be taxed in respect of 2000*l.* a year, whereas they would derive only 120*l.* a year from the property. This cannot, I think, have been the intention of the Legislature. I am, therefore, of opinion that these sets of chambers should be deemed to be "distinct properties" within the 14th rule, and that the defendant association should be assessed upon the real or actual rent or rateable value of each set of chambers, as well as for the apartments, whatever they may be, which are occupied by their servant described in the agreements and memoranda as the resident porter. The Crown will then be entitled to an amount of duties computed upon the real and actual value of the property taxed. It appears to me also that, as these sets of chambers, whether merely let or actually sold, are occupied in all respects as distinct pro-

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parties, separate from and not in any way connected with each other, exactly as the chambers in the Inns of Court, it would be an anomalous and inconsistent mode of taxation to impose the tax, which is universally considered a tenant's tax, not upon the occupier but the owner. I do not refer to the decision of the two learned judges relied upon by the Crown, because they are unaccompanied by any reasons and unexplained by anything to be found in the report. Nor do I rely upon the case in the Queen's Bench, because it was decided upon a different Act of Parliament, though it is impossible to deny that there is much in the language of all the judges tending to support the view which I have taken of the present case. I think, therefore, that the judgment of the court ought to be for the defendants, the association; but my two learned brethren having come to a different conclusion, there must be judgment for the Crown, but we all think that there should be no costs.

Judgment for the Crown without costs.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the defendants, *Burchells.*

ARCHES COURT OF CANTERBURY.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

June 22 and 24, and July 16, 1875.

JENKINS v. COOK.

Ecclesiastical law—Refusal to administer Communion—Order and direction of Ordinary—Existence of a Devil—Eternity of punishment—"Evil liver."

The defendant, the Vicar of O., refused to administer the Communion to the promotor, who was a parishioner, on the ground that he had reason to believe that the promotor did not believe in the existence and personality of the Devil, or in the eternity of punishment. He afterwards communicated the fact of his refusal, and his reasons for it, to the Bishop, and asked his advice on the matter:

Held, first, that having prima facie ground for hesitating to administer the Communion, and having submitted that ground to his Ordinary, and obeyed his order and direction, the defendant had discharged his duty, as laid down in the canons and rubric, and could not be made the subject of a criminal prosecution:

Secondly, that the opinions of the promotor constituted him "an evil liver" and "a depraver of the Book of Common Prayer and Administration of the Sacraments," according to the law of the Church, as expressed in the canons and rubric, in such sense as to warrant the defendant in refusing to administer the Communion to him until he disavowed or withdrew them.

THIS was a suit under the Church Discipline Act (3 & 4 Vict. c. 86), in which the office of the judge was promoted by Mr. Henry Jenkins, of Clifton, against the Rev. F. S. Cook, Vicar of Christ Church, Clifton, for an offence against the laws ecclesiastical, in having illegally, and without any just cause or reason, and contrary to his duty, refused to administer to him the Holy Communion.

The case came before the Court of Arches by

virtue of letters of request from the Bishop of Gloucester and Bristol.

The facts are fully set out in the judgment.

Dr. Deane, Q.C., Dr. Tristram, and A. Charles, appeared for the promotor.

A. J. Stephens, Q.C., and Jeune, for the defendant.

Our. adv. vult.

July 16.—The learned Dean of Arches (Sir R. Phillimore) gave judgment as follows:

Sir R. PHILLIMORE said:—I retain the opinion which I expressed on accepting the letters of request in this case—namely, that it was one especially proper for the cognisance of the bishop of the diocese; and I regret that, in his Lordship's opinion, circumstances had rendered it unfit that he should exercise his episcopal jurisdiction in this matter. It is my duty, however, to deal with the subject thus presented to me according to the best of my ability, without the great advantage of the bishop's judgment thereupon. The history of the proceedings taken in the case, so far as it is necessary to state them, is as follows. Upon the 18th Nov. 1874, the Bishop of Gloucester and Bristol issued a commission, under 3 & 4 Vict. c. 86, to inquire into and report upon a charge preferred by Mr. Henry Jenkins, a parishioner of the parish of Christ Church, Clifton, against the Rev. Flavel Smith Cook, a clerk in holy orders, in the diocese of Gloucester and Bristol, and vicar of his parish, for illegally and without any just cause or reason, and contrary to his duty in that behalf, refusing, when he was officiating minister, to administer the sacrament of the Holy Communion to Mr. Jenkins. The commission was duly holden, and after the examination of a witness, and after hearing counsel on both sides, reported that the majority of them considered that there was sufficient *prima facie* ground for instituting further proceedings against Mr. Cook. Subsequently Mr. Jenkins obtained the permission of the bishop to promote his office by letters of requests to the Court of Arches. On the 9th Feb. 1875, articles were filed against Mr. Cook. The charge that the promotor, being a parishioner of the defendant's parish, a member of the Church of England, and having during the last six years regularly attended divine service on Sundays at his parish church, having been in the habit of receiving the Holy Communion in his church monthly, having always conducted himself reverently in church, joining in the responses in accordance with the directions of the rubric, believing in the inspiration of the canonical books of the Old and New Testament, that Scripture contained all things necessary for salvation, and in the doctrine of the atonement of the sins of mankind by the death of our Lord on the cross, and having published and using a certain volume of family prayers, which is annexed, was, on Sunday the 4th Oct. 1874, after having given the legal notice, and having duly presented himself to receive the Holy Communion, refused the communion by the defendant. The defendant put in a responsive plea, the substance of which will be stated hereafter, and there was an allegation in reply. The case came on for hearing before me on the 22nd and 24th June, and I took time to consider the judgment which I am now about to deliver. The contention of the promotor is that, being a parishioner, and having given due notice of his intention to be a communicant on the following Sunday, he did so present himself, and was

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repelled by the defendant. I thought that when these facts were proved the burden of proof was shifted, and that it was for the defendant to show that he had adequate reasons for this repulsion. The defendant undertook to discharge this burden by proving that the promoter had published a work called "Selections from the Old and New Testament," and had written letters to show that he made these selections more especially because he did not believe in the eternity of punishment, or, indeed, as it would appear from the passages omitted, in the punishment of sin at all, or in the existence or personality of the devil, or in other matters of importance. It was admitted, properly in my opinion, that the publishing a volume of extracts from the Old and New Testament without preface or comment, and with asterisks denoting where passages were omitted, was not *per se* an offence, which warranted the refusal of the Holy Communion to the author of the work. The letters, however, gave a different colour to the matter, showing *quo animo* the omissions were made, and being tantamount to a denial of the doctrine and the truth of the facts contained in the omitted passages. The correspondence put in evidence comprises letters between the defendant and the promoter, between the defendant and the bishop, between the promoter and the bishop, and between the solicitors of the parties. The defendant takes up in substance two grounds of defence. First, that whether the reasons alleged by him were valid or invalid, he is not, having regard to his conduct and the particular law on the subject, a criminous clerk subject to the provisions of the Clergy Discipline Act. Secondly, that his reasons for refusal were legally and morally valid, and that, therefore, he has committed no offence against the law ecclesiastical. The two lines of defence perhaps sometimes cross one another; but, on the whole, they are sufficiently distinct. I proceed to consider them in their order. With reference to the first line of defence, it becomes necessary to enter a little into the history of the present case. It appears that in the year 1865 the promoter published a volume entitled "Selections from the Old and New Testament." This volume he presented to the defendant, who seems never to have examined it until the 6th July 1874. On the Sunday before that day the defendant had preached a sermon in his parish church, and on the next day he received the following letter from the promoter:

3, Vyvyan-terrace, Clifton, 6th July 1874.

My dear Sir—As one of your parishioners who accepts his conscience as the voice of God speaking within him, I beg to protest most emphatically against the irreligious tendency of your sermon of last night. I quite believe that you would not willingly deceive others, but it is my opinion that no difficulties as to language or books should stifle what is imprinted in every man's breast by his Maker—that is to say, the knowledge of right and wrong.—I am, my dear Sir, yours very sincerely,

HENRY JENKINS.

I learn from subsequent correspondence that this letter was caused by the defendant having maintained the doctrine of eternal punishment, which the promoter characterises in subsequent letters addressed to the bishop as an "irreligious," "disgusting," and "impious" doctrine. It appears that the defendant, who had then for the first time examined the book sent by the promoter, and discovered that many important parts of Holy Scripture were omitted in it, called upon the promoter with the object of enlightening and rebuk-

ing him, both as to his letter and book; but he refused to hear any communication on the subject. His wife, however, who has been examined as a witness, called upon the defendant and endeavoured unsuccessfully to persuade him that her husband was justified in his conduct. On the 20th July the promoter again wrote to the defendant. The letter was as follows:

3, Vyvyan-terrace, Clifton, 20th July 1874.

My dear Sir—Mrs. Jenkins has kindly called upon you in order to arrange matters, with, I am afraid, very poor success. With regard to my book, Selections from the Old and New Testament, the parts I have omitted, and which has enabled me to use the book morning and evening in my family, are in their present generally received sense quite incompatible with religion or decency (in my opinion). How such ideas have become connected with a book containing everything that is necessary for a man to know I really cannot say, and can only sincerely regret it.—I am, my dear Sir, yours very sincerely,

HENRY JENKINS.

The Rev. Flavel Cook, 19, Vyvyan-terrace, Clifton.

It is very important to observe the language of this letter, because it contains a declaration that the passages omitted are so omitted on the ground that, as generally understood, they are incompatible with religion or decency. During the hearing I urged more than once upon the counsel for both parties the propriety of the following arrangement, viz., that the promoter should withdraw the letter, and the defendant thereupon should admit him to the Lord's table. The defendant expressed himself as being willing and ready to adopt my suggestion; but, I regret to say, that after deliberation the promoter refused to withdraw the letter, and hence the continuance of this suit. I believe that, of the Old Testament, 215 chapters are omitted altogether, and twenty-five of the New Testament; and there are besides numerous omissions of portions of chapters. I will take, for example, the Gospel of St. Matthew. In that Gospel the omissions are as follows:—Whole of first chapter, including birth of our Lord. Chapter III. Several verses of St. John the Baptist's preaching. Chapter IV. Fasting and temptation of our Lord. Chapter V. Passages relating to the crime of killing and anger towards and abuse of a brother, and commission of adultery. Chapter VII. Passages relating to entering in at the strait gate, and as to trees not bringing forth good fruit being hewn down, and the condemnation of those who have worked iniquity, though they have prophesied and cast out devils. In Chapter VIII. are omitted the passages relating to the expulsion of devils, that relating to those who are to be and those who are not to be admitted into heaven, and our Lord's refusal to allow the burial of a father to excuse a disciple from following him. Chapter IX. The passages relating to the expulsion of devils. Chapter X. Passages exhorting men not to fear those who can only kill the body but not the soul, and the passage in which our Lord says that he is come to send a sword, not peace, upon earth. In fact, of the twenty-eight chapters of St. Matthew, only five, I think (2, 6, 14, 27, 28), have escaped mutilation by the omission of important passages, besides those relating to the eternity of punishment and the personality of the Devil. I return to the correspondence. The next letter is as follows:—

19, Vyvyan-terrace, Clifton, 24th July 1874.

Dear Sir—It would be a great relief to me if I could find in your letter of the 20th inst., or in any other communication written or spoken, something to show that

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I have misunderstood your opinions, or that you have changed them for the better. Unhappily, the conclusion I cannot but form from your letters, words, and printed Selections from the Old and New Testaments is that, of set purpose, you reject very many portions of Holy Scripture. That you have, for instance, cut out as you have from the Bible what is therein written concerning Satan and evil spirits is to me terrible evidence of how far you have allowed yourself to go in mutilating the Word of God. Large differences of opinion concerning Scriptural matters no prudent or charitable minister of the Gospel would condemn, but there are perversions and denials which no faithful minister will sanction, lest he allow unbelief a recognised place in the Church of Christ. With such perversions and denials I grieve to say I am driven to connect yourself. While they remain not retracted or disavowed, you cannot be received at the Lord's table in my church. I hope you will feel that my course is directed by conscience, and not by resentment. I quite forgive your behaviour when I called, and although you would then listen to nothing, if you will converse quietly with me my time shall willingly be given for that purpose. May the Spirit of Truth deliver you from the errors you have adopted; and in hope of seeing this my prayer answered,—I remain, dear Sir, yours faithfully,
FLAVELL COOK.

Henry Jenkins, Esq.

The answer to this is as follows:—

3, Vyvyan-terrace, Clifton, 25th July 1874.

My dear Sir,—Thinking as you do, I do not see what other course you could consistently have taken. I shall, nevertheless, come to the Lord's table as usual at "your" church, which is also mine.—I am, my dear Sir, yours very sincerely,
HENRY JENKINS.

The Rev. Flavel Cook.

The next letter is from the defendant to his bishop:—

Edinburgh, 31st July 1874.

My Lord,—Supposing myself bound by rubric so to do, I write to inform your Lordship that on the 25th inst. I warned one of my parishioners, Mr. Henry Jenkins, that he could not be received at the Lord's table in my church while certain opinions held by him remain not retracted or disavowed. By word and in writing, also in print, he had committed himself to very serious opposition to the Word of God. I may specify the rejection of belief in the existence of Satan and evil spirits. He acknowledged, in reply to my warning of refusal to admit him to the Lord's table, that he thought I could take no other course, yet appears to signify that he purposes to disregard my action, and present himself as usual. If necessary, I will of course furnish particulars of the matter. I have the honour to remain, my Lord, your Lordship's obedient servant,
FLAVELL COOK.

P.S.—Any letter addressed to my residence, Christ Church Vicarage, Clifton, will find me.

The Right Rev. the Lord Bishop of Gloucester and Bristol.

To this letter the answer was as follows:—

The Palace, Gloucester, 2nd Aug. 1874.

My dear Sir,—I hasten to acknowledge your note, dated Edinburgh, July 31. As you notify a fact rather than ask advice about a contemplated course, I cannot obtrude what is not asked; but I may still properly intimate to you my serious doubt whether, under the circumstances specified, repulsion would be sustained by a court of law. Feeling the great importance of this matter, I write at once, and am, faithfully yours,
CHARLES GLOUCESTER AND BRISTOL.

Rev. F. Cook.

The next letter in order is from the promoter to the bishop, which I presume was received after the bishop had sent the last letter to the defendant:—

3, Vyvyan-terrace, Clifton, 2nd Aug. 1874.

My Lord,—At morning service to-day Mr. Cook, the vicar of Christ Church, Clifton, has refused to administer the Holy Communion to me (through the medium of his curate). Now as I am not an open and "notorious evil liver," and as I have not denied any Article of the creed, perhaps you may think it desirable to ask him why he commits this scandal in the church, to say nothing of the particular outrage upon me? Some time ago Mr. Cook

preached two sermons, with the special object of supporting the doctrine of eternal punishment. As a parishioner, I wrote to protest against the irreligious tendency of these sermons. In the course of the controversy my disbelief in the Devil was discovered, and also that in my book, Selections from the Old and New Testaments, I had omitted those passages which seemed to favour those remarkable doctrines. I very much regret the necessity for omitting those passages, and should be delighted if some more wholesome meaning could be attached to them. I have thought it my duty to write this letter, but from what I have said your Lordship will perceive that Mr. Cook very probably considers that in treating me thus he only carries out the principles of the Church of England to their legitimate conclusion; for I believe Mr. Cook's opinions, however extraordinary, are perfectly orthodox.—I am, my Lord, your Lordship's obedient servant,
HENRY JENKINS.

The last sentence of this letter contains, I may observe, a remarkable admission. The bishop sent the following answer:—

Palace, Gloucester, 3rd Aug. 1874.

My dear Sir,—I much regret the occurrence which you specify. The Church of England has not, I believe, anywhere laid down rules relative to refusal to the Holy Communion other than those prefatory to the service and the 26th, 27th, and 109th canon. These, I gather from your letter, do not apply to your case. It might, I think, justly be inferred from the service itself, that a communicant should fully believe in the articles of the Nicene Creed. These, I conceive, you would be willing heartily to accept. If this be so, I think you have a reasonable cause of complaint; but as the matter may come before me in my court, I do not feel able at present to say more. I shall feel it my duty to attend to any further communication on this matter which you may desire to make.—Very faithfully yours,
C. J. GLOUCESTER AND BRISTOL.

In this letter it will be observed no reference is made to the letter which the bishop had received from the defendant, which had apprised the bishop of the distinct grounds of his refusal, nor to the bishop's opinion upon those grounds, nor is there any comment made upon the avowal of the promoter that he disbelieved in the existence of the Devil and in the doctrine of eternal punishment. The reply to this letter has not been produced before me. I think the bishop said it had been lost. But it is clear that the promoter had not availed himself of the bishop's suggestion that he should express his belief in the Nicene Creed, for the next letter was as follows:—

Palace, Gloucester, 13th Aug. 1874.

My dear Sir,—After careful correspondence and inquiry I find that Mr. Thomas [that is, the curate of Mr. Cook] refused you the Holy Communion, partly, because notice was not given according to the rubric, but mainly, because he regarded you to be a common and notorious depraver of the Book of Common Prayer, and of the Articles in certain special details, which he was prepared, if need be, to specify in open court or otherwise. This being alleged to be the case, and it being also doubtful from your letter to me whether you accept the creed which forms a portion of the service, I do not feel that I can personally further interpose in the matter, but should you desire it I shall be quite willing to entertain the question, if brought before me in my court.—Very faithfully yours,
C. J. GLOUCESTER AND BRISTOL.

H. Jenkins, Esq.

This letter the promoter answers as follows:—

13, Manilla-crescent, Weston-super-Mare,
14th Aug. 1874.

My Lord,—I have not alluded to the Nicene Creed except to say that I did not allude to it. The Apostles' Creed (the one placed over the communion table in Christ Church) I still think less involved and more in accordance, on the whole, with what we are told on the subject. I do not think it necessary to notice Mr. Thomas's objections, but the reason Mr. Cook refused me the Sacrament is very intelligible. In speaking to my wife, he said, "Let him tell me that he believes in the devil, and

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I will give him the Sacrament." In his opinion, therefore, this is the passport to the ordinance.—I beg to acknowledge the receipt of your letter, and am, my Lord, your Lordship's obedient servant, HENRY JENKINS. The next letter is from the bishop, and is as follows:—

Gloucester, 15th Aug. 1874.

My dear Sir,—To prevent any mistake, allow me to add that I have only to do with the clergyman who actually refused you, and with the reasons which he assigned. These I took especial care to obtain in an accurate form, and they are as stated in my last letter.—Very faithfully yours,

C. J. GLOUCESTER AND BRISTOL.

H. Jenkins, Esq.

The information to which the bishop refers is contained in two letters of Mr. Thomas, the curate, which were enclosed in a later letter, dated Sept. 16, sent by the bishop to the promoter. The two following letters continue the correspondence between the promoter and the bishop:—

8, Vyvyan-terrace, Clifton, 6th Sept. 1874.

My Lord,—Mr. Thomas has this morning again refused to give me the Sacrament. Now, whatever a "common and notorious depraver of the Book of Common Prayer" may mean as applied to a man who values the book only second to the Bible itself, the reason why I am debarred from partaking of the Holy Communion is sufficiently "notorious." It is because, forsooth, I ventured to protest against the disgusting and impious doctrines set forth by Mr. Cook in the two sermons to which I have referred. My Lord, it is a grievous misfortune if your power will not indeed allow you to check such unjustifiable and scandalous proceedings on the part of your subordinates.—I am, my Lord, your Lordship's obedient servant,

HENRY JENKINS.

Gloucester, 14th Sept. 1874.

My dear Sir,—I have just returned, after a short absence on the Continent; hence the delay in reply. I have, as I implied, either in a former letter or through Canon Mather, this grave difficulty, viz., that I do not yet clearly understand whether you do or do not heartily and *ex animo* accept the Creed which forms a part of the Communion Service. While that doubt remains I cannot conscientiously take any action. As I before said, I have been greatly pained by the whole matter.—Very faithfully yours,

C. J. GLOUCESTER AND BRISTOL.

There then appears to have been a letter from the promoter to the bishop, which was not produced before me. The next letter I have is from the bishop as follows:—

Gloucester, 16th Sept. 1874.

My dear Sir,—Excuse my saying that you do not realise the difficulties of the case. Let me state them:—First, I have nothing to do with anyone except the minister actually repelling; secondly, I learn from him, after careful inquiry, the grounds on which he does so, viz., principally, "that you were a common and notorious depraver of the Book of Common Prayer, and of the Articles in certain particulars which he was prepared to specify." This I have already mentioned to you. Whether these statements can be legally sustained I am not prepared to say. Into this, however, I had resolved not to enter, but was prepared, if I found that you accepted the creed that forms a part of the Communion Service, to direct, under the 27th canon, that you should no longer be refused, as being of honest life and conversation, and holding the fundamental articles of the Christian faith. Unfortunately, on the subject of your acceptance or nonacceptance of the creed which forms a part of the service, I do not obtain, and have not yet obtained, any such clear answer as would, in my judgment, warrant me in personally interposing and overriding the judgment of the clergyman; still I now, as previously, wish to do you all possible justice, and so add, as before, that I will entertain the question if formally brought before me in my court; the question being one of legal difficulty, whether you can be considered to come under the fair construction of the 27th canon. As I wish, in so painful a matter, to act with the fullest consideration of your feelings, I inclose Mr.

Thomas's letter, with the reasons *in extenso*. This please return to me. I am also quite willing that you should go to my friend and legal adviser, Mr. Clarke, show to him this and my other letters, and be guided by his friendly advice. I think I must have made it plain throughout how deeply I regret the whole matter. Still, I cannot and must not set aside the deliberate and reasoned judgment of one of my clergy, unless it be made more clear than it now is to me that I am morally justified in doing so.—Very respectfully yours,

C. J. GLOUCESTER AND BRISTOL.

Mr. Thomas's letters, which are part of the evidence in the suit, were enclosed in the last letter. In answer to the letter of the 16th Sept. from the bishop to the promoter, the promoter appears to have written another letter which was not produced, and then I have the following letter from the bishop to the promoter:—

Gloucester, 18th Sept. 1874.

My dear Sir,—I return the note you have kindly sent. I venture to hope that my last note may have put matters in a clear light. Mr. Cook's case will be that you, by omissions, the design of which you have admitted orally and in writing, have come under the 27th canon. Personally, I doubt much whether this would be the ruling of any competent court; but in my official capacity, especially under the circumstances I have already mentioned in a former note, I ought not to foreclose a fairly arguable case.—Very faithfully yours,

C. J. GLOUCESTER AND BRISTOL.

It appears that on the 2nd Oct. 1874, the defendant had an interview with the bishop upon the subject of his intended refusal of the Holy Communion to the promoter on Sunday, the 4th Oct., notice having been given on the 28th Sept. by the promoter, according to the rubric, of his intention to communicate on the 4th Oct. As to this interview, the bishop himself gave evidence in court, and connected with it there is a document written in pencil by him to which I will presently advert. His Lordship said that he had no memoranda of the details of the conversation, which had faded from his memory, and which he had completely forgotten. He said that to the best of his remembrance he did not give the defendant advice, but assistance; that his general impression was that the defendant said he was conscientiously bound to continue to refuse the Holy Communion to the promoter, and that he did not "collect categorically that Mr. Cook (the defendant) would obey his judgment." But upon cross-examination a document in pencil was shown to his Lordship, which he admitted both to be in his handwriting, and to have been given by him to the defendant as the answer which he would advise him to send to the promoter. The document is as follows:—

I have received your note giving me, &c. I fear it is my solemn duty now to inform you that I cannot receive you as a communicant, inasmuch as you have published a book omitting certain portions of God's Holy Word, and have given me in writing your reasons for doing so. This I solemnly believe to constitute the offence specified in the 27th canon, and believing it, I am conscientiously bound to obey that canon. My course, therefore, is clear, and I shall unhesitatingly follow it. I do, however, feel how grievous the scandal may be for such a case to come on; it must come before the courts of the country, and I do invite you to consider whether it may not be your duty so to respect the consciences of others and the general peace of the Church as voluntarily to withdraw from my congregation, and not to put me to the melancholy and painful necessity of acting as I am resolved to act if you present yourself.

This memorandum, the bishop said in his evidence, was written by him to assist the defendant in the expression of his (the defendant's) opinion. It was adopted by the defendant as his own, and sent

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with additional remarks by him to the promoter. Another letter, which I thought myself bound to admit, though marked "private," is as follows. It is dated, it will be observed, after the repelling of the promoter, an event which occurred on Sunday, Oct. 4, two days after the interview of the defendant with the bishop, and which repelling alone is made the subject of charge in the articles:—

(Private.)

Gloucester, 23rd Nov. 1874.

My dear Mr. Cook,—I have carefully thought over our short conversation, and think now that there seems to be some daylight for us all. But we must, of course, be very careful. It has occurred to me, therefore, that any part I may have had in drawing up the letter which you wrote to Mr. Jenkins, or even any approval of it, should carefully be suppressed. It will not legally aid your case, and it will make my interposition less effective. So, as much as you can, keep me out of it. I shall be more free, and more able to bring matters to a peaceful solution.—Very faithfully yours,

C. J. GLOUCESTER AND BRISTOL.

The only comment which I think it necessary to make upon these letters will be with reference to their bearing upon the point of law relied upon by the defendant, to which I will presently advert. Such being the facts of the case, I will now endeavour to discover and apply the law which is applicable to them. I think it unnecessary to enter upon a discussion of the principles of the general ecclesiastical law upon this particular subject, inasmuch as specific provisions of our church are to be found in the Canons of 1603 and in the rubrics to the present Prayer Book. It has been argued, indeed, that the rubric alone is applicable to them. But I am not of that opinion. As I have always been taught and learnt, the rubric is to be construed, wherever it is possible, so as to agree with the canons. Many authorities might be cited for this proposition; but it really seems to me one of an elementary character. In this particular instance the rubric, as it will be seen, itself refers to the canon. And with respect to the other argument, that the canons are not binding on the laity, after the decision of Lord Hardwicke in *Middleton v. Crofts* (2 Atk. 669), not to say that this proposition is too broadly stated and requires some qualification, it appears to me quite inapplicable to the present case, which is a proceeding against a clergyman in an ecclesiastical court for an offence against the ecclesiastical law. In *Martin v. Escott* (4 Moore, 104), which was referred to, but, I think, infeliciously, by the counsel for the promoter, the layman put in force against the clergyman the punishment prescribed by the canon alone for the offence; and here I may add that this case itself is one of the authorities for both propositions—namely, that the canons are binding upon the clergy, and that the rubric is to be construed with reference to them. The canons to which I think it necessary to refer are the 26th and 27th.

Canon 26. No minister shall in any wise admit to the receiving of the Holy Communion any of his cure or flock which be openly known to live in sin notorious, without repentance; nor any who have maliciously and openly contended with their neighbours, until they shall be reconciled; nor any churchwarden or sidemen, who having taken their oaths to present to their Ordinary; all such public offences as they are particularly charged to inquire of in their several parishes, shall (notwithstanding their said oaths, and their faithful discharging of them is the chief means whereby public sins and offences may be reformed and punished) wittingly and willingly, desperately and irreligiously, incur the horrible crime of perjury, either in neglecting or refusing to present such of

the said enormities and public offences as they know themselves to be committed in their said parishes, or are notoriously offensive to the congregation there; although they may be urged by some of their neighbours, or by their minister, or by their Ordinary himself, to discharge their consciences by presenting of them, and not to incur so desperately the said horrible crime of perjury.

Canon 27. No minister, when he celebrateth the Communion, shall wittingly administer the same to any but such as kneel, under pain of suspension; nor, under the like pain, to any that refuse to be present at public prayers according to the orders of the Church of England; nor to any that are common and notorious depravers of the Book of Common Prayer and Administration of the Sacraments, and of the orders, rites, and ceremonies therein prescribed, or of anything that is contained in any of the Articles agreed upon in the Convocation 1562, or of anything contained in the Book of Ordering the Priests and Bishops; or to any that have spoken against and depraved his Majesty's sovereign authority in causes ecclesiastical, except every such person shall first acknowledge to the minister, before the churchwardens, his repentance for the same, and promise by word (if he cannot write) that he will do so no more; and except (if he can write) he shall first do the same under his handwriting to be delivered to the minister, and by him to the Bishop of the diocese or ordinary of the place. Provided that every minister so repelling any, as is specified either in this or in the next precedent constitution, shall upon complaint, or being required by the Ordinary, signify the cause thereof unto him, and therein obey his order and direction.

I now turn to the rubrics prefixed to the Order of the Administration of the Lord's Supper or Holy Communion:

So many as intend to be partakers of the Holy Communion shall signify their names to the curate at least some time the day before. And if any of those be an open and notorious evil liver, or have done any wrong to his neighbour by word or deed, so that the congregation be thereby offended, the curate, having knowledge thereof, shall call him and advertise him, that in any wise he presume not to come to the Lord's table until he hath openly declared himself to have truly repented and amended his former naughty life, that the congregation may thereby be satisfied, which before were offended; and that he hath recompensed the parties to whom he hath done wrong, or at least declare himself to be in full purpose so to do as soon as he conveniently may. The same order shall the curate use with those betwixt whom he perceiveth malice and hatred to reign; not suffering them to be partakers of the Lord's table until he know them to be reconciled. And if one of the parties so at variance be content to forgive from the bottom of his heart all that the other hath trespassed against him, and to make amends for that he himself hath offended, and if the other party will not be persuaded to a godly unity, but remain still in his frowardness and malice, the minister in that case ought to admit the penitent person to the Holy Communion, and not him that is obstinate. Provided that every minister so repelling any, as is specified in this or the next precedent paragraph of this rubric, shall be obliged to give an account of the same to the Ordinary within fourteen days at the farthest; and the Ordinary shall proceed against the offending person according to the canon.

The rubric, of course, receives a legitimate construction from the service to which it is prefixed. And in that service is to be found an Exhortation, in which are the following words:—

... Therefore if any of you be a blasphemer of God, an hinderer or slanderer of His Word, an adulterer, or be in malice, or envy, or in any other grievous crime, repent you of your sins, or else come not to that holy table; lest after the taking of that Holy Sacrament the Devil enter into you as he entered into Judas, and fill you full of all iniquities, and bring you to destruction both of body and soul.

I think that hinderers and slanderers of God's Word are included in the category of evil lives specified in the rubric. It was admitted that these latter words could not be confined to persons guilty of immoral conduct. Indeed, from the con-

trary position, an obvious absurdity would follow; for, in that case a person might deny the fundamental doctrines of Christianity, and nevertheless claim his right to the reception of the Holy Communion. The law of the Church of England derived from these sources appears to have been anxiously framed to accomplish two objects—on the one hand, to impress on the parishioners the obligation of receiving the Sacrament of the Lord's Supper; on the other, to guard against the reception of it by those whose lives were not in conformity with the precepts of Christianity. It intended to secure the right of the worthy parishioner, and to protect the clergyman in the execution of his duty to repel the unworthy parishioner. In what this unworthiness consists it has stated, partly in general, partly in specific terms. But in both instances it has thrown upon the clergyman the duty of deciding whether the conduct of the parishioner desirous of partaking of the Sacrament did or did not incapacitate him from availing himself of that great but awful privilege. It placed the exercise of the discretion according to the principles of ecclesiastical law under the control and supervision of the ordinary, and upon him it cast the double duty—first, of advising the clergyman; and, secondly, if he agreed with his decision, of taking proceedings in court *pro salute animæ* against the parishioner, in order that he might be brought into a state of penitence qualifying him for the reception of the Sacrament, from which in his present condition he had been rightly repelled. The notion that a criminal layman as well as a criminal clerk is subject to ecclesiastical discipline has fallen into such comparative desuetude that this statement of the law may create surprise; but it is the law of the land. It is clear in any event, and this is the more important observation, that the clergyman is legally entitled to the advice and protection of his bishop in the exercise of this great responsibility. I think the evidence, fairly considered, shows that the defendant sought this advice; and surely, as the bishop wrote the copy of the letter which the defendant was to send to the promoter justifying and adhering to his refusal, it cannot be successfully contended that the bishop did not sanction his conduct. It does, indeed, appear that the bishop, unfortunately, I venture to think, corresponded with both parties separately, and, in his anxiety to make peace, wavered somewhat, perhaps, in the expression of his opinion, accordingly as he addressed the defendant or the promoter; but, nevertheless, the substantial result is that, if he did not, as I think he did, actually authorise the action of the defendant, he at least did not forbid it. How, then, has the clergyman offended against the ecclesiastical law as expressed either in the canons or the rubric? He had *prima facie* ground for hesitating to administer the Holy Communion. He submitted that ground to his ordinary, and either received no "order and direction" from the ordinary at all, or received an "order and direction" which he has obeyed, and in either case has discharged his duty, and ought not to be made the subject of a criminal prosecution. It was contended before me in argument that he had infringed the law in not, within fourteen days after his refusal to administer the Sacrament to the promoter, giving an account of his refusal to the ordinary, according to the provisions of the rubric. But, in the first place, this is not an offence

for which he is articleed. In the second place, I think I must consider the rubric as being on this head directory only. And, in the third place, such an account would have been nothing but the barest formality in this case, inasmuch as the bishop well knew, having been so apprised by the defendant on the 2nd Oct., that the defendant was about to refuse the Sacrament to the promoter on Sunday, the 4th, and that he had been previously refused on two occasions by the curate of the defendant, acting under his direction. Though I am of opinion that the defendant has established his first defence, for the reasons which I have stated, at the same time I do not think that I ought to shrink from the examination of the second line of defence—namely, that the conduct of the promoter furnished a justification of the action of the defendant in repelling him from the Holy Communion, as being under the canons and rubric disqualified from partaking thereof. In considering for this purpose the conduct of the promoter, I must bear in mind not only that he has, in terms, denied the eternity of punishment and the existence of the Devil, but also that he has expunged from the Bible, on the ground of their indecent and irreligious tendencies, large portions, many of which relate to other grave and important doctrines of Christianity, and among which are to be enumerated several passages containing our Saviour's own words and precepts. With respect to the absolute denial of the eternity of punishment—and here I must observe that many of the passages struck out relate not only to the eternity of punishment, but to any punishment for sin—I am of opinion that such a position is at variance with the plain teaching of the Church of England, expressed in her formularies, and especially in the Communion Service and in the Athanasian Creed. And I am further of opinion that the decision of the Privy Council in *Fendall v. Wilson* (2 Moore, P. C., N. S., 433), cannot be carried further than the passage which states the conclusion of their Lordships, and which is as follows:—"We are not required, or at liberty, to express any opinion upon the mysterious question of the eternity of final punishment, further than to say that we do not find in the formularies, to which this article refers, any such distinct declaration of our Church upon the subject as to require us to condemn as penal the expression of a hope by a clergyman, that even the ultimate pardon of the wicked, who are condemned in the Day of Judgment, may be consistent with the will of Almighty God." The expression of such a hope is a very different thing from that absolute denial of the eternity of punishment which the promoter has declared. The next subject for consideration is the denial by the promoter of the existence and personality of the Devil. What is the teaching of the Church of England in her formularies on this subject? Has she spoken ambiguously or clearly? Professing upon this as upon other points to be guided by Holy Scripture, has she treated this matter as one of importance, or the contrary. The Greek word, *διαβολος*, which occurs in the New Testament, I believe at least fifty-three times (Blunt's Dictionary of Theology, tit. "Satan"), is the usual rendering of the Hebrew word "Satan." To the signification "adversary" or "enemy" which Satan implied, the Greek word added that of "slanderer," or, literally, "one who sets at variance by means of slander." The Devil is represented in Holy Scripture as the

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spiritual enemy who slanders God to man, and man to God. I will here avail myself of, and adopt as my own the language used by a very learned person on this subject: "It would be a waste of time to prove that in various degrees of clearness the personal existence of a spirit of evil is revealed again and again in Scripture, every quality, every action which can indicate personality, is attributed to him in language which cannot be explained away" (Dictionary of the Bible, tit. "Satan.") If this be a correct representation of the account given in Holy Scripture of the existence and personality of the Devil, it would certainly be very strange if the Church of England had considered the belief in this existence and personality a matter of indifference, if indeed it had not considered such belief a necessary part of Christian teaching. I turn to her formularies, and especially to her Prayer Book, which is often and truly said to be part of a statute, for information on this point. I find it under these heads: (1) Prayer; (2) Selections from Scripture; (3) Services. I. In the prayers I find it in the Litany, the Collect after the Litany, and the Collect for the 18th Sunday after Trinity. II. As to selections from Scripture, among the most remarkable is the Gospel for the 5th Sunday after Epiphany (Matt. xiii.), containing the parable of the sower of the wheat and the tares; and it is further shown in the following passages—the Epistle for the 8th Sunday after Epiphany (1 John iii. 8); the 1st Sunday in Lent (Matt. iv. 1-12); Wednesday before Easter (Luke xii. 3); 3rd Sunday after Trinity (1 Peter v. 8); 19th Sunday after Trinity (Ephes. iv. 27); 21st Sunday after Trinity (Ephes. vi. 11); St. Michael and all Angels (Rev. xii. 9-12). III. In the particular services I find it in the following places—in the Baptismal Service, in the Catechism, in the Consecration of an Archbishop or Bishop. Lastly, I will again cite what, with reference to this particular suit, is a passage of some importance, and has been already referred to for another purpose. It is taken from the exhortation in the Communion Service: "Therefore, if any of you be a blasphemer of God, an hinderer, or slanderer of His Word, an adulterer, or be in malice, envy, or any other grievous crime, repent you of your sins, or else come not to that holy table; lest after the taking of that Holy Sacrament the Devil enter you, as he entered into Judas, and fill you full of all iniquities, and bring you to destruction, both of body and soul." It is remarkable that this striking passage is to be found in both the Prayer Books of Edw. VI. (1549 and 1552), and also in the Order of Communion of 1548. I must not omit reference to a very important formulary of the Church. In the Thirty-nine Articles there is this passage—it occurs in the 17th Article: "For curious and carnal persons, lacking the Spirit of Christ, to have continually before their eyes the sentence of God's predestination is a most dangerous downfall, whereby the Devil doth thrust them either into desperation, or into wretchedness of most unclean living, no less perilous than desperation." I think it unnecessary to travel further into a statement of the other passages of Scripture, grave and important as some of them are, which do not immediately relate to the eternity of punishment, or the existence of the Devil, and which are rejected by the promoter; because I am of opinion that the avowed and persistent denial of the existence and personality of the Devil did, according to the law

of the Church, as expressed in her canons and rubric, constitute the promoter "an evil liver" and "a depraver of the Book of Common Prayer and Administration of the Sacraments," in such sense as to warrant the defendant in refusing to administer the Holy Communion to him, until he disavowed or withdrew his avowal of this heretical opinion; and that the same consideration applies to the absolute denial by the promoter of the doctrine of the eternity of punishment, and, of course, still more to the denial of all punishment for sin in a future state, which is the legitimate consequence of his deliberate exclusion of the passages of Scripture referring to such punishment. This disqualification of the promoter to receive the Holy Communion is not, in my judgment, removed either by the fact that he has published a volume of prayers taken from our Liturgy, or that he has expressed his belief in the inspiration of Holy Scripture; nor do I stop to consider how such a declaration can be reconciled with his excision of those passages in Scripture to which I have referred. I must consider, therefore, that the second as well as the first defence is established, and I must dismiss this suit with costs.

Proctors for the promoter, *Pritchard and Sons*.
Proctors for the defendant, *Moore and Currey*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORR and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

May 28, June 3, and July 5, 1875.

MILLETT v. COLEMAN; DAWSON v. COLEMAN.

Master and servant—Claim for wages—Jurisdiction of magistrate, 30 & 31 Vict. c. 141.

The plaintiffs, journeymen painters, sued their former employer in a County Court for wages claimed upon a concluded contract of service. The defendant showed that a magistrate had on the merits heard and dismissed summonses for the same wages taken out under the Master and Servants' Act 1867. The County Court Judge refused on that ground to entertain the plaintiffs' claim.

Held, upon appeal (Field, J. dissenting), that the magistrate had jurisdiction to hear such a claim under that Act, and that the decision of the County Court Judge was right.

THESE were two actions brought in the Bow County Court of Middlesex, and there agreed to be tried together to recover two sums of, respectively, 1*l.* 14*s.* 6*d.* for 46½ hours wages at 9*d.* per hour, and 1*l.* 15*s.* 3*d.* for 47 hours wages at 9*d.* per hour.

The plaintiffs are journeymen painters. The plaintiff, Thomas Millett, resides at No. 7, Richard-street, Leonard-road, Bromley, Middlesex; and the plaintiff, John Dawson, resides at No. 68, Upper North-street, East India-road, Poplar, Middlesex.

The defendant is a builder carrying on business at Poplar, within the jurisdiction of the said court.

The said actions came on to be heard on the 9th Nov. 1874, before the judge of the said court, when counsel for the plaintiffs shortly stated the circumstances under which the said plaintiffs came before the court, but the attorney who appeared for the defendant interposed and stated that the

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matters in dispute had been already decided by the magistrate of the Thames Police Court, on the 4th Aug. last, upon certain summonses previously issued by the said magistrate's clerk at the request of the said plaintiffs respectively, and the judge of the said County Court at the request of the said defendant's attorney thereupon allowed the clerk of the Thames Police Court who had been present during the hearing of the said summonses there, and who was then in court with the book containing a record of the proceedings at the said police court, to be sworn and examined, and the said clerk proved that certain summonses had been issued from the said police court on the 29th July last under the 9th section of the Master and Servants' Act 1867 (30 & 31 Vict. c. 141), on complaint made and information laid by the said plaintiffs of non-payment of the said wages respectively now sued for, and claiming also in each case the sum of 19s. as compensation for loss of time in endeavouring to obtain payment of the said wages from the defendant, and that the said police magistrate having heard such matters of complaint, the subject of such summonses under the said sect. 9 of the said 30 & 31 Vict. c. 141 (the Master and Servants' Act 1867), and having taken evidence on both sides, determined the same by dismissing both the said summonses, and refusing to make any order thereunder.

The said judge of the said County Court thereupon gave judgment in each case for the defendant, stating that he so decided on the ground that the respective claims had been already heard and adjudicated upon by the said police magistrate under the said 30 & 31 Vict. c. 141, s. 9; but on the application of counsel for the plaintiffs the said judge reserved for the opinion of the court the following question:

Whether the decisions of the police magistrate under the said 30 & 31 Vict. c. 141, s. 9, given by such magistrate upon the hearing of the said summonses so taken out by the plaintiffs respectively, were or were not a bar to the summonses taken out by the said plaintiffs respectively in the said County Court.

If the Court of Queen's Bench shall be of opinion that the said decisions of the said police magistrate were a bar to the said summonses taken out by the said plaintiffs respectively in the said County Court, then the judgments of the court are to stand.

If the said court shall be of opinion that the said decisions of the said police magistrate were not a bar to the summonses taken out by the said plaintiffs respectively in the said County Court, then the court shall order a new trial in each of the said cases, or direct the said judge of the said County Court to hear the said two plaintiffs, and the evidence that may be adduced by the said respective plaintiffs in support thereof, and determine the matters in question between the parties in each of the said actions.

The following was contained in the second and final reports of the Royal Commission on Labour Laws, which was signed by the commissioners, the chairman of whom was Cockburn, C.J., on the 17th Feb. 1875.

At page 17: "Finally it appeared that a question had been raised whether wages could be recovered under the provisions of this Act, and that a difference of practice on this point existed in various courts in the kingdom; and that while in some districts masters were frequently

summoned under the provisions of the Act, and not questioning the jurisdiction, were ordered to pay and did pay wages due to their workmen, in others the magistrates had refused to grant summonses under this Act. We are of opinion that upon the proper construction of the Act wages can be sued for under its provisions; but we would suggest that some amendment should be made in the Act in order that this part of the law may be freed from any possible doubt."

At page 9 "It appeared from this witness (Mr. Davis) that upon the authority of the text writers who govern the practice of the magistrates, wages had never been sued for at Sheffield under this Act, but under the Act of 20 Geo. 2."

This case came on to be argued before Mellor and Quain, JJ., on Friday, the 28th May. It was then ordered to be re-argued before the full court, and was accordingly heard on Thursday the 3rd June.

Poynter, for plaintiffs, the appellants. — My proposition is that the Master and Servants' Act 1867, was intended to apply only to subsisting contracts of service. As soon as the relationship of master and servant ceases, the jurisdiction of the magistrates created by that Act ceases too. For the recovery of wages after the end of a service, the Act leaves unaltered the remedy previously existing, viz., that under 20 Geo. 2, c. 19. The case finds the summonses were taken out under this Act of 1867, therefore, unless that Act applies to these cases, the magistrates had no jurisdiction, and the plaintiff's claims ought to be heard by the County Court Judge. By the interpretation clause (sect. 2) the "employer" and "employé" are both defined to be persons who have entered into, not have concluded, contracts of service. Sect. 3 strictly limits the application of the Act to a contract of service within the Act and the enactments in the schedule. The cases to which the Act is to apply and the procedure are stated in sect. 4. "Wherever the employer or employed shall neglect or refuse to fulfil any contract of service, or the employed shall neglect or refuse to enter or commence his service according to the contract, or shall absent himself from his service, or wherever any question, difference, or dispute shall arise as to the rights or liabilities of either of the parties, or touching any misusage, misdemeanor, misconduct, illtreatment, or injury to the person or property of either of the parties under any contract of service, the party feeling aggrieved may lay an information or complaint in writing before a justice, magistrate, or sheriff, setting forth the grounds of complaint, and the amount of compensation, damage, or other remedy claimed for the breach or non-performance of such contract, or for any such misusage, misdemeanor, misconduct, illtreatment, or injury to the person or property of the party so complaining." Under this 4th section claims of this kind might perhaps be included, were it not for the omission of any remedy for non-payment of wages in section 9, which provides what the magistrates may do at the hearing. "Upon the hearing of any information or complaint under the provisions of this Act, two justices, or the magistrate or sheriff, after due examination, and upon the proof and establishment of the matter of such information or complaint, by an order in writing under their respective hands, in their or his discretion as the justice of the case requires, either shall make an abatement of the whole or part of any wages then already due to the employed, or else shall direct the fulfilment of the contract of service, with a direction to the party

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complained against to find forthwith good and sufficient security by recognisance or bond, with or without sureties, to the satisfaction of a justice, magistrate, or sheriff, for the fulfilment of such contract, or else shall annul the contract, discharging the parties from the same, and apportioning the amount of wages due up to the completed period of such contract, or else where no amount of compensation or damage can be assessed, or where pecuniary compensation will not in the opinion of the justices, magistrate, or sheriff, meet the circumstances of the case, shall impose a fine upon the party complained against, not exceeding in amount the sum of 20*l.*, or else shall assess and determine the amount of compensation or damage together with the costs, to be made to the party complaining, inclusive of the amount of any wages abated, and direct the same to be paid accordingly; and if the order shall direct the fulfilment of the contract, and direct the party complained against to find good and sufficient security as aforesaid, and the party complained against neglect or refuse to comply with such order, a justice, magistrate, or sheriff may, if he shall think fit by warrant under his hand, commit such party to the common gaol or house of correction within his jurisdiction, there to be confined and kept until he shall so find security, but nevertheless so that the term of imprisonment, whether under one or several successive committals, shall not exceed in the whole the period of three months: Provided always that the two justices, magistrate, or sheriff may, if they or he think fit, assess and determine the amount of compensation or damages to be paid to the party complaining, and direct the same to be paid, whether the contract is ordered by them or him to be annulled or not, or in addition to the annulling of the contract of service and discharge of the parties from the same may, if they or he think fit, impose the fine as hereinbefore authorised, but they or he shall not, under the powers of this Act, be authorised to annul, nor shall any provisions of this Act have the effect of annulling any indenture or contract of apprenticeship that they or he might not have annulled, or that would not have been annulled if this Act had not been passed." Sect. 11 directs recovery of money ordered to be paid by distress, "and in default thereof by imprisonment of such party, according and subject to the Acts described in the second schedule of this Act; but no such imprisonment shall be for more than three months, or be with hard labour." Amongst the enactments referred to in the first schedule is 20 Geo. 2, c. 19, "An Act for the better adjusting and more easy recovery of the wages of certain servants, and for the better regulation of such servants and of certain apprentices." That is a simple Act, with no remedy but distress, and for the purpose of such a case as this it is the only enactment now in force. The third schedule, which gives the forms to be used under the Act of 1867, contains nothing applicable to the recovery of wages for a concluded contract of service.

Grantham, for the defendant.—Although there is no express reference in section 9 to wages, the remedy there provided must be taken to include everything mentioned in section 4. It cannot be that the Legislature meant to allow a person to be summoned for an offence which the magistrate could not punish. This decision of the magistrate being within his jurisdiction, the County Court

judge could not hear the matter again: (*Roulledge v. Hislop*, 2 E. & E. 549.)

Poynter in reply.

Cur. adv. vult.

July 5.—FIELD, J.—These actions are brought in the Bow County Court by the plaintiffs, who are journeymen painters, against their employer to recover two sums for wages claimed to be due, and the defence raised was that the plaintiffs had previously summoned the defendant under the 4th section of the Master and Servants' Act 1867, and upon the hearing of that summons the magistrate having dismissed it upon the merits, the claim had become *res judicata*, and the reply to this defence by the plaintiffs was that the magistrate had no jurisdiction to entertain the matter under the statute; and that question has been stated by the County Court judge for our decision. The answer to it depends upon the construction of the Act in question, which has given rise to a very great conflict of decision amongst the magistrates who have been called upon to decide upon it, and although I find myself able to arrive at a result, I express it with great diffidence, for it neither agrees with the opinion of the eminent lawyers and statesmen who sat under the recent commission of inquiry, nor with that formed by my learned brethren on the bench. The difficulty arises from the circumstance that the Act, instead of expressly repealing that which it was desired should no longer be law, and enacting that which was to be law in future, has intended to carry out its object by reciting and scheduling seventeen Acts of Parliament, commencing in 1720, and then enacting in general terms by the 3rd section, "that in respect to all matters to which this Act applies" the "new provisions are to be substituted" for "such of the former enactments or so much and such part of the same" as would have applied thereto "if the Act now under construction had not been passed." In order therefore to see what the law now is as applied to the present case, it is necessary to ascertain whether the new Act applies to it so as in effect to repeal the previously existing provisions. Now the "employed" in the present case claim to recover a sum for wages alleged to have been earned, and not any sum for having had their service unlawfully determined, and before the passing of this Act their remedy was clear. By the 20 Geo. 2, c. 19, s. 1, upon any "complaint" by an "employed," the magistrate had power to order the payment of so much wages as he should deem just and reasonable, not exceeding 10*l.* in the case of a "servant," and 5*l.* in a case like the present, with a speedy remedy by distress on non-payment, and the only delay possible was by appeal to sessions (sect. 5), *certiorari* being taken away (sect. 6), and this remedy was made still more complete by the 4 Geo. 4, c. 34, s. 3, which gave the magistrate power to fix the period at which the wages should be paid, and more summary by depriving the master of the right of appeal. The remedy was further supplemented by Jervis's Act (11 & 12 Vict. c. 43), which is applicable to all orders for payment of money, and which gave imprisonment on default of distress. Now before considering in detail the grounds upon which I am unable to come to the conclusion that it was intended to alter these provisions in respect of the cases of wages claimed to be due as having been earned, the service being still existing, as distinguished from the claim to have compensation for the un-

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lawful determination of the employment, it will be well to see what are the cases to which the Act of 1867 clearly applies, and then those to which its provisions do not apply. Now those provisions clearly apply to cases of non-fulfilment of the contract on either side, and to misusage, misconduct, and misbehaviour of either party, for the duty to issue the summons in these "expressed" cases is expressly given by sect. 4. And appropriate remedies are given by sect. 9, supplemented by the forms set out by way of example in the third schedule, and this court quite recently, in the unreported case of *Shaw v. Alderson*, so applied the Act, although the justice, having made an order for the whole amount of wages claimed, they sent the case back to him to "determine and assess the compensation" which the employed was entitled to in the language of the 9th section. I think it seems also clear that there are certain cases to which the Act of 1867 does not apply *e.g.*, for I find no sufficient words in it to include criminal cases of purloining and embezzling materials, &c., which are expressly provided for in several of the scheduled Acts. It is, I think, also clear that the Act does apply to some "questions, differences, and disputes" between employer and employed, for I not only find those words in sect. 4, but I find appropriate forms in the schedule. I can well understand that in various trades and manufactures questions may and do frequently arise between employer and employed for the settling of which the parties might gladly invite the decision of an impartial tribunal, without either of them wishing to proceed to the extremity of determining the contract; and for such purpose these words give an appropriate relief. I think, therefore, that those words may have sufficient meaning given to them without extending them to the case now contended for, and that the employer being brought before the magistrate for such a purpose may be dealt with under some of the remedies given in sect. 9. But it is no doubt to be remarked that the words in sect. 4, that I have last adverted to, are in substance the same words as are found in 20 Geo. 2, c. 19, s. 1, under which the justices have express authority to order the payment of wages, and I cannot, therefore, deny the capacity of the language of sect. 4 of the Act of 1867 to carry that relief, and I should have concluded such to have been the intention of the Legislature if I could have found in any part of the Act any adequate expression of such intention; but instead of finding any "order to pay wages" (so clearly given in the former Act), although I do find wages mentioned in sect. 9 (showing that the Legislature was not unmindful of them), I only find them mentioned for the purpose of enabling the magistrate to deal with them by way of abatement as compensation to the master in cases of complaint by him; and the only words which have any capacity of construction consistent with the intent that the Act shall apply to the present case are the words "assess and determine the amount of compensation and damage." But these words seem to me not appropriate to the supposed object. To "assess and determine compensation or damage" are well known and appropriate words to express very different remedies from an order to pay a sum certain, and as the Legislature knew how to enact in the earlier statutes, the consequences of holding the new statutes to apply are not to be

lost sight of. By this construction the master is exposed to an order by a magistrate to any amount, and without any distinction between different classes of servants, and this is done by mere implication and without any express words indicating any such intention. It is quite true that the force of this argument is weakened by the absence of any limit in the case of "compensation or damage." But the argument derived from that circumstance, although entitled to weight, does not to my mind outweigh the annihilation of the limit and distinction between classes of employed in the other case, and I look upon the absence of that limit, in the case of a new provision, as an unintentional omission. To think otherwise would be to suppose that the Legislature intended to give to a single justice a power of thus deciding without any appeal or any power to resort to any superior tribunal (for *certiorari* is taken away by sect. 23) except by a case under 20 & 21 Vict. to an amount beyond that which it has given to a County Court judge with careful provision for an appeal. I do not say that any supposed consequences are to be taken into account in construing an Act of Parliament in cases where the intention of the Legislature is clear, but they ought to weigh in a case like the present where there is an absence of clear and express enactments. And for these reasons I come—without doubt—to the conclusion that the adjudication by the magistrate under the 9th section was without jurisdiction, and therefore no bar to the proceedings in the County Court, and that the case must be remitted to that tribunal to be heard and be determined by its merits.

BLACKBURN, J., delivered the judgment of the majority of the court (Cockburn, C. J., Blackburn and Mellor, JJ.).—In these cases the plaintiffs, journeymen painters, sued the defendant, their employer, in the County Court for wages. The defence set up was that the plaintiffs had summoned the defendant before a police magistrate under the Master and Servant Act 1867, for the same cause, and that he had, after hearing the evidence, determined on the merits against them, and so the matter was *res judicata*. The County Court Judge, on this being proved, gave judgment for the defendant. And on appeal the question stated for the opinion of this court is whether the decision of the police magistrate under the 30 & 31 Vict. c. 141, s. 9, upon the hearing of the summonses so taken out by the plaintiffs respectively, were or were not a bar to the summonses in the County Court. It was not contested on the argument before us that if the police magistrate had jurisdiction his decision on the merits was a bar; but it was contended that the plaintiffs had made a mistake in going before him, as it was alleged that justices have no jurisdiction under the Master and Servant Act 1867 (30 & 31 Vict. c. 141) against an employer on a question as to wages. I now proceed to give my reasons for the opinion I have formed. The statute 20 Geo. 2, c. 19, enacted that after the 25th March 1747, "all complaints, differences, and disputes that shall happen or arise" between masters and mistresses and (*inter alia*) "artificers and handicraftsmen" (words which include journeymen painters) "shall be heard and determined by one or more justice or justices of the peace." It then gives the justices power to examine witnesses on oath, "and to make order for payment of so much

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wages to such servant," as to the justices seem just, so that the sum in question does not exceed 10*l.* to a servant in husbandry, or 5*l.* to an artificer, &c. And against this order there is an appeal given to the Quarter Sessions; but by a subsequent Act, 4 Geo. 4, c. 34, s. 5, the appeal to Quarter Sessions is taken away. This Act is extended by 10 Geo. 4, c. 53, to all persons engaged in the several manufactures, &c. mentioned in 17 Geo. 3, c. 56, that is, almost if not quite every manufacture carried on in England. It is clear from the provision that the justice might make an order for the payment of wages (not exceeding 10*l.* or 5*l.*) that the Legislature meant to include disputes as to wages in the general words "complaints, differences, and disputes that shall happen or arise." The order made by the justices to pay money is made by Jervis's Act (11 & 12 Vict. c. 43), enforceable by distress, or in default of distress by imprisonment as a debtor. Such having been the state of the statute law, as to the power of justices to decide summarily complaints as to wages, when the 30 & 31 Vict. c. 141 came before the Legislature, we have to see how it was altered. The Legislature inserted in a schedule seventeen different statutes, amongst which we find 20 Geo. 2, c. 19; 14 Geo. 4, c. 34; and 10 Geo. 4, c. 52. It then by sect. 3 enacts that "nothing in this Act shall apply to any contract of service other than a contract within the meaning of the enactments in the first schedule, or some or one of them," "or to anything arising between employer or employed other than things to which the said enactments respectively apply." These words, it may be observed, are negative only, and though it may be conjectured that it was intended that the new legislation should extend to all things mentioned in the enumerated Acts, that intention is not expressed. It seems, however, clear that the case of an artificer or handicraftsman, suing his employer for wages, is within 20 Geo. 2, c. 19, and therefore that case is not excluded by the negative part of sect. 3. Sect. 3 then proceeds "and in respect of all things to which this Act applies the respective provisions of this Act are hereby substituted for such of the enactments as would have applied if this Act had not been passed." This leaves open the question whether this Act applies to a suit for wages; but, if it does apply, it makes an important change in the remedy. For under 20 Geo. 2, c. 19 the remedy for an artificer was to obtain an order for the payment of a sum not exceeding 5*l.*, enforceable under Jervis's Act. If this Act applies, the artificer may obtain an order for the payment of the amount of compensation, together with costs, without any limit as to the amount. And this absence of any limit, I think, is the only difference in the jurisdiction of the justice under the one Act or the other. For there is no appeal under the present Act (see sect. 22), and any order under it is expressly enforceable under Jervis's Act. I do not think that this change is at all unreasonable, for 5*l.* is now a much lower limit than it was in 20 Geo. 2 (1747). And, though it is argued that the effect is to give the justice jurisdiction exceeding that of the County Court, I think the possibility of a dispute arising as to wages involving 50*l.* is too remote to have been in the contemplation of the Legislature. *In ea quæ frequentius accidunt præveniant jura.* The change is evidently in favour of the artificer, who has the election whether he will sue in the County

Court or in the Superior Court, or take the cheap summary proceeding, which is final; but it is a change such as employers cannot reasonably object to, as it only puts the employed on the same footing as the employer, who may apply for an order for compensation without limit as to amount. I now proceed to consider the question whether this Act does apply to a complaint that wages are unpaid, to which under his contract the artificer alleges he has a right, the master alleging that he is not liable to pay them. That depends on the true construction of sects. 4 and 9. Section 4 enacts that wherever the "employer or employed" shall neglect to fulfil any contract of service, or "when-ever any question, difference, or dispute shall arise as to the rights or liabilities of either of the parties," the party aggrieved may lay a complaint, and obtain a summons returnable before two justices or a magistrate. The words here used of "question, difference, or dispute which shall arise" are almost identical with those used in 20 Geo. 2 c. 19, viz., "complaints, differences, and disputes which shall happen or arise;" and as the words of 20 Geo. 2 c. 19 clearly embrace a dispute as to wages, I think in this Act similar words should be construed in a similar way. Besides, it seems to me that in their natural grammatical sense the words are applicable to a question whether the servant had a right to receive payment of a sum alleged to be earned under the contract, and whether the employer was liable to pay the same. And I have not been able to discover any reason why disputes as to wages should be excluded from the summary operation of this Act. So far the Act, though certainly ill drawn, is, I think, not worse than usual. It requires a person seeking to understand it to peruse and understand seventeen Acts of Parliament, and when this troublesome task is performed the meaning of the Legislature in this Act is not so clear as it might easily have been made. But the Act so far is intelligible, and uses language which, I think, shows an intention to embrace this case. But now comes sect. 9, which is so penned as to raise the doubt in this case. It would be obviously perfectly nugatory to bring an employer before the magistrate on a complaint by the artificer, unless the magistrate has power given to him to make and enforce a decision against the employer. Now, sect. 9 enacts what different things the magistrate may do, and it is contended that no one of those things will apply to such a complaint as this. It is argued (I think quite correctly) that, however clearly the earlier part of the Act may seem to indicate an intention to enable the magistrate to bring the employer before him on such a complaint, it must be disregarded if it appears clearly that the magistrate can do nothing with him when he appears. But, on the other hand, if the Legislature have (as I think they have) expressed an intention to bring the employer before the magistrate, the clause which enacts what the magistrate is to do ought to be understood (if the words will bear it) in such a sense as to enable the magistrate to do something with the employer when brought before him. I do not say that the words are to be strained, but only that they are to be so construed if they will bear that meaning. Now, sect. 9 says the magistrate "either shall make an abatement of the whole or part of the wages then already due to the employed," "or else shall direct the fulfilment of the contract," "or else shall annul

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the contract, discharging the parties from the same, and apportioning the amount of wages due up to the completed period of such contract," "or else, where no amount of compensation or damage can be assessed, or where pecuniary compensation will not, in the opinion of the magistrate, meet the circumstances of the case, impose a fine not to exceed 20*l*." So far the provisions (though some of them are such as might be applicable against an employer) are such as to show that the person framing them had in his mind that which is no doubt the common case, where the employer is complainant, and the employed defendant; but then it goes on "or else shall assess and determine the amount of compensation or damage, together with the costs to be made to the party complaining, inclusive of the amount of any wages abated, and direct the same to be paid accordingly." This in terms is applicable to the party complaining, whether that party be the employer or the employed; it contemplates that the employer may be the party complaining, in which case the benefit he may receive from the abatement of wages, if any, is to be taken into account; but it is not confined to such cases; and it certainly seems to me that the language in its ordinary sense expresses what would be a proper judgment on a question raised as to whether the complainant, being an artificer, had a right under the contract of service to wages, the liability to pay which was denied by the employer. It was objected on the argument that the apt and proper words in such a case would be to authorise a magistrate to order the payment of the wages, instead of authorising him to assess the damages sustained in consequence of the non-payment. I am not sure that the suggested words would be more appropriate than those used. In the courts of common law the party who had earned wages might either sue for the wages as a debt and recover the amount, or bring an action of assumpsit, and recover the same sum, as damages for the breach of contract in not paying them. But I think it enough that the form of words used is sufficient to embrace the case, which, for the reasons I have given I think the Legislature had in contemplation. I think the judgment in the County Court was right, and should be affirmed.

Judgment for defendant.

Attorney for plaintiff, *E. J. Anning.*

Attorneys for defendant, *Wood and Hare.*

V.C. BACON'S COURT.

Reported by F. GOULD and H. L. FRASER, Esqrs.,
Barristers-at-Law.

June 8, 9, and 10, 1875.

THE ATTORNEY-GENERAL v. THE HACKNEY LOCAL BOARD.

Nuisance—Watercourse, pollution of—Sewer—Injunction—The Metropolis Local Management Amendment Act 1862 (25 & 26 Vict. c. 102), s. 106—Notice—Costs.

The fact that a watercourse is the natural drain of a district, and is polluted to some extent—but not so as to be a nuisance or to prevent a qualified enjoyment of it—by the sewage of some of the houses on its banks flowing or draining into it, does not entitle a local board of health to treat it as a

common sewer, and to connect other sewers with it so that it becomes a public nuisance.

It is unnecessary, before instituting proceedings in the Court of Chancery for an injunction to restrain a local board of health from continuing a nuisance, to serve the notice required by 25 & 26 Vict. c. 102, s. 106; such notice refers only to proceedings at law.

In answer to a bill filed against a local board, to restrain them from polluting a watercourse, they contended—which contention failed—that the watercourse was a sewer, and, as such, was vested in them under certain statutes, and claimed the right to treat it as a common sewer. They also pleaded that the bill was filed without any notice or complaint to them, and that before bill filed, they had commenced and were constructing a scheme of drainage which would entirely remove the nuisance, and that the plaintiff, although informed of these facts, and offered every facility for inspecting the works, persisted in bringing the suit on to a hearing.

Held, that the defendants must nevertheless pay the costs of the suit.

THIS was an information at the relation of J. M. Yetts to restrain the Hackney Local Board from polluting a watercourse, which bordered his property, by discharging sewage into it.

The bill stated that Joseph Yetts was and had been for many years the occupier of a messuage, called Marsh House, and eight acres of land, and also the proprietor of several freehold properties in Homerton of which the occupiers had cattle rights on Hackney-marsh. That the plaintiff's eight acres of land were bounded on the east and south by a natural watercourse or brook called the Marsh Brook.

That the Marsh Brook in 1855 took its beginning near Leas' Dock on the River Lea, and was also supplied with water from the natural drainage of the land through which it flowed. It ran through Hackney-marsh, passed the premises of the plaintiff, and, in 1855, emptied itself into the River Thames.

That by the Metropolis Local Management Act 1855, the sewers situate within the Hackney District, which in 1855 were vested in the Metropolitan Commissioners of Sewers with the rights and incidents connected therewith under sect. 68 of the same Act, became vested in the Hackney Local Board of Works.

That no right or interest in the Marsh Brook was vested in the Metropolitan Commissioners of Sewers, and therefore the defendants never acquired any right or power over it.

That the Marsh Brook in 1855 contained clean wholesome water in which there was a great quantity of small fish, and that the cattle on Hackney-marsh would drink the water, and that the plaintiff by virtue of his occupation of Marsh-house and otherwise was entitled to a cattle right or right of turning cattle into the Hackney-marsh, which abuts west on the Marsh Brook and also the use of the water of the brook for the cattle.

That since 1870 the water in the brook became less clear, and had gradually become dark and thick, the fish deserted it, and the cattle were unable to drink the water, and that latterly the water had become a black fluid loaded with sewage matter and human excrement emitting a most offensive smell so that the plaintiff and his family, and other residents in the neighbourhood, had

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suffered extremely from the bad smells proceeding from the brook which were a nuisance and injurious to public health.

That the first connection of any of the defendants' sewers with the Marsh Brook was in 1870, when they turned a sewer from Buccleugh-terrace, Upper Clapton, into the Marsh Brook, and that since that time they had made or permitted the connection or drainage of other new drains and sewers under their control into the Marsh Brook.

That the defendants by their acts had rendered the contents of the Marsh Brook as bad as those of any common sewer, and the plaintiff prayed for an injunction to restrain the defendants from turning or carrying any sewage matter into the Marsh Brook, or permitting any new sewer or drain to communicate with any existing sewer which had its outfall into the Marsh Brook; from treating the Marsh Brook as a sewer under the powers of any Act of Parliament, and from covering it over or preventing the access of the plaintiff and other persons having a right to turn cattle on Hackney-march to it; and from continuing the connection of any sewers under their control with the Marsh Brook to be fouled by any sewage matter.

The defendants, by their answer, admitted that the plaintiff's property was bounded by a natural watercourse, but alleged that such watercourse was not a brook, but a sewer, and was then and had been for more than twenty-six years past, called the Marsh Sewer, and was never known as the Marsh Brook; and that the sewer never emptied itself directly into the River Thames, but in 1855 emptied itself into the Hackney Brook sewer which emptied itself into the River Lea, and the River Lea emptied itself into the River Thames. They asserted that the Marsh Sewer had always from a long time previous to the year 1843 been and been treated as a common sewer, and that under the 11 & 12 Vict. c. 112 it was a sewer vested in and under the management and control of the Metropolitan Commissioners of Sewers, who had acquired and exercised rights and interests in and over it accordingly. That in the year 1843 the then Commissioners of Sewers made a survey of their district the result of which was embodied in a map, and that in such map the Marsh Sewer along its whole course was marked as a sewer under their jurisdiction; and that under and by virtue of the Metropolis Local Management Act 1855, s. 68 the Marsh Sewer became vested in them and they acquired right and power over the same as being a sewer at the date of the Act. They also alleged that the Marsh Sewer was, in fact, the proper outfall sewer of the district through which it flowed, and admitted that they had constructed or permitted other drains to be connected with it, and insisted that they had a right to drain any sewer under their control into it. They admitted that the sewer was at times a nuisance, but denied that it was injurious to health, and claimed the right under the powers vested in them by the Act of Parliament to treat it as a sewer within their jurisdiction by covering it over, or to prevent the access to it by the plaintiff and his cattle. They submitted that notice under sect. 106 of the Metropolis Local Management Act 1862 ought to have been served on them previous to any proceedings being instituted against them. They asserted they had lately adopted and were carrying out with all reasonable dispatch a scheme for the con-

struction of a sewer by which the nuisance complained of would be completely removed, and which would not involve the covering of the Marsh Sewer or the prevention of the access to it of the plaintiff or of his or other persons' cattle; that such scheme had been adopted and commenced before the filing of the bill, and that the suit had been instituted without any previous notice or complaint to them; that as soon as they were served with the bill their solicitor wrote and informed the plaintiff of the scheme which they were carrying out, and offered him all reasonable opportunities of inspecting the works, and satisfying himself of the progress they were making, and suggested, in order to prevent any further litigation, that some arrangement should be come to, but that the plaintiff, however, insisted on continuing his proceedings.

Kay, Q.C. and E. C. Batten, for the plaintiff, the relator, referred to 28 & 29 Vict. c. 75, ss. 10, 11, and contended that the defendants were bound not only not to pollute the Marsh Brook, which the evidence clearly proved to have been a stream of natural drainage, but to protect it. The acts of the defendants amounted to an injurious nuisance, and the plaintiff was entitled to an injunction. They cited

Reg. v. Godmanchester Local Board, L. Rep. 1 Q. B. 228;

Res v. White, 1 Burrows 333;

The Attorney-General v. The Corporation of Leeds, L. Rep. 5 Ch. App. 583; 22 L. T. Rep. N. S. 330.

Eddis, Q.C. and J. M. Solomon, for the defendants, contended: First, that the Marsh Brook was and always had been a sewer, and had as such become vested in the defendants under 11 & 12 Vict. c. 65 and 18 & 19 Vict. c. 120; secondly, that before instituting any "proceedings" the plaintiff was bound under 25 & 26 Vict. c. 102, s. 106 to give the defendants a month's notice, *Poulsom v. Thirsk*, L. Rep. 2 C. P. 449; (a) thirdly, that the bill was filed without any such notice, and after steps had been taken to make works, now nearly

(a) The Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), s. 106 provides: That no writ or process shall be issued out, against, or served upon, and no proceeding shall be instituted against, the Metropolitan Board of Works, or any vestry or district board or their clerk, or any clerk, surveyor, contractor, officer, or person whomsoever acting under their or any of their directions, for anything done or intended to be done under the powers of such board or vestry under the Acts in the said Act now in statement referred to, or the said Act now in statement, until the expiration of one calendar month next after notice in writing shall have been served upon such board or vestry, or, where the action or proceeding shall be against such officer or other person acting under their or any of their directions, shall have been delivered to him or left at his office or place of abode, stating the cause of action or grounds of the proceeding or demand and the name and place of abode of the intended plaintiff or claimant or of his attorney or agent in the cause or proceeding, and upon the trial of any action the plaintiff shall not be permitted to go into evidence of any cause of action except such as is stated in the notice so served or delivered, and unless such notice be proved the jury shall find for the defendant, and every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards, and every such action shall be laid and tried in the county or place where the cause of action accrued, and not elsewhere. And the defendant shall, in any such action, be at liberty to plead the general issue, and give the said Acts referred to in the said Act now in statement, and the said Act now in statement, and all special matter in evidence thereunder.

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THE ATTORNEY-GENERAL v. THE HACKNEY LOCAL BOARD.

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completed, which would entirely remove the nuisance complained of, and that the plaintiff, by persisting in his suit after the offer contained in the answer, was not entitled to any costs.

No reply was called for.

The VICE-CHANCELLOR.—I think that the plaintiff has established his title in this case, and I think that the Attorney-General has shown his right to institute this suit. I am disposed to mention, in the first instance, the objection that the notice required by the Act of Parliament in the cases there mentioned, and for the purposes for which that clause was introduced into the Act of Parliament, has no application whatever to the case before me. The policy of the law is that if these public bodies, entrusted with powers for public purposes, in the course of exercising those powers, commit any inadvertence or irregularity or wrong, before anybody has a right to require payment from them in respect of that wrong, they shall have an opportunity of setting themselves right, they shall have the period of a month for the purpose of making amends, or for restoring, if they have taken away anything, and of paying for, if they have done, any damage. That is the meaning of the clause. But what is there in it which excludes the authority of the Court of Chancery? Giving to any proceedings contemplated by the clause or giving to any proceeding the widest signification which anybody desires, what has that to do with the speedy remedy which the law gives to a man who complains of an injury which can best be redressed by an injunction? If he were to wait for a month, the wrong of which he complains might become irreparable. The use of an injunction is to restrain a wrong which is in progress, something which is threatened, and, although in this case, there has been no application for an interlocutory injunction, that is because of the nature of the defence which is set up by the defendants' answer, because they plead that they have a certain right. The common law case to which Mr. Eddis referred is a plain illustration of what I am saying. There an action was brought against a contractor of the Metropolitan Board of Works, for damages sustained by reason of his negligence in executing certain works. He had mistakenly constructed the works, the consequence of which was that water flowed in to the injury of the plaintiff. There was no ground for an injunction—the thing was done. It would be the first time that any such objection has succeeded, not the first time it has been raised, if I held that where a man has an equitable title to the interposition of this court by way of injunction, the speedy present remedy that is provided here, he is prevented from asserting that right because the Act of Parliament says "that before an action, or any other proceeding," and the other words contained in that Act, "A month's notice shall be given" before the plaintiff is allowed to open his mouth or to utter anything aloud. I think that contention cannot be sustained. Then, as to the main part of the case, it seems to me to be a very reasonably plain one. This is unquestionably a watercourse. I call it by that name not to insist upon it—it may be called a sewer, if anybody likes to give it the name of a sewer; that would not alter the nature of the thing—issuing from the River Lea, and proceeding in the course described upon the plan, passing by, and surrounding a field belonging to

the plaintiff, and for years it is proved by unquestioned evidence that the watercourse contained pure water—not the most pure water that could be got, there may have been some drains from houses into it, and probably there were—but for years it continued in such a state of purity that it was nothing like a public nuisance. It was useful for the cattle, who had a right to drink of it; and it was enjoyed by the persons whose lands bounded either side of it. Of late years its character has been totally changed. About five years ago the whole of the sewage of a place called Buccleuch-terrace was turned into this water, turned into it with the sanction and by the authority of the Commissioners of Sewers by the present local board of health. The effect of that is described by the reports which were made to the local board of health by their officers. One of them calls it an elongated cesspool, I believe, and another says that it is foul and filthy to the last degree. Those are their own words, not the plaintiff's. That is the state in which the plaintiff found it, when, years having passed, and every day, perhaps every hour, adding to the inconvenience, at last it becomes insufferable. Then he files his bill, not before; and it is said because the Act of Parliament gives to the local board of health all authority over all sewers, as it does unquestionably, the local board of health would have power to say how the drainage shall be effected. But what power have they under the Act of Parliament or in common sense or common justice to say that, because more houses have been built in the district, they will add to the nuisance and injury already experienced and permit anybody who builds houses upon the bank to drain the drains into the watercourse. That is not the meaning of the Act of Parliament. That is not an exercise of the powers which the Commissioners of Sewers have. I am not desirous to limit their powers in the slightest degree, for the Legislature has decided that they shall have very extensive powers, yet the Legislature has not decided, and the law will not countenance, the proposition which indeed has not been argued on the part of the defendants, that whatever their power may be it may authorise them to commit a nuisance. I have it from the defendants themselves that by the conduct which they have thought fit to pursue, possessing all these powers, they have made an elongated cesspool above the plaintiff's premises, and have reduced it to a condition of foulness and filthiness. Is the law of this country such as to compel a man to submit to that, and is he to be deprived of the right to the enjoyment of the water more or less pure in the stream? It is said that the commissioners have such powers (and they are made judges upon the subject no doubt) that if they find that the sewers are in any case a nuisance they can cover them up. That is a remedy which does not apply to the present case, for whether this be called a sewer, as the defendants call it, or whether it be called a brook, as the plaintiff calls it, you cannot sever its character of watercourse from its character of sewer. You cannot, by calling it a sewer, deprive people of rights they have already acquired. That is what the defendants have done in this case; and, on that point, it is not the least remarkable that the defendants' witnesses, who insist on calling it a sewer, put in evidence a map

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which describes it as that which is a sort of continuation of, or which falls into, the Hackney Brook. That is called the Hackney Brook, but for the purposes only of their present contention is called the Marsh Sewer. Whether it is called the Marsh Sewer or not, in my opinion, is of no kind of consequence. I think that the plaintiff is entitled to the relief which he asks to prevent the defendants, who have the powers of dealing with the sewage in any way they think fit according to law, provided they do not commit a nuisance, from continuing that which they themselves say and prove is a very foul nuisance. I think the plaintiff has also a clear right to prevent them draining from any houses which may hereafter be built. That is the relief which he asks for by the bill. The defendants have put in an answer in which they insist on their legal rights. They say that they have done nothing that the court ought to restrain them from doing, or for which the plaintiff can have any ground of complaint. If he chose to bring the cause to a hearing in that state, in my opinion, their complaint that they had not notice of the intention to file his bill loses all its point and force. I think, therefore, upon the whole, that the injunction must go as it is asked. Considering what is in evidence before me as to the state of the works, by which I understand the nuisance has been entirely cured. I am inclined to let the operation of this injunction be suspended for any time that seems to be reasonable, excepting only the injunction which prevents them from making any new communication. As to the costs of the suit it seems to me only reasonable that the defendants should pay those costs. It would be highly unjust that the plaintiff with such a cause of complaint as he alleges and proves, met by such a defence as has been set up against him, should have to bear the burthen of that litigation out of his own pocket.

Solicitor for the plaintiff, J. M. Yetts.

Solicitor for the defendant, R. Ellis.

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

April 26 and May 26, 1875.

REG. v. CHANTRELL.

Prevention of Cruelty to Animals Act 1849 (12 & 13 Vict. c. 92), s. 26—Certiorari.

A writ of certiorari cannot issue to bring up and quash an order of sessions affirming a conviction, subject to a case for the opinion of a Superior Court, where the certiorari is taken away by the Act under which the conviction proceeded.

THE appellant was convicted before justices under the Prevention of Cruelty to Animals Act 1849 (12 & 13 Vict. c. 92), and the conviction had been affirmed by the quarter sessions, subject to a case for the opinion of this court, and a writ of *certiorari* had been issued for the purpose of bringing the case before the court. A rule had been obtained to supersede the writ, on the ground that sect. 26 of the Act absolutely prohibited its issuing.

12 & 13 Vict. c. 92. s. 26, provides: "That no conviction made under the authority of this Act, nor any order, judgment, or proceeding relative thereto, shall be quashed for want of form, or be

removed by *certiorari* or otherwise, into any of her Majesty's Superior Courts of Record."

Lord showed cause.

Waddy, Q.C. supported the rule. The following cases were referred to:

Reg. v. The Justices of Middlesex, 8 D. & R. 117;*Reg. v. Boulton*, 4 A. & E. 498;*Reg. v. Thomas*, 7 E. & B. 399;*Reg. v. Dickenson*, 7 E. & B. 831; 26 L. J. 204, M. C.*Curr. adv. vult.*

May 26.—The judgment of the court (Blackburn and Field, JJ.) was now delivered as follows by

FIELD, J.—The rule obtained in this case was to supersede a writ of *certiorari*, *quia improvide emanavit*. The *certiorari* was for the purpose of bringing up to quash an order of the Justices of Sussex in Quarter Sessions, whereby they conditionally confirmed a conviction of the appellant under the Prevention of Cruelty to Animals Act (12 & 13 Vict. c. 92), subject to a case for the opinion of this court. The writ of *certiorari* was issued for the purpose of bringing the case before the court. The objection to it was, that such a writ was absolutely prohibited by the 26th section of the Act, and could not issue even for this purpose, and we feel ourselves bound to yield to the objection. The form of the commission of the peace, which gives the justices jurisdiction, appears never to have been altered from the first. It is found in Latin, as it originally issued in Dalton's Justices of the Peace, p. 17, and in English, as it is now issued in Dickinson's Quarter Sessions, p. 59, and it contains the following proviso:—"Provided always that, if a case of difficulty, upon the determination of any of the premises before you, or any two or more of you, shall happen to arise, then let judgment in no wise be given thereupon before you, or any two or more of you, unless in the presence of one of our justices of either bench, or of one of our justices appointed to hold the assizes in the aforesaid county." This not merely empowers, but requires the justices, in any case of difficulty, to obtain the opinion of a judge, and by implication requires the judge to give his opinion. We can find no traces of the manner in which the presence of a justice of either bench at the sessions was ever obtained. The justices of the peace are required to attend at the assizes, which, in early times, was not, as it now is, a mere form; and there could be no practical difficulty in obtaining the presence of a justice of the bench so long as the pressure of business was not so great as to prevent his having time to attend to the sessions business. A practice, however, seems to have arisen, by which, instead of adjourning the sessions to the assizes, and then deciding the case which the justices thought of difficulty, in the presence of the judge of assize, the sessions stated the case on which they found difficulty, in writing, and decided it according to the opinion of the judge of assize given upon that case, and we find traces of this practice being resorted to as late as the year 1734, but it was probably attended by inconveniences, which led finally to its disuse in favour of the practice with which we are now familiar, of deciding the appeal conditionally, and subject to the opinion of this court, upon any question of law stated by the justices upon a case reserved by them. We cannot discover the time when this modern practice became established. It appears from an

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Anonymous case (2 Salk. 486), that, as early as Hilary Term 11 Will. 3, an attempt was made to reserve a case for the opinion of the Court of King's Bench, but that court refused to entertain it, and remitted it to the judge of assize. This was in the time of Lord Holt. It appears from the discussion in *Reg. v. Tedford* (Burr. S. C. 57), that in the time of Lord Hardwicke the modern practice existed, but had not completely superseded the old practice. In Nolan's Poor Laws (the first edition of which was published in 1807), the practice of stating a case for the King's Bench is mentioned as having completely superseded the old practice of obtaining the opinion of a judge of assize. The question whether a case was one of difficulty or not, fit to be reserved for the court, was to be determined by the sessions, and not by the parties; but if they found it one of difficulty, and stated a case for the opinion of the court, then it became necessary that a *certiorari* should issue to bring that case before the court, that being the only mode by which the order could be brought into the court having jurisdiction to quash or confirm it. But there can be no doubt that a great many orders, good and valid, and worthy to have been upheld on the merits, were often quashed for some technical defect in an age in which technical and formal objections prevailed more than they, happily, do now, and hence it became common to insert in statutes and provisions that orders or convictions under these Acts should not be quashed for error in form, or removed by *certiorari*. We think it could hardly be the intention of the Legislature that a provision so directed, and properly directed, against objections of a technical and formal character, should extend to exclude the jurisdiction of the court to entertain any substantial question of law which the justices themselves are desirous of raising, this result being arrived at solely in consequence of an enactment prohibiting the putting in force of the formal machinery necessary for the purpose of bringing up the order from the court below; and if it were *res integra*, we should be much inclined to hold that writs of *certiorari*, issued for the purpose of bringing up a case stated by the sessions, were impliedly excepted from such enactments. But as far back as 1770, when the practice upon questions of bringing up cases was more recently established, the Court of Queen's Bench (Lord Mansfield being present) held that their jurisdiction was excluded by a similar provision in a Turnpike Road Act: (*Reg. v. Micklethorpe*, 4 Burr. 2522.) Again, in the more recent case (cited during the argument) of *Reg. v. The Justices of Middlesex* (*ubi sup.*), the same result was arrived at, and the rule was formally recognised in the subsequent case of *Reg. v. Dickenson* (*ubi sup.*), although the judgment was given upon another ground. We are, therefore, clearly bound by this long-standing judicial construction of the provision in question to hold that we had no power to issue the writ in this case. It is, however, right to remark that Lord Kenyon in his day expressed an opinion that the practice of taking away the *certiorari* by statute had then become too frequent; and it does appear to us that the attention of the Legislature should be specifically directed to the question whether it is desirable to give this extensive effect to the clause prohibiting the *certiorari*, or whether the legislation adopted in sub-sects. 107 & 108 of the General Highway Act (5 & 6 Will. 4, c. 50), might not be

extended to all Acts in which the *certiorari* is taken away, so as to provide a convenient mode of having any substantial question of law upon which the justices have doubts settled by the highest authority. In the language of Erle, J., in the last cited case, we think that the restoration of this use of the *certiorari* would be a "salutary addition to the laws." Upon the argument of the rule, it was contended on behalf of the defendant that whatever might be the effect of the 26th section in excluding the jurisdiction under this Act, the writ of *certiorari* in question having been issued with the consent of the counsel for the informant could not now be quashed. Even, however, had there been express consent of the parties, we are at a loss to understand how such consent could operate to give this court a jurisdiction which the Legislature has in express terms prohibited its having. It is true that in the case of *Reg. v. Dickenson* (*ubi sup.*), the court did express an opinion in a similar case, in compliance with the consent and wish of the parties, but this, if it can be justified at all, can only be so on the ground that the party there was precluded from raising the objection after having procured the case to be stated. In the present case the informant cannot be so estopped, as it appears that his counsel, at the hearing of the appeal, objected to any case being stated, relying expressly on the 26th section, and cannot, therefore, in any view be said to have procured it to be stated. It is very unfortunate that the sessions should have disposed of this appeal, subject to the opinion of this court, on a case which cannot be brought before it. What the effect of this is must be considered by the parties. It is not the question now before us. We can only say that the rule to quash the *certiorari* must be made absolute.

Rule absolute.

Attorney for the prosecution, A. Leslie.

Attorney for defendant, H. J. Lynch.

COURT OF COMMON PLACES.

Reported by ETHERINGTON SMITH and J. M. LELY, Esqrs.
Barristers-at-Law.

Monday, May 24, 1875.

PRENTICE v. LONDON, LONGHURST, AND OTHERS.

Building society—Assignee of shares—Refusal of trustees to admit assignee as member—Action by assignee—Plea of arbitration clauses—Whether jurisdiction of court ousted—10 Geo. 4, c. 56 s. 27—6 & 7 Will. 4, c. 32, ss. 1, 4.

Where an assignee of shares in a building society, established under 6 & 7 Will. 4, c. 32, claims to be admitted as member on the ground of the assignment, and the trustees of the society refuse to admit him, the question of his right to admission may not be referred to arbitration so as to oust the jurisdiction of the courts.

The defendants were the trustees of a building society, established under 6 & 7 Will. 4, c. 32, which incorporated 10 Geo. 4, c. 56, so far as applicable to building societies. By sect. 27 of the latter Act it is provided that "provision shall be made by one or more of the rules" of such societies "specifying whether a reference of every matter in dispute between any such society and any individual member thereof, or person claiming on account of any member," shall be made to justices of the peace or to arbitrators to be appointed in

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manner thereafter directed," and one of the rules of the defendants' society provided that "should any dispute arise respecting the construction of either these rules, or any alterations thereof" or on any ground whatever which would affect the interests of the society "between any of the trustees and any member of the society, and which could not be satisfactorily settled by the board of management," such dispute shall be referred to arbitration in manner thereafter mentioned.

F., being secretary of the defendants' society, borrowed 200l. of the plaintiff, and having transferred to him certain shares in the society by way of security for the loan, afterwards decamped owing a sum of 400l. to the society, whereupon the society (which had had no notice of the transfer) declared the transferred shares cancelled, and refused to admit the plaintiff as member. The plaintiff then sued the defendants as trustees for refusing to admit him, and the defendants set up the defence that the dispute between them and the plaintiff was such a dispute as ought to have been referred under 10 Geo. 4, c. 56, s. 27, and the rule made pursuant thereto.

Held, that such section had no application, and the plaintiff having been nonsuited at the trial, a rule to enter a verdict for the amount borrowed by F. made absolute.

DECLARATION against the defendants as trustees of a benefit building society called the Albion Mutual Benefit Society that before the happening of the grievances thereafter mentioned one A. C. Foote was a member of the society aforesaid, and possessed of certain shares therein, which shares he was entitled to assign and transfer according to the regulations of the said society, and that while he was so possessed thereof, and before he had done anything to disentitle himself therefrom, he had transferred the same to the plaintiff for value to hold the same, subject to the payments and regulations prescribed by the said society, and the plaintiff agreed to accept and did accept the same subject to the said payments and regulations.

Averment of performance of conditions precedent.

Breach that the defendants did not nor would pay certain large sums of money to the plaintiff, and did not nor would admit the plaintiff to the benefit and advantages to which he was entitled as a member of the said society and as the holder of the said shares.

There was also a count for conversion of the shares, and a common money count in respect of shares bargained and sold.

There were ten pleas, the material ones being the sixth and tenth. The sixth was to the effect that the defendants' society was a building society established under 6 & 7 Will. 4, c. 32(a),

(a) The following enactments and rules of the society are material, 10 Geo. 4, c. 55, s. 27. "Provision shall be made by one or more of the rules of every such society . . . specifying whether a reference of every matter in dispute between any such society, or any person acting under them, and any individual member thereof, or person claiming on account of such member, shall be made . . . to justices of the peace . . . or to arbitrators . . . and whatever award shall be made by the said arbitrator . . . shall be binding and conclusive on all parties, and shall be final to all intents and purposes without appeal or being subject to the control of one or more justices of the peace, and shall not be removed or

and that by the rules of the said society duly framed, certified, and enrolled according to law, and according to the statutes in such case made and provided, it was amongst other things provided that should any dispute arise respecting the construction of the said rules or any of the clauses, matters, or things therein contained, or which on any ground whatever, would affect the interest of the said society between any of the trustees or officers, and any one or more of the members of the society, or any person or persons claiming on account of any member or members which could not be satisfactorily settled by the board of management or a majority of members present at a special or general meeting such dispute or disputes should be referred to arbitrators to be elected at the first meeting after the said rules were certified, none of them being beneficially interested, directly or indirectly in the funds of the said society, and that in each case of dispute the names of the arbitrators should be written on pieces of paper and placed in a box or glass, and three whose names were first drawn by the complaining party should decide the matter in dispute; that the said rules were in full force and effect upon and at the time of the accruing of the supposed causes of action and disputes in the said first count mentioned, and that the same were a dispute between the defendants as trustees as aforesaid, and the said Adam Clark Foote as a member of the said society, and plaintiff as a person claiming on account of a member of the said society, and was a dispute which, according to the said rules

removable into any court of law, or restrained or restrainable by the injunction of any court of equity . . ."

By 6 & 7 Will. 4, c. 32, s. 1 "it shall be lawful for any number of persons" to establish building societies of the character therein mentioned, "and to and for the members of each society from time to time to assemble together, and to make, ordain, and constitute such proper and wholesome rules and regulations for the government and guidance of the same as to the major part of the members shall seem meet, so as such rules shall not be repugnant to the express provisions of the Act, and to the general law of the realm." By sect. 4 all the provisions of 10 Geo. 4, c. 56, "so far as the same or any part thereof may be applicable to the purpose of any benefit building society, and to the framing of any rules thereof shall extend to such benefit building society in the same manner as if the provisions of the said Act had been therein expressly re-enacted.

Rule 6 of the defendants' society was as follows: "Any shareholder desirous of using his shares in the society for the purpose of security or otherwise may, on formal application, obtain a certificate signed jointly by the secretary and himself, stating the amount standing to the credit of his shares, and such shares cannot be withdrawn or otherwise dealt with until the return of the share certificate for cancellation." Rule 7 provided that the signatures to every transfer should be attested by the secretary as witness, and gave a "form of transfer," whereby the transferee agreed to accept the transferred shares "subject to the payments, rules, and regulations of the society." Rule 30 was as follows: "Should any dispute or disputes arise respecting the construction of either these rules, any of the clauses, matters, or things herein contained, or any additions, alterations, or amendments hereof, or on any ground whatever which would affect the interests of the society, between any of the trustees or officers and any one or more of the members of the society, or any person or persons claiming on account of any member or members, and which cannot be satisfactorily settled by the board of management or a majority of members present at a special or general meeting, such dispute or disputes shall be referred to arbitration in manner hereinafter mentioned." [The rule then set out the manner of arbitration as in the fifth plea.]

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of the said society in the plea above set forth, and the statutes in such case made and provided, ought to be settled by arbitration as aforesaid, as provided by the said rules, and that all conditions have been performed and all things happened and all times elapsed necessary to entitle the defendants or trustees as aforesaid and the said society, and to oblige the plaintiff to have the said dispute so settled, and nothing happened or was done to prevent the defendant being so entitled, and the plaintiff being so obliged as aforesaid.

The 10th plea was, to the money counts, and repeating the allegations of the 6th plea, was to the effect that the causes of action in the said money counts were disputes between the plaintiff as a member of the society, or a person claiming on account of a member and the defendants as trustees, and ought, therefore, to have been referred to arbitration.

The plaintiff, taking issue on the other pleas, replied to the 6th and 10th pleas that the rule in the said pleas mentioned became and was in operation as against the plaintiff by reason of the non-performance by the defendants of certain conditions precedent to the operation and validity thereof, to wit, that five arbitrators should be elected, &c., which conditions precedent had not been performed; and further, that the causes of action in the first and third counts mentioned were not disputes between the defendants as trustees, and the said Foote as a member and the plaintiff as claiming on account of a member; and that the said causes of action were not nor was any of them disputes or a dispute which, according to the said rules and the statutes, ought to be settled by arbitration as provided by the said rules, and by reason of the premises the defendants were disentitled to have the said causes of action so settled.

There was also a demurrer to the 6th and 10th pleas on the ground that the rule there relied on was not authorised by statute. The defendant, Longhurst, pleaded separately, but so far as is material to this report his defence did not differ from that of the other defendants.

The cause came on to be tried before Denman, J. and a common jury, at the London Sittings after Trinity Term 1874, when the following facts appeared:

The plaintiff was an accountant in the city of London, and Mr. A. C. Foote, when secretary of the society of which the defendants, London and Longhurst, with three others, were trustees, had borrowed moneys amounting in the whole to 200*l.* of the plaintiff, to whom he had transferred fourteen shares. Foote not long afterwards got into greater difficulties, and finally absconded, owing the society about 400*l.* In part satisfaction of this debt, the shares which Foote had transferred to the plaintiff were declared cancelled (after the transfer), the amount standing to the credit of Foote in the books of the society being 200*l.* 9*s.* 6*d.* at the date of such cancellation. The society had never had any notice of the assignment by Foote to the plaintiff. The amount actually advanced by Prentice to Foote was 200*l.*, but there was a memorandum by way of equitable mortgage in respect of 100*l.* only.

Upon these facts the learned judge directed a nonsuit with leave to move to enter a verdict for the plaintiff for 200*l.* or 100*l.* as the court should think right, and a rule having been obtained

accordingly on the ground that the jurisdiction of the courts of law was not ousted,

Prentice, Q.C., and *Lumley Smith*, for the defendants, except the defendant Longhurst, now showed cause. It is well established law that the effect of the enactments under which the defendants' society was incorporated, and of similar enactments, is to exclude the jurisdiction of the superior courts:

Crisp v. Bunbury, 8 Bing. 394;

Thompson v. Planet Building Society, 28 L. T. Rep. N.S. 549; L. Rep. 15 Eq. 333; 42 L. J. 364 Ch.;

Armitage v. Walker, 26 L. T. Rep. O.S. 182; 2 Kay & J. 211;

Ex parte Payne, 5 D. & L. 679;

Reg. v. Mildenhall Savings Bank, 6 A. & E. 933;

Reeves v. White, 17 Q.B. 895;

Trott v. Hughes, 16 L. T. Rep. O.S. 260;

Pratt on Friendly Societies, 7th ed. p. 47; 8th ed. A.D. 1873, p. 46.

"The Legislature," said Wood, V.C., in *Armitage v. Walker* (*ubi sup.*), "intended carefully to provide that these societies should not be dragged before courts of law or equity, if it could possibly be avoided, and has taken care to enact that the whole discussion of their affairs shall be disposed of in a cheap and summary manner by the decision of any arbitrator or justice as the parties shall choose, and when they have once made their election, the power of the justice or arbitrator, acting always within the rules of the society, is complete, and is not subject to revision by any court of law or equity." The principle established by the authorities clearly applies to the plaintiff, who, unless he is a member, has no claim upon the society at all. He is therefore in this dilemma: Either he is a member, in which case his claim must be referred, or he is not a member, in which case his claim fails. [BRETT, J.—The case of the plaintiff is not that he is a member, it is rather that the defendants will not admit him to be a member.] At all events, he claims "on account of" a member within the meaning of rule 30. If the plaintiff's claim be allowed, the arbitration clauses may be evaded by any member assigning his shares to a stranger, and then suing in respect of them. [BRETT, J., referred to *Morison v. Glover* (4 Ex. 430), the effect of which will be found stated in the judgment of the Lord Chief Justice.] The intention of the Legislature as to assignment clearly appears from the analogous statute 18 & 19 Vict. c. 63, by s. 40 of which "every dispute between a member of a friendly society established under that Act, or any person claiming through or under a member or under the rules of such society, and the trustees, shall be decided in manner directed by the rules of such society, and the decision so made shall be binding and conclusive on all parties without appeal." The operation of this section is by 20 & 21 Vict. c. 101, s. 6, extended expressly to disputes between "the executors, administrators, nominees, or assigns of a member" and the trustees of the society. [Lord COLERIDGE, C.J.—The word "assigns" must, I should imagine, be confined to cases where the suit is for the benefit of the assignor. However, that may be, the word does not appear in the Act under which the defendants' society was established.] The insertion of the word in an analogous enactment is evidence of the general policy of the Legislature which was to prevent the expense of litigation by the establishment of a domestic tribunal. The form of transfer had to be witnessed by the secretary, who, in this case, was himself the transferor. By giving

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no notice to the society of the transfer, the plaintiff conduced to the fraud of the secretary, whose signature was intended to act as a check upon improper transfers.

Darling, for the defendant Longhurst, referred to the latter portion of rule 4 of the society which was as follows: "Any member, not having executed a mortgage to the society who may continue to neglect the payment of his subscriptions, until the fines and charges incurred thereon equal the amount of subscriptions already paid by him, shall thereupon cease to be a member, and forfeit all the moneys paid in respect of the shares on which such fines and charges have been incurred . . ." Clearly this is a rule, the application of which might give rise to a dispute which would have to be referred to arbitration under rule 30, and yet the application of it is to determine membership. Conversely it is equally reasonable that the commencement of membership should be referred to arbitration, for in both cases the question of member or no member is the one at issue.

McIntyre, Q.C., and *F. Turner*, for the plaintiff, were not called upon to support the rule.

Lord COLERIDGE, C.J.—I am of opinion that the rule must be absolute to set aside the nonsuit, and to enter a verdict for the plaintiff for 200*l.* without interest. The ground of defence which has taken is shortly this, that the defendants are the trustees of a society under the Building Societies Acts, and that under those Acts certain disputes are referable to a domestic arbitration which ousts the jurisdiction of this court, and that this is one of those disputes. Now there is no doubt that in a great number of cases, against the correctness of the decisions in which I have not a word to say, actions brought against the trustees of societies of this kind by individuals admitted to be members have been either restrained in equity or defeated at law. *Crisp v. Bunbury* (8 Bing. 394) is an authority very strong to show that even where an arbitration has been demanded on the part of the member, and refused on the part of the society, the trustees can set up the arbitration clause in defence to an action springing out of the very same dispute. We do not in the least infringe upon the principles established in that case, but to this case those principles are not applicable. Here we have an action upon a *bona fide* transfer of his shares from a member of the society to the plaintiff. After that transfer it appears that the society cancels the shares transferred and refuses to admit the plaintiff as a member, or to give him any of his rights under the transfer. The plaintiff claims those rights, and this is the dispute between the parties. That such a dispute as this should be referable under the arbitration clauses is a proposition which the mere statement of it shows at once to be untenable. *Morison v. Glover* (4 Ex. 430) is not, to be sure, an authority directly in point. It is, however, a case *à fortiori* to this. The action was by the plaintiffs as trustees of a building society against one of their members whose membership was never in dispute. It was admitted that among the matters which gave rise to the action there were matters in dispute between the society and the defendant as member. But one of the matters out of which the action arose was of a different character, and in respect of that matter the defendant was not sued as member. The court took time to consider their judgment, and Pollock, C.B. in delivering it said:

"It was contended on behalf of the defendant that whatever question arose between the society and its members must be referred to arbitration, and that therefore the plea was good. No doubt some of the grounds of action were matters in dispute between the society and the defendant in the character of a member, and there may be strong reason for saying that if the claim had been entirely confined to matters of that description, the case of *Crisp v. Bunbury* (*ubi sup.*) would have applied. On consideration we are of opinion that if any other rule be established than this, that matters in difference between the society and its members in the character of members can alone be referred to arbitration—if we go one step beyond that, then extraneous matters of any kind, which may happen to be in dispute between the society and its members, ought to be the subject of a reference. It appears to us, therefore, that the words 'matters in dispute' must be real matters in dispute between the society and its members *as members*"—this the court italicises—"and not in any other capacity." The dispute here being whether a particular person be a member or not, I cannot but think that *Morison v. Glover* is an *a fortiori* case to this. Then Mr. *Darling* refers us to rule 4, and suggests that the effect of that rule and of rule 30 is to bring the determination of the question of membership or non-membership within the arbitration clauses. If that be the construction of rule 4, I should doubt whether the rule would not be *ultra vires*. It appears, however, that rule 4 may be construed as applying only to cases where the party within its meaning has been once a member, so that the arbitration clauses would only operate upon the question whether the rules under which members are liable to expulsion have been properly applied in a particular case. The concession on both sides that the party was once a member would be a condition precedent to the arbitration clauses taking effect. If the Legislature had intended that these arbitration clauses should operate in cases like the present, where the very claim to membership is repudiated in its inception, we should have had in sect. 27 of 10 Geo. 4, c. 26 the words "claiming to be members" instead of the words "claiming on account of." The nonsuit, therefore, was wrong. No case has been cited where the arbitration clauses have been held to extend so far as we are asked to extend them, and the cases which have been cited have no application. We should be extending those authorities far too widely if we were to hold that they applied to the ordinary case of a plaintiff suing a building society in his own right.

BRETT, J.—The two questions here are, first, what was the dispute between the plaintiff and the defendants? and, secondly, whether the Act 10 Geo. 4, c. 56 could prevent the plaintiff from prosecuting his claim in the ordinary manner. Now, as to the first question, it seems that the plaintiff claimed as the legal transferee of the shares formerly held by Foote, and that his cause of action was that the transferred shares were cancelled. The defendants' answer is that the plaintiff is not the legal transferee, inasmuch as although Foote had assumed to transfer the shares, so far as he could, yet that he could not transfer them, and the defendant had cancelled them on account of certain debts owing to them by Foote. Such, then, was the dispute be-

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tween the parties—was the plaintiff transferee, or was he not? Now in one sense this is a dispute between the society and one of its members, but in the sense which is material to the present case it is not. For *Morison v. Glover* (*ubi. sup.*) decides that the true construction of these sections is that the subject-matters of disputes, in order to bring them within the arbitration clauses, must be questions between the society as such and the member as such. It is impossible to twist the words of the sections into any other meaning. The case, therefore, is not within the section, and rule 30 has no operation to oust the jurisdiction of the court. It is then said that the plea was proved. I should be inclined to say that the plea was bad on demurrer, inasmuch as it does not allege that the plaintiff was a member. However, it is enough to say that the plea was not proved, inasmuch as the plaintiff was not claiming on account of Foote but on his own account. Lastly, Mr. Darling points to rule 4, and argues that as that rule authorises an arbitration as to whether a member is or is not to cease to be such, it is inconsistent to hold that arbitration may not also settle the question whether a person is to be admitted to membership. Now whether cases under rule 4 would come under rule 30 is at least doubtful, but assuming that they do, the only right given is to cancel the shares of persons already members, and to determine the propriety of the cancellation may, within the statute, be a matter to be referred, so that this last suggestion, however ingenious, does not assist the defendants.

GROVE, J.—I am of the same opinion. The arbitration clauses give a particular mode of arranging internal disputes. The plaintiff comes forward and says that he has a right to have the benefit of these clauses. This benefit he would have if he could obtain what the defendants decline to grant by cancelling the shares transferred to him. Thus, by the very act which leads to the present action, the defendants deprive him of the benefit of the arbitration, and in another breath set up those very arbitration clauses against him. This is a course which is absolutely inconsistent. As to whether the plea is proved, my brother Brett rightly points out that the plaintiff is claiming not "on account" of Foote but on his own account.

LINDLEY, J.—I am of the same opinion. The object of these clauses is to settle internal disputes, and they assume that these disputes are between the body and the persons within that body, where a dispute arises with a person without that body, these clauses have no application.

Attorneys for the plaintiff, *Patersons, Sons, and Garner*.

Attorneys for the defendant Longhurst, *J. A. Redhead*, for *B. Langdale Barrows*, Matlock.

Attorney for the other defendants, *H. R. Silvester*.

EXCHEQUER CHAMBER.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

June 14, 15, and 26, 1875.

LONDON AND NORTH WESTERN RAILWAY COMPANY
v. BUCKMASTER.

Rating—License to use stables—Demise—Exclusive occupation.

A railway company granted to coal owners the use of certain stables (situate within the premises of the railway station, and approachable only through the gates between the station and the public roads) under agreements containing the following terms: "In consideration of the London and North Western Railway Company permitting us to occupy and use a stable for the accommodation of four horses at or near the O. station of the said company, we do hereby undertake and agree that we will pay the said railway company the clear monthly rent or sum of 1l. 5s., without any deduction, &c. And we undertake and agree, so long as we shall occupy or use the said stable to observe, perform, and be bound by the byelaws, rules, and regulations which shall, for the time being, be issued or prescribed by the said railway company for the government and use of their railway station, premises, and conveniences. And we further undertake and agree to give and deliver up possession of the said stable at the expiration of one month after a notice in writing for that purpose." The railway company did not, in fact, exercise any control over or use any of the stables during the currency of these agreements; and none of the byelaws, rules, or regulations of the company had reference to them.

Held, by the Exchequer Chamber, affirming the Queen's Bench, that under the circumstances (although Cleasby, B., Grove, and Denman, JJ. dissented as to the effect of this agreement taken by itself), the railway company was properly rated for these stables.

THIS was an appeal by the plaintiffs against a decision by the Court of Queen's Bench (Blackburn, Quain, and Archibald, JJ.), in favour of the defendants upon a special case stated in an action of replevin.

The special case, with the plaintiffs and defendants' points, the arguments of counsel, and the judgments of the court below are fully reported 31 L. T. Rep. 835; also L. Rep. 10 Q. B.

Littler, Q.C., with him Webster, argued for plaintiffs, the appellants.

Herschell, Q.C., with him Glen, in support of the decision of the Queen's Bench.

The arguments were similar to those before reported, and may be gathered from the judgments of the court.

Cur. adv. vult.

June 26.—CLEASBY, B., delivered the judgment of himself, Grove and Denman, JJ.—It must be taken as admitted that if the rate was bad as to the stable, the plaintiffs in this action of replevin are entitled to succeed. As I understand, at least three of my learned brothers are in favour of affirming the judgment, and as this is not a case which, it is to be hoped, will be carried further, it might seem superfluous for me to give my reasons, and my only ground for doing so is to prevent the judgment of a court of error from having the effect, which in one view it might have, of materially unsettling the law of rating. If it

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was a correct conclusion from the facts stated in this case that the whole of the station within the boundaries marked was to be regarded as one tenement, and occupied as such by the railway company, in the same manner as a dwelling house, though let off in parts to various tenants, is all in the occupation of the landlord, the rate would be right. The overseers have treated it so, but I fear their doing so cannot be treated as evidence of the fact, since it is the matter now in dispute, and it is their interest to treat it so, because if the whole is one occupation the stables would be part of the subject of rating whether used or not, like simply lodgings in a house. I must say the materials are very slight for regarding it all as one occupation. It does not appear that there is any gate in the opening into the public street, still less that it is ever closed, much less locked. Indeed it seems clear from paragraph 9 that there is only a gateway and no gate where the tenants of the stables have access; though there is a gate at the other end, near Lavender Hill. The only outer door, therefore, is that of the stable itself, and the consequence of holding it all to be one occupation would be that if the stable was broken into, and a horse stolen, the stable must be described in the indictment as the stable of the railway company. And if the only outer door is that of the stable, the case of the stable can hardly be distinguished in any particular from that of the offices, and the idea of a curtilage seems to be inapplicable. The existence of an outer door, with a servant appointed and removable by the railway company to take charge of it, if there was one, would be by no means conclusive, as appears by the case of *Reg. v. St. George's Union*. It is stated in paragraph 20 that unless the facts establish an occupation by the railway company they are not occupiers. It is not to be inferred because it would seem convenient; still, if upon the materials before them, and in the absence of any such facts as I have adverted to, my learned brothers feel justified in concluding that the facts which do appear are such that the stables, if not used, could not be returned to the overseers as empty, but must be rated as part of the occupation of the railway company (like the case of a house with lodgers), upon this, which is, I think, only a conclusion of fact, I would rather acquiesce in their conclusion than rely upon my own view. But if the case is to be regarded as depending upon the effect of the agreement between the railway company and the gentleman who it was said formed the Clay Cross Company (and it was mainly, if not entirely, upon this that the case was argued), I could only come to the conclusion that the effect of the agreement was to hand over the occupation and possession of the stable to the tenant in the same way as it does with the offices. Upon this it must be noticed that the question is not what the title of the Clay Cross Company to the possession was, but what their possession in point of fact was. And, therefore, it is wholly immaterial that the agreement of the railway company was only by parol and not under seal. The rent paid by the Clay Cross Company was still rent paid for the stable, and could not be recovered back upon the ground that the agreement was imperfect. Treating, therefore, the stable as a separate tenement, and the subject of separate occupation, the following reasons satisfy me that the subject of the

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agreement was the occupation and possession of the stable itself, and not the mere easement and right to put horses in it. First, the language "use and occupation of a stable by the permission of the landlord," is the usual and regular language when the thing itself is let. Although the words are "a stable," and not "the stable," as soon as the subject matter of the agreement was made certain by one particular stable being used, the two descriptions would mean the same thing. I should myself read the words "a stable for the accommodation of four horses," as indicating a particular stable, but this would be immaterial as soon as it was certain what stable formed the subject which the agreement was to apply to. It is worthy of notice that the same words "permitting to use and occupy," are used as regards the offices, and as to them, the possession was no doubt given up. Secondly, by the terms of the agreement "rent is to be paid." The word "rent" generally means what is paid by a tenant to his landlord for the occupation of the property of the latter, and carries with it the right of distress upon what is let. Thirdly, the tenant is to deduct property tax from the rent. But he can only deduct property tax because he pays it, and he only pays it because he is assessed to it, and he is only assessed to it because he is the occupier. Fourthly, the tenant is not to make any other deductions from the rent. This must refer, amongst other things, to the poor rate; the clause is almost an invariable one in leases and agreements, and that is its recognised meaning. The tenant thus is not to deduct poor rate, that is, he is to pay it himself, but this is because he is rated to it, and he is rated to it because he is the occupier. Thus the agreement of the parties, so far as I can collect it, is that the tenant is to pay poor rate, but the present decision is that the landlord is to pay poor rate. Lastly, the tenant is to give up "possession of the said stable" at a month's notice. But unless he has possession of the stable, how is he to give it up to the railway company? The railway company are always in possession of it. And the clause in the agreement on this subject is very precise, for provision is made for a payment of a proportional part of the rent if the notice did not agree with the rent day, and for the notice being served upon the executors and administrators of the tenant (I before mentioned that the Clay Cross Company was said to consist of one person), or might be given by affixing it upon a conspicuous part of the stables. This last clause is an usual one in leases and agreements, and is of great service when premises are left empty and the tenant cannot be found or there is at the time no personal representative, and it shows almost conclusively that the railway company could not lawfully take possession of the empty stables, and would be trespassers if they did so, without this notice, and yet they are said to be always in possession. Treating, therefore, the stables as a separate tenement and capable of separate occupation, I think to hold that the agreement set out does not make the Clay Cross Company the occupiers would introduce great uncertainty into the law of rating, and on that account I have added the above remarks. I do not think that the case of *Reg. v. Trent and Mersey Navigation Company*, a lime quarry, (4 B. & C. 57), and *Rex v. Marquis of Salisbury*, tolls, (8 A. & E., 716), govern the present case. Indeed they have little or no bearing upon the

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question of who is in the actual possession of such a tenement as a stable. It is found as a fact (Par. 20) that none of the byelaws are material to the question of occupation. And it seems hardly reasonable to suppose the byelaws could be made for such an object as would affect the possession of a particular stable under an agreement. It is also to be noticed that the words of the agreement as to byelaws are that the tenant will observe the byelaws, rules, and regulations to be made for the government and use of the railway station premises and conveniences. This can hardly mean for the government and use of the stable let; it may well mean use of platforms, open spaces, gates, &c., which may interfere with the convenience of the occupier of the stable, but not give a right to the railway company to interfere with the occupation and possession of the stable itself without due notice. If the rest of the agreement gives an independent possession to the tenant, such a clause ought to have a meaning not inconsistent, if it can have a consistent meaning.

AMPHLETT, B. delivered the judgment of Lord Coleridge, C.J., Pollock, B., and himself.—This is an appeal from a decision of the Court of Queen's Bench that the plaintiffs were properly rated as occupiers in law in respect of certain lines of railway, and a stable, all within the ambit or curtilage of their station at Clapham Junction, and that consequently a distress levy for the rates was good. This court was unanimously of opinion, on hearing the appellants' counsel only, that so far as related to the lines of railway the plaintiffs were liable to be rated, and accordingly the only point left for decision is as to the stable, which was *de facto* in the occupation of the Clay Cross Company, under the agreement dated 5th Feb. 1870, set out in the case. If the effect of that agreement was to create an actual demise of the stable in favour of the Clay Cross Company it was not, and in my opinion could not, be successfully disputed that the latter company and not the plaintiffs were the proper parties to be rated, and that consequently the decision of the court below was wrong. It was, however, contended on the part of the defendants that the agreement did not create any estate but merely operated as a licence to the Clay Cross Company to occupy and use the stable as an easement; and if that is the true construction I am of opinion that the Clay Cross Company had not a rateable occupation, and that the decision of the court below was therefore correct. For it appears to be settled that a mere licensee is not liable to be rated unless he has the sole and exclusive occupation, and in my opinion the clause of the agreement whereby the Clay Cross Company were to be bound by the bye-laws, &c., from time to time made by the plaintiffs, is sufficient when taken in connection with the other circumstances stated in the case to show that the plaintiffs were to retain a control over the stable as part of their station. It is true that the company have not in point of fact exercised any control over the stable during the currency of the agreement, but that I think is quite immaterial; the power to exercise such control is sufficient to prevent a mere licensee from acquiring a rateable occupation. Thus in *Reg. v. Trent and Mersey Navigation Company* (4 B. & C. 57), where the company under a power from the proprietors of certain limestone quarries entered and continued exclusively for more than twenty years to work the quarries, paying 2d. per

ton, it was nevertheless held that because the proprietors might if they pleased have granted (although they in fact never did) a similar privilege to other persons, the company had not an exclusive occupation so as to make them liable to be rated. The only question then which remains, is whether the agreement did in fact operate as an actual demise, and I have come to the conclusion that it did not. For first it may be observed that it contains no express obligation on the plaintiffs to do anything, and it is consequently not signed by any person on their behalf, but it imposes many obligations upon the Clay Cross Company in consideration of the plaintiffs permitting them to occupy and use a stable for the accommodation of four horses. This is certainly remarkable if it was the intention of the parties that an actual tenancy should be created, but might be expected if there was to be a mere permissive occupation. I think, however, that if the plaintiffs had been individuals and not a company, as to which I shall say more presently, it would be inferred that there was a contemporaneous parol agreement on the part of the plaintiffs to give effect to the consideration mentioned in the agreement, that is to say to permit the Clay Cross Company "to occupy and use" a stable for the accommodation of four horses. But what is the meaning of these words "occupy and use"? They are no doubt not inconsistent with and might well operate and create a demise if the rest of the agreement or the surrounding circumstances afford reasonable proof that such was the intention of the parties, but taken by themselves they do in my judgment more properly denote a mere permissive occupation or easement resembling that of a lodger. The only passage I can find in the rest of the agreement that appears to countenance a more extensive meaning to those words is that which stipulates that the rent is to be paid "without any deduction whatever, property tax only excepted," from which it is sought to be inferred, not without some plausibility, that the rates were to be paid by the Clay Cross Company. I think, however, that the inference cannot be properly made in this case. I should have expected (if that was the intention) to find rates and taxes specifically mentioned, and as to the words "without any deduction whatever," they are merely common form, and may have been used here to introduce the exception of the property tax which might, I suppose, be paid by a mere lodger when a periodical rent is reserved. And it may be further observed that the property tax generally, and not merely the landlord's property tax, is excepted, whereas if a tenancy were created, there would be a tenant's property tax as well, which could not of course have been intended to be excepted. This may be thought rather to look as if the parties were aware that there was to be no tenancy, and therefore no tenant's property tax to be paid. The provision as to quitting and delivering up possession of the stable at the expiration of one month after notice to the Clay Cross Company, or their executors or administrators, does not appear to me to afford any inference that an actual demise was intended, inasmuch as it would be as suitable to a lodger for instance as to a tenant. Any licence of that kind being accompanied by an interest might as well here be extended to executors. But if there was (as contended) not a mere licence, but a demise, it

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would be assignable, and it is difficult to account for assigns not being mentioned in the clause respecting notice. It must be admitted, however, that inferences drawn from an accurate criticism of the particular expressions of an agreement of this kind taken by themselves are vague and ambiguous, and I do not rest much upon them. The broad fact remains that, considering that the stable was within the curtilage or ambit of the station, and evidently intended for the accommodation of the coal dealers who occupied offices provided for them by the plaintiffs, and carried on their business in connection with the plaintiff's railway, it is in a great degree improbable that the plaintiffs should have intended to grant a demise with no proviso against alienation, and no power of re-entry in case the stables should be used for other purposes than the accommodation of horses. It is possible that considerable annoyance and inconvenience might arise in this way before the plaintiffs could eject a disagreeable tenant by notice in due course of law, all danger of which would be avoided if the agreement operated as a licence only. As, therefore, the language is at least as applicable to a licence as to a demise, I think that justice and convenience alike require that it should be so construed. And further, I think there is force in the observation of my brother Quain in his judgment in the court below, respecting the use of the indefinite article before stable, in the agreement, and in the reasons which he gives, and which therefore I will not repeat, that it was only intended to give the Clay Cross Company and the other coal dealers accommodation for four horses in some stable on the premises, at the selection of the plaintiffs, and which might be possibly part of a larger stable if convenience required it. There was another point raised by Mr. Herschell which I think is deserving of consideration. The plaintiffs are a corporation, and cannot therefore create any estate, not even a tenancy at will, except by an instrument under their corporate seal; how then can they be bound by a parol agreement for a demise, if in fact any was entered into by any person on their behalf, when the Clay Cross Company was let into possession? The plaintiffs' agents might of course give to that company the physical possession of the stable, but I see nothing to prevent the plaintiffs from terminating that possession at any time without giving the month's notice required by the agreement, and it may be that it was the knowledge of that circumstance which occasioned the agreement to be drawn up without any stipulation on the part of the plaintiffs. In *Reg. v. The Marquis of Salisbury* (8 A. & E. 716), it was held the Marquis was rateable for tolls of which he was the owner, and not his tenants, who had actually received and paid rent for the same under a parol agreement, and the decision was based on the ground that the tolls from their nature could only pass by deed, and no interest at law therefore had passed out of the Marquis. This authority was applicable to the case, if no interest passed out of the plaintiffs for want of an instrument under their corporate seal. I do not wish, however, to rest my judgment upon this somewhat technical point, but upon the substantial merits of the case I think that the judgment of the court below was right, and that the appeal ought to be dismissed. *Judgment affirmed.*

Attorneys: *K. F. Roberts; J. C. F. W. Rogers.*

COURT OF COMMON PLEAS.

Reported by *ETHELRINGTON SMITH* and *J. M. LELY, Esqrs.*,
Barristers-at-Law.

SECOND DIVISION.

June 4 and 5, and July 9, 1875.

WATKINS (app.) v. MAJOR (resp.)

Game—1 & 2 Will. 4, c. 32, s. 30—*Jurisdiction of justices*—*Claim of an impossible and absurd right*—*Mens rea*.

Under 1 & 2 Will. 4, c. 32, s. 30, a person may be convicted, although he had no mens rea at the time of committing the trespass; and therefore a claim of right impossible in point of law, and unsupported by any evidence showing any ground for its assertion, will not oust the jurisdiction of the magistrates to convict, even though the claim be set up *bonâ fide*.

The appellant's father claimed as a commoner a right to shoot over a common, part of a manor, and gave notice to the lord of the manor that his son would shoot there, in pursuance of the right so claimed. The appellant was summoned before the magistrates upon an information laid under 1 & 2 Will. 4, c. 32, s. 30, charging him with having shot a rabbit on the common, when it was objected that the magistrates had no jurisdiction, there having been a *bonâ fide* claim of right set up.

No evidence could be produced in support of the alleged right, which was indeed an impossible one in point of law, but the claim was not set up as a frivolous pretext to escape a conviction, but was *bonâ fide* in the sense of being believed in by the appellant and his father.

The magistrates overruled the objection, and convicted the appellant.

Held (affirming the conviction), that the magistrates were entitled to disregard the claim of right altogether, and that their jurisdiction was not thereby ousted, because, as the absence of mens rea is not necessarily a defence under this statute, a person setting up an absurd and unreasonable claim of right must show some ground for its assertion.

CASE stated by magistrates of the county of Somerset, under 20 & 21 Vict. c. 43:

At a petty sessions holden at Dunster, in the said county, on the 25th Sept. 1874, an information was preferred by the said Thomas Major, hereinafter called the respondent (on behalf of the Rev. William Sweet Escott, against the said Maurice Mahon Watkins, hereinafter called the appellant), under sect. 30 of the statute 1 & 2 Will. 4, c. 32, charging for that he the said appellant, on the 9th Sept. 1874, at the parish of Dunster, in the daytime of the said day, to wit, about the hour of six o'clock in the afternoon, unlawfully and wilfully did commit a trespass on a certain piece of land situate in the said parish of Dunster, called Alm's Hill, part of Alcombe Common, within the manor of Alcombe, and then and there being in the tenure of the said William Sweet Escott (therein called William Escott), as lord of the said manor, by then and there wilfully entering and being in the daytime as aforesaid on the said land in search and pursuit of conies without the licence and consent of the said William Escott or of any person having the right of killing the conies upon such land, contrary to the form of the said statute. And the said information was heard and determined by us, the said parties

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respectively being then present, and upon such hearing the appellant was convicted before us of the said offence, and we adjudged him to pay a penalty of 1l.

And, whereas, the said appellant being dissatisfied with our determination upon the hearing of the said information, as being erroneous in point of law, hath, pursuant to the said statute (20 & 21 Vict. c. 43), duly applied to us in writing to state and sign a case, setting forth the facts and the grounds of such our determination as aforesaid for the opinion of this court, and on his behalf a recognisance has been entered into as required by the said last-mentioned statute.

Now, therefore, we the said justices, in compliance with the said application, do hereby state and find the following case:

Upon such hearing it was proved in evidence on the part of the informant in that behalf, and was admitted by the appellant, that on the 9th Sept. 1874, in the daytime, the defendant Maurice Mahon Watkins did shoot at and kill a rabbit or cony at Alm's Hill, on Alcombe Common aforesaid, and that the said appellant shot the rabbit in the presence of one Charles Smith, a person appointed by James Hole to watch for trespassers, and stated to him that he had a right to come up there and shoot; and it was stated and deposed on oath by James Hole, Esq., a landowner of property in Alcombe aforesaid, that he had known Alcombe Common for forty years, and had always believed it to be part of the manor of Alcombe, and that the manor belonged to the Escott family; first to Mr. Bickham Escott, then to his daughter Miss Escott, and now to the Rev. William Escott; that the deponent had known his, the deponent's late uncle, William Hole, shoot there and had shot there with him on the common, and also with his uncle, Thomas Hole, between thirty and forty years ago; that his uncle did not claim to shoot there in his own right; that he, the deponent, had continued to shoot there at intervals ever since his uncle, William Hole, died, which was about ten years ago; that after the death of his uncle, William Hole, his (deponent's) aunt, Lucy Hole, succeeded to his (deceased's) property, and the deponent continued to shoot there for her; that his uncle and aunt made an exchange with Miss Escott, through her agent, Mr. Langworthy, to have the shooting on Alcombe Common in exchange for shooting elsewhere; that the deponent had had a communication on the subject with Mr. Langworthy, the agent of Miss Escott, proposing he should consent to the continuation of the exchange, and that Mr. Langworthy did so consent; that the Rev. William Sweet Escott (in the information called William Escott) succeeded to the property of Miss Escott, and had consented to the same arrangement; that the deponent had no recollection of seeing anyone else shooting or sporting on the said common, nor had he heard of any other person claiming a right of sporting thereon, except in the present case; that he was requested by Mr. Escott to prosecute any trespasser on the common; that his uncles and aunt were owners of land in Alcombe; that the deponent is now an owner of land in Alcombe; that he did not shoot on the common in right of his own land; that he knew that persons had rights of turbary and stockage on Alcombe Common; that he had heard of people tracing for rabbits on the common in the winter; that he had heard that the appellant's

father claimed a right of shooting there by a letter received from him by the deponent of the 9th July last. And in further support of the case on behalf of the respondent, a deputation was produced under the hand and seal of Mary Escott, now deceased, dated the 5th Sept. 1803, and which appeared to have been duly enrolled by the Clerk of the Peace for the County of Somerset on the 26th Sept. 1803, whereby she appointed Thomas Sweet, of Brompton Ralph, her gamekeeper for and within the manor of Alcombe.

On the part of the appellant (who is a youth of about thirteen years old), his father, Mr. William Theodore Pitt Watkins, a solicitor, appeared, and contended that there was no evidence of the existence of the manor of Alcombe, or that the Rev. William Escott was lord of the manor of Alcombe. And he further stated that he (W. T. P. Watkins) claimed rights of common and also a right of sporting there, and he produced a lease to him dated the 14th Sept. 1871, from Thomas Abraham, Esq., for a long term of years of a close of land at Alcombe, adjoining or near to the common, on which close he has lately built a house, and in respect of which close he claimed as one of the commoners rights of common and also a right of sporting and killing rabbits on Alcombe Common. The lease does not specify any such rights. Mr. W. T. P. Watkins further contended that the claim of right so set up by him was *bonâ fide*, and was sufficient to oust the jurisdiction of the justices. No evidence was offered that any of the commoners or any other persons except the Escott family, or persons authorised by them, had ever claimed or exercised a right and of killing game or rabbits, or of sporting on the common. At the instance of Mr. W. T. P. Watkins, there were put in and read the said letter from him to James Hole, Esq., dated the 9th July 1874, claiming a right of shooting over Alcombe Common, and also a correspondence between Mr. W. T. P. Watkins and Mr. Charles Edward Rowcliffe, solicitor of Mr. Escott, in which Mr. Watkins claimed a right to sport over Alcombe Common, and stated that his sons did so in support of that right, and Mr. Rowcliffe denied that Mr. Watkins had any such right, and maintained that the exclusive right of sporting belonged to Mr. Escott, as lord of the manor.

Copies of the said letter and correspondence, and also copies of the information and of the depositions taken at the hearing, accompany this case, and by consent of the parties are to be taken as forming part of this case.

We, however, being of opinion that for the purpose of supporting the said information there was sufficient evidence of the existence of the manor or reputed manor of Alcombe, that Alcombe Common was parcel of that manor, and that the Rev. William Escott was lord of the said manor; that there was no evidence of the existence of the right claimed by Mr. W. T. P. Watkins, and that his setting up such a right did not take the case out of the jurisdiction of us the said justices, gave our determination against the appellant in the manner before stated.

The questions of law arising on the above statement for the opinion of this court, therefore, are: First, were the magistrates justified in coming to the conclusion that, for the purpose of supporting the information; there was sufficient evidence of the existence of Alcombe as a manor or reputed manor? that the Rev. Mr. Escott was lord of the

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said manor, and that Alcombe Common was within the said manor? and, secondly, was the claim of right set up by the father of the appellant sufficient to oust the jurisdiction of the magistrates? If the court should be of opinion that the said conviction was legal, and properly made, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed.

(Signed) CHARLES LETHBRIDGE.

Jan. 12, 1875.

JOHN HALLIDAY.

The letter referred to in the case, dated the 9th July 1874, was as follows:

Dunster Lodge, Alcombe, 9th July 1874.

Dear Sir,—Will you inform me if you claim the exclusive right to shoot over Alcombe Common lands, as I am informed you do? I claim to be entitled to do the same thing, but of course would not infringe on the rights of others, provided it is clear they possess them.

Your faithful servant,

W. T. WATKINS.

T. Hole, Esq., Knowle House, Timberscombe.

To this Mr. Escott's solicitor replied, asserting the exclusive right to be in him, when Mr. Watkins wrote, saying:

I do not claim the exclusive right of shooting over Alcombe Common, neither, as I understand the law and the facts, can anyone else, but of this I will write you shortly. I claim a right, as one of the commoners, to sport over Alcombe Common. My sons do so in pursuance of that right; but should it appear the claim to do so is not in strict accordance with my legal right as the owner and occupier of lands in the parish of Dunster, I should certainly at once desist.

The correspondence was continued up to the 29th Aug. 1874, Mr. Watkins throughout asserting his right.

Sawyer, for the appellant.—The justices have here found that the appellant made a claim of right, and have not found that it was not made *bonâ fide*; their jurisdiction is therefore ousted. On the second question stated for the opinion of the court, the fact that the appellant's father claimed the right in July, and stated that his sons would shoot in assertion of the right, shows that the claim was not a pretence, but a genuine and *bonâ fide* one, of which full notice was given: (*Lovesey v. Stallard*, 30 L. T. Rep. N. S. 792.) The impossibility of the claim being in fact sustained does not make any difference: (*Reg. v. Justices of Derbyshire*, 11 W. R. 780.) It is also plain that here there was no *mens rea*, and in the absence of that the claim must be one which deprives the justices of their jurisdiction to try a question of right. On the first question, the only evidence given was the deputation of a gamekeeper. This, indeed, mentions the manor, but no mention is made in it of the common.

A. Charles, for the respondent.—If the claim made be a claim of a right unknown to the law, it cannot be *bonâ fide*. It is found here by implication that the claim was not *bonâ fide*, because it is found that it was not reasonable. In *Cornwell v. Saunders* (7 L. T. Rep. N. S. 356; 13 B. & S. 206) a similar claim was made, and it was held that the jurisdiction was not ousted, "there being no colour for such a claim." The only distinction is, that the justices there expressly found that the appellant had no ground for believing he had such a right. The test is seen in *Leath v. Vine* (8 L. T. Rep. N. S. 581; 30 L. J. 207, M. C.), where it is said that the assertion of a right without showing any such claim as would be a defence to an action

of trespass did not oust the jurisdiction of the magistrates to convict under this statute: (*Morden v. Porter*, 1 L. T. Rep. N. S. 403; 7 C. B., N. S., 641.) *Bonâ fide* belief even is not enough, for *mens rea* is not an ingredient in the offence. *Hudson v. MacRae* (9 L. T. Rep. N. S. 678; 4 B. & S. 585), where sect. 24 of 24 & 25 Vict. c. 96, was held not to be criminal: (See also *Taylor v. Newman* (8 L. T. Rep. N. S. 424; 32 L. J. 106, M. C.) The 24th section of the Criminal Law Consolidation Act 1861, and the 30th section of 1 & 2 Will. 4, c. 32, were intended to protect property, not to create a crime.

Paley on Convictions, 5th edit. p. 150.

Sawyer, in reply.—This is within the rule laid down in *Reg. v. Oridland* (7 E. & B. 853.) [BRETT, J.—It is said here that the right was not merely illegal but impossible, and if the claim be *bonâ fide* but absurd, does not *Leath v. Vine* (ubi sup.) apply?] The 23rd section of 1 & 2 Will. 4, c. 32, which is similar in its terms to sect. 30, was held to be a criminal section in *Cattell v. Ineson* (27 L. J. 167, M. C.).

Cur. adv. vult.

July 9.—The judgment of the court (BRETT and LINDLEY, JJ.) was delivered by

LINDLEY, J.—This is an appeal from a conviction by the justices of Dunster, in Somersetshire, for an offence against 1 & 2 Will. 4, c. 32, s. 30. It appears that the appellant, who is a lad of about thirteen, went, by the direction of his father, on to Alcombe Common, within the manor of Alcombe, and shot a rabbit in the presence of the gamekeeper of the lord of the manor; and that the lad stated at the time that he had a right to come up there and shoot. It further appears that the father, who is a solicitor, had previously acquired the lease of some land near the common, and had built a house on that land, and had, in correspondence with the lord's solicitors, claimed in respect of such land, as one of the commoners, rights of common, and also a right of sporting and killing rabbits on the common. The lease, however, did not specify any such rights, nor was any evidence adduced to show that any of the commoners had ever claimed or exercised a right of killing game or rabbits or of sporting on the common. It was objected, on the part of the appellant, that there was no sufficient evidence of any manor, or that Alcombe Common was within it, or that the prosecutor was the lord; but the justices overruled this objection, and, we think, rightly, as was stated in the course of the argument. It was further objected that what was done was done in the exercise of a *bonâ fide* claim of right, and that the justices had, therefore, no jurisdiction to convict the appellant. This objection was also overruled, upon the ground that there was no evidence of the existence of the right claimed, and the setting up of such right did not oust the jurisdiction of the magistrates. The substantial question we have to determine is, whether the justices were right in so holding. It is not found in express terms whether the appellant or his father claimed the right alleged, *bonâ fide* or not. We are left to draw our own inference as to this point, and we are of opinion that both father and son did assert that claim *bonâ fide* in a certain sense. We think that the claim of right was not set up as a frivolous pretext to escape a conviction, and that, whatever the father may have believed as to his alleged rights, his son *bonâ fide*

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believed that the father had them. This, under ordinary circumstances, would suffice to render a conviction for any criminal offence improper; for it is well established that justices cannot try the existence of a right *bonâ fide* set up in answer to a criminal charge brought before them: (see Paley on Convictions, 47 and 137, &c.) But it has been decided more than once that a person may be convicted under the statute with which we have now to deal, and other game statutes, although he had no *mens rea*, and believed that he was not a trespasser: (*Morden v. Porter*; *Leatt v. Vine*; *Cornwell v. Saunders* (*ubi sup.*)). These game statutes, it is said, are not mere criminal statutes, but are statutes passed for the purpose of protecting the peculiar rights of those entitled to shoot game. The statutes themselves, it has been held, either expressly or by necessary implication, enact that the person charged with the trespass cannot defend himself by showing merely that he believed he was not a trespasser; he must show that he had a reasonable ground for such belief. And it has been further held that, where the person charged with such a trespass only sets up a right of a third person, or a right in himself which is impossible in point of law, the magistrates are justified in disregarding such a claim of right as wholly unreasonable. Although, therefore, where there must be a *mens rea* to constitute an offence, an honest claim of right, however absurd, would frustrate a summary conviction, yet where, as here, the absence of the *mens rea* is not necessarily a defence, the person who sets up a claim of right must show some ground for its assertion. This, in fact, was decided in the cases last referred to. In all of them rights were claimed, but they were such as could not by law exist: (see also *Hudson v. MacCrea* (*ubi sup.*)). We are of opinion that these principles and decisions are applicable to the present case, and the magistrates might not improperly have found that the claim set up, although in one sense *bonâ fide*, was not a fair and reasonable claim of right, and therefore that they were not bound to stop. Even if such a right as that set up could by law exist, the claim made was so vague and improbable that, in the absence of all evidence to support either that or some other right on the part of the appellant to shoot rabbits on the common, the justices were entitled to disregard the claim of right altogether, and to convict the appellant.

Conviction affirmed.

Attorneys for appellant, *Bridges, Sawtell, and Co.*, for *Watkins*, Bristol.

Attorneys for respondent, *Gregory and Rowcliffe*.

Friday, June 3, 1875.

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32 & 33 Vict. c. 101, s. 72—33 & 34 Vict. c. 78, s. 46—*Tramway—Payment of fares—Authority of bye-laws—Time when fares legally demandable—Jurisdiction of magistrate to hear a charge different from the one on which a defendant had been summoned.*

A man was brought before a magistrate upon one charge which the evidence wholly failed to support, whereupon another and a different charge was preferred against him, no fresh summons being taken out. He defended himself against

the second charge at first, but after being remanded took objection to the magistrate's jurisdiction, that he was not legally in custody after the dismissal of the charge on which he had been summoned.

Held, that his objection was too late; he having submitted to the second charge being entered upon, the want of any summons or warrant to bring him legally before the magistrate was cured by his voluntary submission.

P. was charged by the conductor of a tramway company under a bye-law, which says, "Every passenger shall upon demand pay the fare legally demandable for the journey," with not paying upon demand made. The fare was demanded during the journey, and P. objected that it was not legally demandable until the completion of the journey. The company were authorised by Act of Parliament to "make regulations for regulating the travelling in or upon any carriage belonging to them," and their Act also provided that "the tolls, &c., shall be paid to such persons and at such places upon or near to the tramways, and in such manner and under such regulations as the company shall by notice appoint."

Held, that the bye-law was authorised by the Act, that it was reasonable, and that, as P. had become a passenger and was travelling upon the tramway, he was liable to pay the fare whenever it was demanded of him by the conductor.

THIS was an appeal from the decision of a metropolitan magistrate who had refused to convict the respondent under the circumstances set out below, and had stated a case for the opinion of the court at the request of the appellant, who was a conductor of the North Metropolitan Tramways Company.

The respondent, in Aug. 1873, entered a car belonging to the company in Moorgate-street, and when asked by the conductor for his fare as the car was proceeding along Kingsland-road, he refused to pay then, saying that he was going as far as Dalston Junction; and when asked again subsequently he still refused, saying that he was going to Stamford Hill; and upon the conductor still demanding the fare, and requiring his name and address upon refusal to pay, the respondent then objected that he could not be compelled to pay until he had arrived at the end of his journey, and stated that he should try the right of the company to demand it before then, his mother having on the previous day been made to pay her fare twice over because of her ticket having been blown away and lost. On his refusal either to pay or give his name and address, or to leave the car, a policeman was called, but as he would not interfere, the respondent was removed by the company's servants from the car, and taken to the police station, and charged by the conductor with an offence under the 73rd section of 32 & 33 Vict. c. 101 (The North Metropolitan Tramways Act 1869), which enacts as follows: "If any person travelling or having travelled in any carriage of the company avoid or attempt to avoid payment of his fare . . . or if any person knowingly and wilfully refuse or neglect on arriving at the point to which he has paid his fare to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings." He was locked up for the night, and next morning brought before a magistrate on that charge. The case was remanded several times, the

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respondent being in the intervals liberated upon his own recognisances, and on the occasion of one of these remands a charge in a different form was preferred, viz., that he had broken the 9th bye-law, which is in these terms: "Each passenger shall, upon demand, pay to the conductor, or other duly authorised officer of the company, the fare legally demandable for the journey."

This charge, embodying as it did the question, the answer to which the respondent originally professed to be desirous of testing, he defended himself against before the magistrate, urging that the fare was not legally demandable before the completion of the journey. He was again remanded after this question had been discussed, until on the last occasion his attorney raised the objection that there was no evidence on the first charge, and that the magistrate had no jurisdiction to hear the second, the respondent not being legally in custody upon it, the first being abandoned.

The magistrate on this last occasion, 2nd Oct. 1873, decided that the respondent was not guilty under sect. 3 of 32 & 33 Vict. c. 101, of avoiding or attempting to avoid payment of his fare, but that if the fare was legally demandable before the completion of the journey he had undoubtedly failed to pay upon demand, and so had contravened the 9th bye-law. But as the magistrate doubted whether the Acts of Parliament under which the bye-laws were framed authorised the company to require prepayment of the fares, or justified such a construction being put upon the words of the 9th bye-law as was contended for on the part of the company, and having regard also to the objection which had been raised to his jurisdiction over the second charge founded upon that bye-law, he dismissed the summons and discharged the respondent. The appellant, however, being dissatisfied with the decision of the magistrate, applied to him to state a case for the opinion of the court, in which two questions were raised—First, whether the magistrate was bound to discharge the respondent on the first charge preferred, and, being so bound, had no jurisdiction to hear the second charge; and, secondly, whether the conductor was justified in demanding the fare from the respondent at the time he did, or whether the respondent might lawfully refuse to pay until the journey was completed. The Act 32 & 33 Vict. c. 101, s. 72 (North Metropolitan Tramways Act 1869) enacts "The tolls and charges by this Act authorised shall be paid to such persons and at such places upon or near to the tramways and in such manner and under such regulations as the company shall by notice be annexed to the list of tolls appoint;" and by sect. 67 "the company may demand and take from every passenger travelling upon any of the tramways" certain tolls specified; and by sect. 76 the company may make bye-laws "for regulating the travelling upon or using or working of the tramways." Then sect. 46 of 33 & 34 Vict. c. 78 (The Tramways Act 1870) says, "The promoters of any tramway and their lessees may from time to time make regulations for regulating the travelling in or upon any carriage belonging to them . . ." Sect. 51 of this Act is identical in terms with sect. 73 of the 32 & 33 Vict. c. 101 set out above. Bye-laws were accordingly made under the powers contained in these Acts, and were allowed and approved by the Board of Trade on 16th June 1873, and came into operation on 1st July 1873.

The 23rd bye-law referred to in the judgment is as follows: "Any person offending against or committing a breach of any of these bye-laws and regulations shall be liable to a penalty not exceeding 40s."

Kemp, for the appellant, contended that the magistrate had jurisdiction to hear any charge when the respondent was before him and did not object; and cited

Turner v. The Postmaster-General, 5 B. & S. 82;
Reg. v. Smith, L. Rep. 1, C. C. R. 110.

Next that the fare was payable on demand, and the company were entitled under 32 & 33 Vict. c. 101, s. 72, to require payment at any time and place of which they gave notice.

Metcalf, Q.C., *contra*, urged that the only jurisdiction the magistrate could have was under 11 & 12 Vict. c. 43. That here he found that there was no ground for the charge against the respondent of attempting to evade payment of his fare. That he was therefore bound to dismiss that charge, and that being so, the respondent did not legally remain in custody, and there was no jurisdiction to hear another charge, there being no information or summons. On the second point he relied on the words of the bye-law, which limited the payment of the fare by the words "legally demandable," and contended that in the absence of a special statutory provision the payment could not be required till the work was done. There was nothing in sect. 72 of 32 & 33 Vict. c. 101 as to the time at which fares were to be paid, though the persons and places were mentioned, and as the bye-law had not specified the time, but merely said when "legally demandable," the ordinary rule would apply, and the respondent was not in strict law liable to be asked for payment till the end of his journey was reached.

BRETT, J.—In this case it seems to me necessary that we should state how we understand the facts to be. We understand that the respondent was a passenger in the tramway car belonging to the appellant's company, and while he was such passenger the conductor asked him for payment of a fare, which it is admitted was a proper fare for the journey, and not excessive, but which he refused to pay on the ground that it was not the proper time for it to be demanded of him. He did not wish to evade payment, but merely desired to pay at another time. That being so, the conductor gave him into custody erroneously, that is, on the charge of trying to avoid payment of his fare, which he was not in fact attempting. The respondent was, when so given into custody, taken before the magistrate on that charge; and if that had been the only charge against him, the magistrate ought to have discharged him, there being no evidence of any attempt to evade payment of the fare altogether. There were, however, several remands granted, and at one of the later hearings an additional charge was brought forward against him, viz., a charge of breaking the ninth bye-law of the company by not paying his fare when it was demanded. On this being preferred the respondent had an opportunity of answering it, and did so as far as he could; but at the last hearing, and not till then, the respondent's attorney took the objection that the magistrate was bound to dismiss the case on the first charge, and that he could not hear the second charge at all, because the respondent was not legally before him. The magistrate, upon the evidence, was prepared to find that he had

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broken the bye-law, and was liable to a penalty under the 23rd bye-law for so doing, but the objection having been taken, he reserved the point raised by it for us. On the first question put to us, as to whether he was bound to discharge the respondent from custody on the original charge, we answer Yes; but if it means that he ought to have discharged him as to breaking the bye-law, we think that he ought not to have done so. Now, it is said that the magistrate had no jurisdiction to hear the second charge, because there was no summons in writing issued to bring the respondent before him. It is, however, admitted that he might have ordered a summons to be issued and served then and there. Yet it is contended that, not having done so, he had no jurisdiction. But it is to be noticed that the respondent did not object at first to the charge being entertained, and if so, the want of a summons in writing is cured by his voluntary submission. The authority for this is the passage at p. 39 of Paley on Convictions: "If the defendant appears any irregularity in the summons, or even the want of a summons altogether, becomes immaterial, except it be in a case where a special form of summons is required by the Act which has not been complied with." *Reg. v. Aiken* (3 Burr, 1786), quoted also at p. 50, in Paley on Convictions, as showing that the presence of the defendant and his hearing of the evidence was the essential matter in a question as to the regularity of the magistrate's proceedings. Then there is *Turner v. The Postmaster-General* (*ubi sup.*), in which case two men were brought up wrongly in custody, but when before the magistrates a new charge was preferred and they did not object, and it was held that they had waived the want of an information and summons. Then it is said, further, here, that the respondent was bound by recognizance to appear up to the time of the last hearing, and so did not voluntarily submit; but the case last cited shows that if he were present, heard the charge, and did not object, the court had jurisdiction. If that be so here, the magistrate had a right to entertain the charge. Next comes the more important consideration, Was the conductor justified in demanding the fare from the respondent at the time he did? This depends on the construction of the bye-laws made under 32 & 33 Vict. c. 101, s. 72, and 33 & 34 Vict. c. 78, s. 46. Now the 9th bye-law is, "Each passenger shall upon demand pay to the conductor, or the duly authorised officer of the company, the fare legally demandable for the journey." It seems to me that this bye-law is within the words of sect. 46 of the Act "for regulating the travelling in or upon any carriage belonging to them," and it also comes within sect. 72 of 32 & 33 Vict. c. 101, which says, "The tolls and charges by this Act authorised shall be paid to such persons and at such places upon or near to the tramways, and in such manner and under such regulations as the company shall by notice to be annexed to the list of tolls appoint." Therefore, although it does not fix a place for the demanding of the fare, it does say that demand is to be made on a passenger. A person need not get into the car, but when he does so he is a passenger; and so the regulation does fix the place where the fare is demandable as being somewhere between where the person began to be and where he ceased to be a passenger. Otherwise, if the fare may not be demanded in

the carriage and during the journey, the tramway company must have fixed places for payment, and must compel the passengers to pay before or at the end of the journey, and at no other time or place. So I think that the bye-law is authorised by the statute, and that there was a breach of it here. There was, therefore, sufficient evidence before the magistrate of a breach of the bye-laws, and he would be justified in convicting the respondent in a penalty.

DENMAN, J.—I am of the same opinion. With regard to the point first stated by the magistrate, whether he ought to have discharged the respondent on the first charge, I think that this depends upon the answer to the further question whether the respondent was there present before him with notice of the charge preferred against him. As to this, for the reasons given by my brother Brett, I agree in thinking that he was so present. A man ought to do something by way of protest if he wishes to object that he is not legally brought before a court, but here the respondent did nothing, and so far from originally objecting, he professed that he wished to test the alleged right of the conductor to demand the fares before the end of the journey. The second question is concerned with his liability to a penalty, although he did not intend to avoid payment, and on this and the other questions, taking them together, I am of opinion that he was liable to a penalty under the 9th and 23rd bye-laws, or by the joint effect of the bye-laws and the sections of the Acts set out in the case. The words are that the fares shall be paid to such persons at such places as shall be determined by the company, and they are authorised to make bye-laws for this purpose. Taking, then, an obvious view of the bye-laws, and having regard to one's common knowledge, I think that a person who becomes a traveller must pay the fare to the conductor on the journey when demanded, such fare being that for the journey which he is proposing to go; and I feel that it would involve great delay and inconvenience if it were compulsory that all the fares should be taken at the end only of the journeys. These, then, in my opinion, are reasonable bye-laws, and they are put up in places where they give notice to people of their provisions, so they were binding on the respondent, and he has committed a breach of them, which has rendered him subject to a penalty.

LINDLEY, J.—I am of the same opinion. The offence charged is a breach of the 9th bye-law, and the question is, whether the company can demand the fare before the transit is ended. It is well to see under what authority the bye-laws are made, and what was the object of them. They are derived from the 46th section of 33 & 34 Vict. c. 78, and the powers to levy tolls under the private Act of the company, set out in the case. This bye-law speaks of a passenger while travelling, not of one whose journey is complete. It is thus, I think, equivalent to saying every passenger shall, whenever it may be demanded of him, pay any toll which the company are entitled by law to demand.

Judgment for the appellant.

Attorney for appellant, *E. Vann*.

Attorneys for respondent, *Wontners*.

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TURNER v. THE GREAT EASTERN RAILWAY COMPANY.

[C. P.]

Thursday, June 10, 1875.

TURNER v. THE GREAT EASTERN RAILWAY COMPANY.

Negligence—Master and servant—Common employment—Test of liability of master—Contractor's servant—Railway company.

The defendants, a railway company, employed a contractor to unload their coal trucks at shoots on sidings constructed for the purpose. The contractor employed his own labourers, among whom was the plaintiff, whom he engaged and paid, and over whom he had entire control. The plaintiff, while engaged in the work, was injured by the negligent shunting of an engine managed by the servants of the defendants, which was bringing coal trucks on to the sidings to the shoots.

Held, that there was no such common employment between the plaintiff and the shunter as would disentitle the former from bringing an action against the defendants for the negligence of their servants.

The plaintiff in this action sued the railway company for compensation for injury received by him owing to the alleged negligence of their servants. It appeared that the defendants, having made some sidings for the reception of their loaded coal waggon, and shoots by means of which the waggons could be discharged for the various dealers and consignees, contracted with a man called Lanesborough to do the work of so discharging the waggons. Lanesborough employed men to enable him to carry out his contract, among whom was the plaintiff; he paid them their wages, and the company had no control over the men so as to be able either to engage or dismiss them. It was proved at the trial that Lanesborough could engage and pay his own servants.

While the plaintiff was so employed under Lanesborough, and an engine of the defendants was engaged in shunting trucks so as to bring them to the coal shoots, the plaintiff was knocked down and injured by reason of some trucks being shunted into a wrong siding, and this occurred through the mistake and negligence of the defendants' servants who were in charge of the engine.

At the trial at Guildford in Aug. 1874, before Bramwell, B., the plaintiff had a verdict, but a rule nisi to set it aside was afterwards obtained, pursuant to leave reserved, on the ground that the plaintiff was a servant of the defendants, and that the injury was one of the risks of the common employment, which he must be taken to have contemplated at the time that he entered the service.

Willoughby, Gore, and Boddam, showed cause.—The plaintiff here was not a servant of the defendants, but was employed by Lanesborough. The latter had a contract for work with the defendants, and employed and had control over his own men. *Wiggett v. Fox* (25 L. J. 188, Ex.) is distinguishable from the present case, because the control over the plaintiff there remained in the principal contractor, Fox, who not only paid him but had the right to dismiss him. This is more like *Abraham v. Reynolds* (5 H. & N. 143), where the question of control is alluded to as a principal test in determining whether the relation of master and servant exists. So, too, *Sadler v. Henlock* (4 E. & B. 570), where Crompton, J., says, "the test is whether the defendant retained the power of controlling the work." In *Priestley v. Fowler*

(3 M. & W. 1), the rights and relations between masters and servants are discussed, and the principle laid down that the servant has a choice as to the risks he incurs, and must be taken to incur voluntarily the ordinary risks of the service. Here the plaintiff was in no such relation to the company. In *Murray v. Currie* (23 L. T. Rep. N. S. 557; L. Rep. 6 C. P. 24) the judgment of Willes, J., is in the plaintiff's favour, on the principle of his contention here: (see also *Smith v. Steel*, 32 L. T. Rep. N. S. 195; L. Rep. 10 Q. B. 125). It may also be tested by considering that if the plaintiff had by his negligence caused an injury to some third person, the action would have been brought not against the Great Eastern Railway Company, but against Lanesborough.

Parry, Serjt., and Marriott, in support of the rule.—The employment here was a common one to the plaintiff and the company's servants who were the cause of the injury. The engine driver and shunter were engaged on the very same work as the plaintiff, viz., in unloading the coal trucks and taking them to the shoot for the purpose. Then the payment of the plaintiff was really by the company, although it was not direct, but passed through the contractor's hands, so the case comes within *Wiggett v. Fox* (*ubi sup.*) See *Hutchinson v. The York, Newcastle, and Berwick Railway Company* (5 Ex. 343), where the man who was killed was not at the time engaged on any work which was common to the other servants whose negligence caused the accident, yet the company were held not responsible, because the deceased was employed by the company, and must be taken to know the risks. The test, therefore, is, whether the person who enters into an employment does so with a full knowledge of all the risks. Here the plaintiff knew that his particular business exposed him to risks arising from negligence on the part of the other servants of the company who were engaged on the very same work that he was. In *Abraham v. Reynolds* (*ubi sup.*) there was only a single act, and it might well be held that there was no common service and no control. But here we say that the company had control over the plaintiff, and upon the facts it is an inference which the court might and would draw. And if in doing his work the plaintiff injured anyone, the company would be liable:

Southcote v. Stanley, 1 H. & N. 247;

Priestley v. Fowler (*ubi sup.*)

They cited also

Indermaur v. Dames, 14 L. T. Rep. N. S. 484; L. Rep. 1 C. P. 274;

Morgan v. Vale of Neath Railway Company, 13 L. T. Rep. N. S. 564; L. Rep. 1 Q. B. 149.

Lord COLERIDGE, C.J.—I am of opinion that this rule ought to be discharged. These cases are cases of difficulty, and I say so with the less hesitation because a very eminent judge, Mr. Justice Crompton, has said so before me in *Sadler v. Henlock* (*ubi sup.*). This case is one that is exceedingly near the line. The circumstances, as I understand them, are these. The Great Eastern Railway having a very large coal traffic, and having made a place where the coal they bring on their railway is shot from the trucks for the various contractors and dealers, appointed a man called Lanesborough to undertake the duty of shooting the coal, as between himself and the company, and the plaintiff in this action was one of Lanesborough's servants. He might also, no doubt, be a servant of the company; that will remain for consideration

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TURNER v. THE GREAT EASTERN RAILWAY COMPANY.

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whether he was or no, but at first he was certainly and primarily Lanesborough's servant. While so discharging his duty under Lanesborough's direction, the shunting engine of the Great Eastern Railway, under some admittedly negligent mistake of the company's servants, shunted some trucks into a wrong siding and injured him severely. The question, then, is, whether the employment was so common between the plaintiff and the shunter who directed the engine, as to bring the case within *Priestley v. Fowler* (*ubi sup.*), and establish that the action is not maintainable. The case is a difficult one, as I have said, because it is so near the line; and the line to be drawn is one which it is not easy to state in language, and I will not attempt to give a definition calculated to meet all cases. Each case must depend upon its particular circumstances, and no single circumstance can be stated as being a certain and single test of general application; but several circumstances may, at any rate, be remarked upon, all or some of which when they occur may show what is on one side or the other of the line which is not itself easy to be drawn. The case by which we were here most pressed was *Wiggett v. Fox* (*ubi sup.*), where the defendants, Fox and Henderson, were contractors for the building of the Crystal Palace, and employed Moss to do part of the work by the piece for a certain sum, payable by monthly instalments, according to the work done. Moss employed the plaintiff, who was killed by the negligence of the defendants' servants. The Court of Exchequer held, and the decision was not questioned, that the plaintiff could not recover against Fox, because Fox and Henderson were general contractors for the whole work, and the sub-contractor was so far under Fox and Henderson's control as to make his workmen in a common employment with those of the general contractor. That case came under consideration in *Abraham v. Reynolds*, in 1860. There, however, the question of common employment did not arise, so far at least as a common employer is concerned, because there a servant going to get bales from a warehouse not belonging to his master was injured by the negligence of the warehouseman's servant, and on the question being raised, could he recover for the injury so caused, it was held that he could. It was held that the facts did not render the employment of the two servants a common one, or give any control to the master of either over both. This was the express ground of Martin, B.'s judgment, and of his assent to *Wiggett v. Fox*. So, too, Watson, B. and Channell, B., the latter of whom, commenting on *Wiggett v. Fox*, says: "But it was proved that the deceased was paid by the defendants, and it further appeared by the printed rules which were given in evidence, and by the evidence of Moss, that the defendants had a control over and power to dismiss *Wiggett*, though engaged by the contractors. The ground on which the judgment proceeded was therefore the payment of the plaintiff by the defendant, and the control exercised by the latter over him, so that he could dismiss him, as put by Channell, B. Now both those grounds are wanting here. The defendants did not pay the plaintiff, and had no control over him so as to be able to engage or dismiss him. So on these two grounds it seems to me that this case is clearly distinguishable from *Wiggett v. Fox*. Then in *Sadler v. Hemlock* (4 E. & B. 570), which was an action for an obstruction and nuisance on a highway caused by

a man whom the defendant had employed to clean out a drain, taking up and improperly replacing part of the highway adjacent to the defendant's land, in which the drain was. The question whether the defendant was answerable to the plaintiff, whose horse was injured by falling into the hole made in the highway, depended on whether Pearson, the man employed by the defendant, was a contractor or a servant. Crompton, J. says in the argument: "Is not this rather a case where the employer maintains a control over the person whom he employs," and in his judgment; "the real question is, whether the defendant and Pearson stand to each other in the relation of master and servant. I decide not on the ground that Pearson did not employ the hands of another, for if he was the defendant's servant the defendant would be liable for the wrong-doing of the person whom the servant employed; though it is true that such employment may sometimes be a test as to whether the employer was a servant or an independent contractor. The test here is, whether the defendant retained the power of controlling the work." Now I will not say that this is the only test, but it is put there as the test by which to distinguish whether a man is a contractor or a servant; and so here it would be the test to discover whether Lanesborough was a contractor or a servant, and on this point the report of the judge says that he could engage and pay his own servants. Then, to take it in another way; suppose the situations reversed, and that the plaintiff had negligently caused injury to someone else. It seems to me extravagant to say that such a person could sue the now defendants for such injury. They would say in defence, and as I think say unanswerably, we had no control over the man, we did not engage him and could not dismiss him, we are therefore not liable for his negligence. If, then, in such case an action would not lie against the railway company, it follows that the same ground which would save them there, would make them liable here. It is not necessary, in my opinion, to discuss *Murray v. Currie* (*ubi sup.*), there was clearly an independent employment in that case, and the peculiar circumstances do not make it applicable here. On the whole, therefore, though the cases are cases of difficulty, I think that this is not within the authority of *Wiggett v. Fox* (*ubi sup.*), and if it is not, the action is maintainable, and the plaintiff entitled to his verdict, and the rule must be discharged.

GROVE, J.—I am of the same opinion. I will not go through the many cases bearing on the question, and which have been fully discussed. No doubt the cases do not depend necessarily on the term contractor, because the man may stand in different relations to the person with whom he contracts and those whom he employs. If it did depend on that word, then *Wiggett v. Fox* (*ubi sup.*) would be an authority for the defendants. Here the so-called contractor paid and directed the plaintiff; he was called a contractor simply without any qualification, and appears to have been the person who engaged and dismissed the plaintiff and his other workmen, and did so, as I gather from the report of the judge, independently of the Great Eastern Railway Company altogether. The Great Eastern Railway Company would have no power except through Lanesborough over the plaintiff, unless they had some perhaps on some ground quite independent of any relation of master

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and servant. In *Wiggett v. Fox* (*ubi sup.*), not only were there these two distinctions, but Martin, B., says expressly, "The relation of master and servant existed between the defendants and Wiggett." That is just the distinction to my mind between that case and this. And thus it is not only that control must exist and be retained, but also that there must be the correlative submission on the part of the servant to the control of the master. He submits himself to the risks which in the service of his master the latter may reasonably impose upon him. I see nothing here from which I can derive an inference that the plaintiff not only submitted to the control of Lanesborough, and undertook the risks of his service, but also agreed to exempt from liability all other persons who might injure him by their negligence, and who were not in any relation to him as master or as servants of a common master. Another element may be noticed which has a bearing on the matter. Where a person undertakes a service he has the power of remonstrating in reference to anything which he does not like or considers dangerous, or he may by giving notice give up the service. But here the plaintiff would not have been in a position to do either of these things as regards the defendants, though he clearly could as regards Lanesborough. This is one of the tests on which the cases cited depend; *Priestley v. Fumler* (*ubi sup.*) was decided on it, and Alderson, B., in *Wiggett v. Fox*, draws attention to that fact. No doubt the cases do run into fine distinctions, but there is sufficient breadth of distinction here, in my opinion, to entitle the plaintiff to our judgment.

LINDLEY, J., concurred.

Rule discharged

Attorney for the plaintiff, *John Long*, Victoria Park.

Attorney for the defendants, *W. H. Shaw*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 13, 1875.

(Before LORD COLERIDGE, C.J., BRAMWELL, B., MELLOR, J., GROVE, J., and POLLOCK, B.)

REG. v. DOWNES.

Manslaughter—Infant—Neglect of parent to supply medical aid from conscientious religious belief—31 & 32 Vict. c. 122, s. 37.

Since the 31 & 32 Vict. c. 122, s. 37 which makes it an offence punishable summarily for any parent wilfully to neglect to provide medical aid for his child being in his custody and under the age of fourteen years, whereby the health of such child shall have been or is likely to be seriously injured, it is manslaughter if the child die from such neglect, and it is no answer to the charge of manslaughter that the parent so neglected from a conscientious religious belief that it was wrong to call in medical aid, and that medical aid was not required, and not from any intention to disobey the law.

CASE reserved for the opinion of this Court by Blackburn, J.

1. The prisoner was indicted at the Central Criminal Court for the manslaughter of Charles Downes.

2. It appeared on the trial before me by the evidence that Charles Downes was an infant who, at the time of his death, was a little more than two years old. The child had been ill and wasting away for eight or nine months before its death. The prisoner, who resided at Woolwich, was the father of the deceased, and had during the whole of this time the custody of the child.

3. The prisoner was one of a sect who call themselves "The Peculiar People."

4. During the whole period of the child's illness he did not procure any skilled advice as to the treatment of the child, but left it to the charge of women who belonged to his sect, and called in at intervals George Hurry, an engine driver, who prayed over the child, and anointed it with oil.

5. The reason of this course of conduct was explained by George Hurry who was called as a witness.

6. He stated that the Peculiar People never call in medical advice or give medicines in case of sickness. They had religious objections to doing so. They called in the elders of the church, who prayed over the sick person, anointing him with oil in the name of the Lord. This he said they did in literal compliance with the directions in the 14th and 15th verses of the fifth chapter of the Epistle of St. James, and in hope that the cure would follow.

7. This course was pursued with regard to the deceased infant during its illness. The prisoner consulted the witness Hurry as to what was the matter with the child, and as to what should be given to it. They thought it was suffering from teething; and he advised the parents to give it port wine, eggs, arrowroot, and other articles of diet which he thought suitable for a child suffering from such a complaint, all of which were supplied accordingly. There was no evidence that this treatment was mischievous, and though this was probably not logically consistent with the doctrines of his sect as described by him, I saw no reason to doubt that it was all done in perfect sincerity.

8. He was asked by the counsel for the prosecution whether if one of their sect met with an accident, such as a broken bone, their principles would prevent their calling in a surgeon to set it, and he answered that he thought they probably would call in a surgeon in such a case, but it had never yet arisen. He was asked whether they trusted to nature in cases of childbirth. He said they did not call in midwives, which would be against their principles, but that several sisters of their persuasion were as skilful as any midwives, and that they assisted the women in labour.

9. He was further asked whether he had not himself on the trial before Mr. Justice Byles promised that in future medical advice should be called in when necessary. He explained that in that case the disease was infectious, and that he understood the judge to say that the law forbid them to endanger the lives of others, and as it was one of their principles to obey the law, he had given a pledge that they would call in medical advice where the disease was infectious, which pledge they had kept.

[I here interposed and asked him whether he would now give a similar pledge in cases where the sick person was a helpless infant, taking the law from me to be that though an adult who could judge for himself might refrain from calling in skilled advice without transgressing any law,

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those who had the charge of a helpless infant were bound to procure it where it was necessary. If he would give such a pledge I said I had no doubt the prosecutors would be perfectly satisfied and give no further evidence. He would not, however, do more than promise that he would bring the point before the next assembly of his church. The prosecution, therefore, proceeded. I should add that though all this might show that these Peculiar People were not logically consistent in their tenets and practice I saw no reason to doubt that they were sincere.]

10. It was admitted on the part of the prosecution that the child was kindly treated, kept clean, and furnished with sufficient food, and nursed kindly by the mother and the women of the sect.

11. Evidence was then given that the prisoner had sufficient means to procure skilled advice, which was easily to be obtained at Woolwich. That neither he nor the elder had any competent skill. The disease of which the child died having nothing whatever to do with teething, but being chronic inflammation of the lungs and pleura, which was of long standing, and was a disease which might have been cured at any time if competent advice had been obtained, probably though not certainly, would have been so cured, if the advice had been called in in the early stages of the complaint.

12. The prisoner in his own defence said that he sincerely believed that by abstaining from calling in medical aid he gave the child the best chance of recovery as if he showed a want of faith he thought he could not rely on the promise which he thought was given.

13. The prisoner had no counsel.

14. My attention being called to the decisions of Byles, J. in *Reg. v. Hurry* (a) in the Central Criminal Court Sessions Paper for May 1872, and Pigott, B. in *Reg. v. Hines* in the sessions paper of August 1874, p. 300, which seemed to me contradictory—I expressed my intention to raise the question for the opinion of this court. I did not reserve any question on the sufficiency of the evidence to prove the cause of the death of the child, or any other of the questions of fact, that being a matter which I thought I was bound to decide on my own responsibility. And accordingly I have only stated the evidence in so far as it is necessary to make my direction to the jury and the questions which I put to them intelligible. But taking it that there was sufficient evidence to warrant the findings in fact of the jury I reserved everything else.

15. I told the jury that the law casts on the father who has the custody of a helpless infant a duty to provide according to his ability all that is reasonably necessary for the child, including, if the

child is so ill as to require it, the advice of persons reasonably believed to have competent medical skill, and that if death ensues from the neglect of of this duty it is manslaughter in the father neglecting the duty.

I told them that I did not as at present advised think it any defence that the prisoner sincerely believed that he ought not to provide such advice, nor that he believed that he was doing the best for the child if he had not in fact, competent skill and knowledge himself. After explaining this more fully I asked the jury four questions which, to prevent any risk of mistake, I reduced to writing and handed to them. They answered all in the affirmative.

16. The following is a copy of the writing I handed to the jury and their answers.

Did the prisoner neglect to procure medical aid for the helpless infant when it was, in fact, reasonable so to do and he had the ability?—Yes.

Was the death caused by that neglect?—Yes.

Unless both of these are proved he is not guilty. If both proved find him guilty but then say further,

Did the prisoner *bonâ fide* though erroneously believe that medical advice was not required for the child?—Yes.

Or *bonâ fide* believe that it was wrong to call in medical aid?—Yes.

I thereupon directed the verdict of guilty to be entered and admitted the prisoner to bail.

The question for the opinion of this Court is whether the conviction so obtained on this direction and those findings should stand or be set aside.

COLIN BLACKBURN.

No counsel was instructed to argue for the prisoner.

D. Straight, for the prosecution.—The conviction was right. In *Reg. v. Hurry* (*sup.*) at the May Sessions 1872 of the Central Criminal Court a parent was indicted for neglecting to call in medical aid for a young child. The 30 & 31 Vict. c. 122, s. 37 makes it an offence for a parent wilfully to neglect to provide adequate food, clothing, medical aid or lodging for a child under fourteen years of age in his custody whereby the health of the child is, or has been or is likely to be seriously injured. [MELLOR, J.—The words of the section “wilfully neglect” mean intentionally or purposely omit to call in medical aid. Lord COLERIDGE, C.J.—In *Reg. v. Wagstaffe* (10 Cox C. C. 530) an indictment for manslaughter against parents of the same religious sect as the prisoner in this case for neglecting to provide medical aid for the child, who died in consequence of such neglect Willes, J. upon similar facts, seems to have been of opinion that the indictment could not be sustained, but that was before the 31 & 32 Vict. c. 122, s. 37 passed. And in the case of *Reg. v. Hines* (a)

(a) George Hurry and Cecilia his wife were indicted for unlawfully neglecting to provide medical aid to Cecilia Hurry, whereby her life was endangered, Cecilia was discharged as she acted under her husband's advice, and George Hurry was found guilty. The prisoner stated that he and his people had never been satisfied as to what the law on the subject was, but now that they knew it, they would submit to it, as they were the last people who would break the laws of their country. To enter into his own recognisance in £50 to come up for judgment if called upon.

The prisoner George Hurry was also indicted for feloniously killing and slaying Cecilia Hurry, but no evidence was offered, and the prisoner was found not guilty.

(a) *Reg. v. Hines* was an indictment against Hines for unlawfully endangering the life of his child aged two years, by omitting to provide proper and sufficient medicine. At the opening of the case Pigott, B. expressed a very strong opinion that it could not be sustained. Mr. Poland referred to Russell on Crimes, p. 80, to the case of *Reg. v. Smith* (8 C. & P.), and to *Reg. v. Hurry* (Central Criminal Court Reports, vol. 76, p. 63). After hearing the evidence in the case, and Mr. Poland in support of it, Pigott, B. said: “I am of opinion that there is no case to go to the jury of any crime; I think it is one of those cases in which a parent, instead of being guilty of anything like culpable negli-

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before Pigott, B. that statute was not brought to his attention.]

COLERIDGE, C.J.—I think that this conviction should be affirmed. For my own part but for the statute 31 & 32 Vict. c. 122, s. 37, I should have much doubt about this case, and should have desired it to be further argued and considered. Perhaps it is enough to say that the opinions of Willes, J. and Pigott, B. are deserving of grave consideration. The statute 31 & 32 Vict. c. 122, s. 37, however, is a strong argument in favour of the conviction. By that enactment it is made an offence punishable summarily if any parent wilfully neglects to provide (*inter alia*) medical aid for his child being in his custody under the age of fourteen years, whereby the health of such child shall have been or shall be likely to be seriously injured. That enactment I understand to mean that if any parent intentionally, *i.e.* with the knowledge that medical aid is to be obtained and with a deliberate intention abstains from providing it, he is guilty of an offence. Under that enactment upon the facts the prisoner would clearly have been guilty of the offence created by it. If the death of a person results from the culpable omission of a breach of duty created by the law, the death so caused is the subject of manslaughter. In this case there was a duty imposed by the statute on the prisoner to provide medical aid for his infant child, and there was the deliberate intention not to obey the law—Whether proceeding from a good or bad motive is not material. The necessary ingredient to constitute the crime of manslaughter existed, therefore, in this case, and for that reason this conviction ought to be affirmed.

BRAMWELL, B.—I am of the same opinion. The 31 & 32 Vict. c. 122, s. 37, has imposed a positive

gence, has done everything that he believed to be necessary for the good of his child; that he may be one of those persons who have very perverted views and very superstitious views, and may be altogether mistaking that doctrine of scripture from which he has taken his course of proceeding in this case, may be perfectly true; but that there is anything in the nature of a duty neglected, that is, a duty which he believed or knew to be such, in this instance I am clearly of opinion the evidence does not show; on the contrary he believed his duty to be in the direction in which he acted, and he carried out that duty to the utmost of his ability. He may altogether have mistaken what his duty was; still I believe it was an honest mistake. It may be an ignorant mistake, in all probability it is the result of ignorance and superstition, but certainly there is not a trace of anything like an intentional omission of duty or a culpable omission of duty within the meaning of that expression as used in the criminal law. I am clearly of opinion that it is not a case for an indictment, nor a case for a judge to deal with in a Criminal Court. If the Legislature (as they have done) are minded to pass a law on the subject, that is a different matter, and it would be quite right then that persons should be compelled to conform to it although they themselves may personally object to it, because it is the law of the society in which they live, and they are bound by that law if society chooses to enact it. But I am clearly of opinion that no judge sitting in a Criminal Court, without any direction or enactment of the Legislature, would be justified in saying that a parent who exercised his best judgment though a perverted one, in dealing with his child by nursing and care instead of calling in a doctor to apply blisters, leeches, and calomel was guilty of criminal negligence. I may say that I had an opportunity before coming into court, knowing that this case was coming on of speaking of it to Mr. Justice Quain, and the learned Recorder, and they quite concur in the view I have propounded and upon which I am acting.

and absolute duty on parents, whatever their conscientious or superstitious opinions may be, to provide medical aid for their infant children in their custody. The facts show that the prisoner thought it was irreligious to call in medical aid, but that is no excuse for not obeying the law.

MELLOR, J.—I am of the same opinion. The 31 & 32 Vict. c. 122, s. 37 does not seem to have been called to the attention of Pigott, B. in *Reg. v. Hines*, or of my brother Blackburn upon the trial of the present case. Otherwise it may be that Pigott, B. would have summed up differently to the jury.

GROVE, J. and POLLOCK, B. concurred.

Conviction affirmed.

Solicitor for the prosecution, W. Farnfield.

Saturday, Nov. 13, 1875.

(Before Lord COLERIDGE, C.J., BRAMWELL, B., MELLOR, J., GROVE, J., and POLLOCK, B.)

REG. v. SAUNDERS AND HITCHCOCK.

Indecency—Exhibition in a booth on a race course—Misdemeanor.

A booth on a race course, into which persons are admitted by payment only, is a public place so as to support an indictment for an indecent exhibition therein at common law. The indictment charged in one count the keeping a booth in a public place for the purpose of showing an indecent exhibition to any persons willing and desirous of paying for admission.

Held that the indictment sufficiently stated an indictable offence.

CASE stated for the opinion of this Court by the Chairman of the Surrey Quarter Sessions.

At the General Quarter Session of the Peace holden at St. Mary Newington, in and for the county of Surrey on Tuesday the 29th June 1875, John Saunders and George Hitchcock were tried on an indictment of which the following is a copy.

Surrey to wit.—The jurors for our Lady the Queen upon their oath present that John Saunders and George Hitchcock being scandalous and evil disposed persons, and devising, contriving, and intending the morals as well of youth as of divers other liege subjects of our said Lady the Queen to debauch and corrupt and to raise and create in their minds inordinate and lustful desires, on the 23rd May in the year of our Lord 1875, at the parish of Epsom, in the county of Surrey, unlawfully, wickedly, and scandalously did keep and maintain a certain booth, tent, and shed for the purpose of exhibiting and showing to the sight and view of any person or persons willing and desirous of seeing the same, and paying for their admission into the said booth, tent, and shed, divers, lewd, wicked, scandalous infamous, bawdy, and obscene performances, representations, practices, and figures, and in the said booth, tent, and shed on the said 23rd May in the year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully, wickedly, and scandalously for lucre and gain did exhibit and show the said performances, practices, representations, and figures, and cause and permit the same to be exhibited and shown to the sight and view of divers and very many liege subjects of our said Lady the Queen to the manifest corruption of the morals as well of youth as of other liege subjects of our said Lady the Queen in contempt of our said Lady the Queen and her laws to the evil example of all others in like case offending, and against the peace of our Lady the Queen her Crown and dignity.

Second count.—After commencing with a similar inducement as in the first count proceeded.

On the said 23rd May in the year aforesaid, at the parish aforesaid, in the county aforesaid, in a certain

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booth tent, and shed there situate did unlawfully, wickedly, and scandalously exhibit, show, and cause to be exhibited and shown for lucre and gain to and in the view of divers and very many liege subjects of our Lady the Queen, divers lewd, wicked, scandalous, bawdy, and obscene performances, representations, practices, and figures (concluding as the first count).

Third count.—After commencing as in the first count proceeded:

On the 23rd May in the year of Lord 1875, in a certain public place, to wit Epsom Downs, situate in the parish of Epsom aforesaid, in the county of Surrey aforesaid, unlawfully, wickedly, and scandalously did exhibit and show and cause and permit to be exhibited and shown for lucre and gain to the sight and view of divers liege subjects of our Lady the Queen in the said public place as aforesaid then being divers indecent, lewd, filthy, bawdy, and obscene representations, practices, and performances. (Here followed a more specific description, and then the count concluded as the first count.)

Fourth count.—After commencing as the first count proceeded:

On the 23rd May in the year of our Lord 1875 in the presence and hearing of divers liege subjects of our said Lady the Queen there assembled together, to wit on Epsom Downs, in the parish of Epsom, in the county of Surrey, unlawfully, wickedly, and scandalously did publish, utter, pronounce, and declare and cause and procure to be published, uttered, pronounced, and declared the wicked, obscene, filthy, and bawdy words and matter following that is to say. (The words uttered were then set out and the count concluded as the first count.)

Fifth, sixth, and seventh counts were similar to the first count only alleging the offence to have been committed on the 26th May A. D. 1875.

Eighth count—

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Saunders and George Hitchcock on the 23rd May in the year of our Lord 1875, and on divers other days and times between that day and the day of taking this inquisition, at the parish of Epsom aforesaid, in the county of Surrey aforesaid, near unto the Queen's common highways, unlawfully did keep and maintain in a certain public place, to wit on Epsom Downs, in the parish aforesaid, in the county aforesaid, a certain booth, tent, and shed for the purpose of exhibiting and showing indecent, lewd, wicked, and obscene performances, exhibitions, representations, and figures to the sight and view of any person or persons willing and desirous of seeing the same, and of paying for their admission, and that the said John Saunders and George Hitchcock on the day and year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition at the parish aforesaid, in the county aforesaid, unlawfully did exhibit and show and cause to be exhibited and shown in the said booth, tent, and shed, there situate as aforesaid to the sight and view of divers and very many liege subjects of our Lady the Queen, divers indecent, lewd, wicked, and obscene performances, exhibitions, representations, and figures, to the great damage and common nuisance of all the liege subjects of our said Lady the Queen there inhabiting, being residing, and passing, to the evil example of all others in the like case offending and against the peace of our Lady the Queen her Crown and dignity.

It appeared from the evidence that the prisoners were travelling showmen pursuing their calling on the Epsom Downs on the 23rd and 26th May 1875 during the Epsom Summer Races, and were the owners and keepers of a booth.

On the 23rd, the defendant Saunders sat in front of and at the junction of two booths which were close together. On one booth was a painting of two fat women and on the other a picture of some negroes. Saunders kept calling out "Now undressing!" and on being asked "Who are undressing?" he replied "The fat ladies" pointing to the picture. Being further asked "Will they be exhibited naked?" He replied

"Quite naked, Sir." Thereupon two of the witnesses were induced to pay two pence and go in, but seeing nothing indecent they told Saunders when they came out that they thought it "a sell." He replied "Well, never mind there's something genuine in the next tent, a nigger and his wife will appear both naked." Hitchcock came up and said "Whatever he (Saunders) says is true and you will see it." The witnesses then went in. There were about twenty-five people present. Hitchcock acted as showman, closing the door of the tent, and pulling aside a screen from behind which a large negro stepped out. (The case then stated the indecent acts.)

Between the 23rd and the 26th May, information was given to the police. And on the 26th two detectives were sent to visit the booth. They paid threepence each, and there were fourteen or fifteen persons present. On the occasion of their visit Hitchcock again acted as showman. (The indecent acts on this occasion were then set out.)

Counsel on behalf of the prisoners objected that they could not be legally convicted.

First, upon the first, second, fourth, fifth, and sixth counts of the above indictment on the ground that those counts do not disclose an indictable offence at common law; secondly, upon the third and seventh counts of the above indictment on the ground that there was no evidence of an indictable offence at common law by indecency in a public place the said "booth, tent, and shed" not being a public place as alleged in those counts; and, thirdly, upon the eighth count of the above indictment on the ground that there was no evidence of indecency on any days except the 23rd and 26th May.

The Chairman withdrew the eighth count from the jury, but overruled the objections taken to the other counts, and both the prisoners were convicted on the first seven counts of the indictment, but judgment was respite for the purpose of taking the opinion of the court on these objections.

If the court should be of opinion that these objections are valid the conviction will be quashed, if not the conviction will be affirmed.

The prisoner Saunders was admitted to bail, but the prisoner Hitchcock was unable to find bail and remains in custody.

WILLIAM HARDMAN, chairman.

E. Clarke, for the prisoners.—The first, second, fifth, and sixth counts are bad as they do not allege that the indecency therein charged was committed in a public place. The third and seventh counts which aver that the indecency was committed in a public place were not proved. The first count alleges that the indecency was committed for lucre in a booth in the sight of divers persons. A booth into which the public have no right to enter except on payment is not a public place, and the indecency was before persons therein who paid for and were desirous to witness it. In *Reg. v. Webb* (1 Den. C. C. 338; 3 Cox C. C. 183) it was held that an indecent exposure to one person only was not an offence at common law. [MELLOR, J.—It is not necessary to prove any public indecency outside on an indictment for keeping a bawdy house.] That is an offence as against the public peace causing the coming together of disorderly persons. [GROVE, J.—In *Reg. v. Holmes* (22 L. J. 122, M. C.; 21 L. T. Rep. N. S. 160) it was held that an

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omnibus was a sufficiently public place to sustain an indictment for an indecent exposure therein.] The public have a right to travel in an omnibus. [Pollock, B.—In *Reg. v. Thallman*, (L. & C. 325; 9 Cox C. C. 388) where the exposure was on the roof of a house and could not be seen by persons passing along the street, but could be seen by persons at the back windows of the opposite houses, Erle, C.J. said “Public place does not necessarily mean public highway.”] Here the spectators were not only willing, but paid to see the exposure in a booth into which the general public had no right to enter.

Baggallay, for the prosecution.—Similar forms of indictment to the present are to be found in 2 Chit Crim. Law, 48. Whatever openly outrages decency and is injurious to public morality is a misdemeanor. (1 Rus. on Cr. 449). In *Res v. Carl* (2 Stra. 789). the Attorney-General in his argument said that acts destructive of morality in general constituted an offence of a public nature and that upon this foundation bawdy houses were indict-

able, and that there had been many prosecutions against the players of obscene plays, citing *Tremayns' case*, Ent. 209, 213, 214, 215, and 3 State Trials *Lord Grey's case*.

Lord COLERIDGE, C.J.—We are of opinion that the conviction should be affirmed. In this case it appears that the two prisoners kept a booth on Epsom Downs for the purpose of a disgusting and indecent exhibition, and that they invited all persons within reach of their voices to come into the booth, and see the exhibition, and the persons who paid and went in did see a grossly indecent exhibition. We think that these facts are abundant to prove a common law misdemeanor, and that the indictment is sufficient as to the statement thereof.

The rest of the court concurred.

Conviction affirmed.

Solicitor for the prosecution, *Solicitor to the Treasury*.

Solicitor for the prisoners, *Fullagar*.

END OF VOLUME IX.



